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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0856; Directorate Identifier 2012–NM–093–AD; Amendment 39–17464; AD 2013–11–04]

RIN 2120–AA64

Airworthiness Directives; The Boeing Company Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain The Boeing Company Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes; Model 767–200, –300, –300F, and –400ER series airplanes; and Model 777–200, –200LR, –300, and –300ER series airplanes. This AD was prompted by operator or in-service reports of burned Boeing Material Specification (BMS) 8–39 urethane foam, and a report from the airplane manufacturer indicating that airplanes were assembled, throughout various areas of the airplane (including flight deck and cargo compartments), with seals made of BMS 8–39 urethane foam, a material with fire-retardant properties that deteriorate with age. This AD requires replacing certain seals made of BMS 8–39 urethane foam. We are issuing this AD to prevent the failure of urethane seals to maintain sufficient Halon concentrations in the cargo compartments to extinguish or contain fire or smoke, and to prevent penetration of fire or smoke in areas of the airplane that are difficult to access for fire and smoke detection or suppression.

DATES: This AD is effective July 9, 2013.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the AD as of July 9, 2013.

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

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Eric M. Brown, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6476; fax: 425–917–6590; email: *Eric.M.Brown@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM published in the **Federal Register** on August 21, 2012 (77 FR 50411). That NPRM proposed to require replacing seals made of BMS 8–39 urethane foam in certain areas of the airplane.

Comments

We gave the public the opportunity to participate in developing this AD. The following presents the comments received on the proposal (77 FR 50411, August 21, 2012) and the FAA's response to each comment.

Request for Safety Determination

United Parcel Service (UPS) noted that the proposed actions specified in the NPRM (77 FR 50411, August 21, 2012) affect a relatively small quantity of small parts in the airplane, and that the referenced sources of service information were not identified as ''alert'' service bulletins. UPS therefore requested additional information on the risk assessment that was done to determine that those parts pose a significant risk to flight safety.

We agree to provide additional information to support the need to issue the AD as proposed. The intent of the AD, as explained in the NPRM (77 FR 50411, August 21, 2012), is to prevent penetration of smoke or fire in areas of the airplane that are difficult to access for fire and smoke detection or suppression. Further, BMS 8–39 fire properties degrade over time and may result in BMS 8–39 material becoming a fuel source for an ignition event in hidden parts of the airplane. The FAA made this safety determination based on tests of aged BMS 8–39 material and in-service experience that demonstrated that this material may propagate a fire when exposed to an ignition source. We have therefore determined that it is necessary to proceed with issuing the final rule.

Request To Clarify Re-Installation Restrictions

Boeing and United Airlines (UAL) requested that we revise paragraph (i) of the NPRM (77 FR 50411, August 21, 2012), which proposed to prohibit installation of BMS 8–39 foam seals on any airplane. Noting that paragraph (g) of the NPRM would require seal replacement only in certain areas of the airplane, the commenters requested that paragraph (i) of the NPRM be revised to explicitly identify the areas that are subject to re-installation restrictions.

UPS noted that not all BMS 8–39 foam is removed from the airplane as part of the rework as specified in Boeing Special Attention Service Bulletin 747–25–3381, Revision 1, dated May 17, 2012; and Boeing Special Attention Service Bulletin 767–25–0381, Revision 1, dated September 17, 2012. Those service bulletins state that the foam is ''not replaced in areas where it is

encapsulated by a protective fire resistant barrier or where it is physically isolated from an ignition source.'' UPS was concerned that BMS 8–39 foam may be used to replace damaged foam in these encapsulated areas, creating noncompliance with paragraph (i) of the NPRM (77 FR 50411, August 21, 2012).

We agree with the request. The intent of paragraph (i) of this AD is to maintain the level of safety established by the corrective action of this AD, not to prohibit BMS 8–39 installation in locations excluded by this AD. We have revised paragraph (i) in this final rule accordingly.

Request To Allow Re-Installation During Maintenance

UPS requested that we revise paragraph (i) of the NPRM (77 FR 50411, August 21, 2012) to allow re-installation of items removed for access without the need to replace serviceable BMS 8–39 foam seals before the proposed rework is done. UPS suggested adding the following sentence: ''Parts removed and reinstalled to facilitate maintenance, or removed, repaired in accordance with the approved manuals, and reinstalled, on the same airplane are not affected by this rule.''

We acknowledge the commenter's concern, and agree to clarify the requirement. Once we have determined that an unsafe condition exists, an AD generally specifies not to allow that condition to be introduced into the fleet. Although the word ''install'' is generally considered to be broader than the word ''replace,'' operators can interpret ''install'' in this AD as meaning ''replace'' and still meet the intent of paragraph (i) of this AD (''Parts Installation Prohibition''). By simply re-installing a part removed during maintenance, the operator is not ''installing'' a different part. Therefore, the AD allows operators to remove a part to gain access, and then re-install that same part for other maintenance activities not associated with the AD.

Request To Supplement Service Information

UPS noted that the number and location of affected foam insulation parts are not specified in Boeing Special Attention Service Bulletin 747–25–3381, Revision 1, dated May 17, 2012; or Boeing Special Attention Service Bulletin 767–25–0381, Revision 1, dated September 17, 2012. This leaves the decision to remove and replace insulation to the mechanic. UPS added that those service bulletins do not clearly depict the affected parts, whereas typical AD-related service bulletins are very specific as to the location, quantity, and condition being addressed. UPS asserted that neither of these service bulletins has the expected level of detail necessary to prevent the risk of noncompliance.

We infer that the commenter is requesting additional AD instructions to supplement the service bulletins. We disagree. The level of detail necessary to comply with the requirements of the AD is clear in Boeing Special Attention Service Bulletin 747–25–3381, Revision 1, dated May 17, 2012; and Boeing Special Attention Service Bulletin 767–25–0381, Revision 1, dated September 17, 2012. These service bulletins cannot provide specific information for every airplane because the location of the parts may not be identical on every airplane. Therefore, these service bulletins may not provide explicit directions regarding the location of the parts needed to be removed; instead the service bulletins provide inspection procedures to locate those parts. Once the affected parts are located, operators can document the parts/locations as necessary to ensure that compliance with the AD is maintained in the future. Because the service information is adequate to perform the required tasks, we have not changed the final rule regarding this issue.

Request To Clarify Service Information

Paragraph (i) of the NPRM (77 FR 50411, August 21, 2012) would prohibit installing a BMS 8–39 urethane foam seal on any airplane as of the effective date of the AD. UPS stated that, in many cases, Boeing has given unique part numbers to the new seals, but has not changed the assembly part numbers of the associated line replaceable units (LRUs). UPS added that certain modifications (such as the installation of felt on Model 767 airplanes per Figure 18 of Boeing Special Attention Service Bulletin 767–25–0381, Revision 1, dated September 17, 2012) identified in the associated service bulletins do not bear specific part numbers and are unrelated to the installation of BMS 8–39. UPS stated that Boeing has not provided any revisions to the illustrated parts catalog (IPC) or airplane maintenance manual (AMM) associated with the service bulletin changes. Without such manual support, UPS asserted that there are no industry controls in place to effectively maintain a post-modification configuration.

We infer that the commenter is requesting that we revise the NPRM (77 FR 50411, August 21, 2012) to clarify the referenced procedures and parts. We disagree. Operators are required to both comply with the AD requirements and have controls in place to effectively maintain the configuration of their airplanes. The IPC and AMM are not FAA approved and are not used to control the configuration of the airplane. Operators can, however, request from Boeing any updated documents that would facilitate the maintenance of the AD-mandated configuration. We have not changed the final rule regarding this issue.

Request To Cite Latest Service Information

Paragraphs (c)(2) and (g)(2) of the NPRM (77 FR 50411, August 21, 2012) referred to Boeing Special Attention Service Bulletin 767–25–0381, dated August 19, 2010, as the appropriate source for the applicability and service information for Model 767 airplanes. UAL requested that we revise the NPRM to refer to the recently revised service bulletin: Boeing Special Attention Service Bulletin 767–25–0381, Revision 1, dated September 17, 2012.

We agree. Boeing Special Attention Service Bulletin 767–25–0381, Revision 1, dated September 17, 2012, changes certain airplane groups and provides other administrative changes, but adds no work for any affected airplane. We have revised paragraphs (c)(2) and (g)(2) in this the final rule accordingly. We have also added new paragraph (h)(2) in this final rule to provide credit for actions done on affected airplanes in accordance with Boeing Special Attention Service Bulletin 767–25–0381, dated August 19, 2010.

Request To Delay AD Issuance Pending Revised Service Information

UPS reported that it has submitted service bulletin comments and questions directly to Boeing and requested that the FAA permit Boeing to address these concerns by revising the referenced service information before issuing the final rule.

We disagree. Delaying issuance of the AD would negatively affect safety. If the commenter has a specific concern with the ability to comply with the AD, we will consider requests to approve specific procedures for compliance under the provisions of paragraph (j) of this AD, if sufficient data are submitted to substantiate that the procedures would provide an acceptable level of safety.

Request To Consider Information Notices

UAL questioned whether the AD will cover the changes introduced by two Information Notices (INs): Boeing Service Bulletin 777–25–0362 IN 01, dated February 27, 2012; and Boeing

Service Bulletin 777–25–0362 IN 02, dated August 14, 2012.

We have not changed the final rule to refer to the INs, which are for information only. The INs do not affect compliance with the final rule.

Request To Extend Compliance Time

All Nippon Airways (ANA) requested that we revise the NPRM (77 FR 50411, August 21, 2012) to extend the compliance time from 72 months to 88 months to correspond to ANA's 4C check interval. ANA reported that removal of stowage bins and other cabin items, typically done as part of the 4C check, would allow access to the areas affected by the NPRM. But with the 72-month compliance time, as proposed, ANA asserted that additional tasks would be necessary to get access to those areas, and would add work-hours and large costs for most of its fleet.

We acknowledge ANA's concern, but do not agree with the request. In developing an appropriate compliance time for this action, we considered the urgency associated with the subject unsafe condition, the availability of required parts, and the practical aspect of accomplishing the required seal replacement within a period of time that corresponds to the normal scheduled maintenance for most affected operators. Under the provisions of paragraph (j) of this AD, however, we will consider requests to approve an extension of the compliance time if sufficient data are submitted to substantiate that the new compliance time would provide an acceptable level of safety. We have not changed the AD in this regard.

Request To Exclude Certain Airplanes

The NPRM (77 FR 50411, August 21, 2012) stated that deteriorated BMS 8–39 urethane foam seals in a cargo compartment compromise the Halon retention and smoke- and fire-blocking capabilities of the cargo compartment. UPS reported that its Model 767–300F package freighters are not equipped with Class C cargo compartments and do not have issues with containment of Halon.

We infer that the commenter is requesting that we revise the applicability to remove airplanes that do not have Class C cargo compartments. We disagree. The unsafe condition identified in this AD—penetration of smoke/fire in areas of the airplane that are difficult to access for fire/smoke detection or suppression—is not limited to airplanes equipped with Halon fire suppression. In addition, BMS 8–39 fire retardant properties, which deteriorate over time, can provide a fuel source for an ignition event in hidden areas of the airplane. We have therefore determined that UPS's package freighters are subject to the identified unsafe condition. We have not changed the final rule regarding this issue.

Request To Revise Inspection Requirement

Paragraph (g)(1) in the NPRM (77 FR 50411, August 21, 2012) would require replacement of the BMS 8–39 urethane foam seals with BMS 8–371 insulation foam or BMS 1–68 silicone foam rubber seals, in accordance with Boeing Special Attention Service Bulletin 747–25–3381, Revision 1, dated May 17, 2012. Japan Airlines (JAL) noted that these actions include removal of a certain foam pad, as specified in Figure 16, View 1, of that service bulletin. JAL reported that the cargo light part number BR7203–701 does not contain any foam, and no foam was found installed around the cargo light. JAL concluded that it cannot identify the existence of the foam pad and therefore requested that we revise the NPRM to specify that this removal step would apply only if the foam pad exists.

We agree to provide clarification on this issue. We have determined that some sort of padding should exist near the cargo light. If the pad has been removed, however, the operator can request approval of an alternative method of compliance for appropriate procedures in accordance with the provisions of paragraph (j) of this AD. We have not changed the final rule regarding this issue.

Conclusion

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

- Are consistent with the intent that was proposed in the NPRM (77 FR 50411, August 21, 2012) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (77 FR 50411, August 21, 2012).

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

Costs of Compliance

We estimate that this AD affects 694 airplanes of U.S. registry. We estimate the following costs to comply with this AD:

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Replacement—165 Model 747 airplanes.	Up to 432 work-hours × $85 per hour = $36,720.	Up to $6,162	Up to $42,882	Up to $7,075,530.
Replacement—399 Model 767 airplanes.	Up to 72 work-hours × $85 per hour = $6,120.	Up to $3,967	Up to $10,087	Up to $4,024,713.
Replacement—130 Model 777 airplanes.	16 work-hours × $85 per hour = $1,360.	$1,038	$2,398	$311,740.

Authority for This Rulemaking

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

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

Regulatory Findings

This AD will not have federalism implications under Executive Order 13132. This AD will not have a

substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

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

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

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

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

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

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2013–11–04 The Boeing Company: Amendment 39–17464; Docket No. FAA–2012–0856; Directorate Identifier 2012–NM–093–AD.

(a) Effective Date

This AD is effective July 9, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to The Boeing Company airplanes, certificated in any category, identified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD.

(1) Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes, as identified in Boeing Special Attention Service Bulletin 747–25–3381, Revision 1, dated May 17, 2012.

(2) Model 767–200, –300, –300F, and –400ER series airplanes, as identified in Boeing Special Attention Service Bulletin 767–25–0381, Revision 1, dated September 17, 2012.

(3) Model 777–200, –200LR, –300, and –300ER series airplanes, as identified in Boeing Special Attention Service Bulletin 777–25–0362, dated August 19, 2010.

(d) Subject

Joint Aircraft System Component (JASC)/Air Transport Association (ATA) of America Code 25, Equipment/furnishings.

(e) Unsafe Condition

This AD was prompted by reports of burned Boeing Material Specification (BMS) 8–39 urethane foam, and a report from the airplane manufacturer indicating that airplanes were assembled, throughout various areas of the airplane (including flight deck and cargo compartments), with seals made of BMS 8–39 urethane foam, a material with fire-retardant properties that deteriorate with age. We are issuing this AD to prevent the failure of urethane seals to maintain sufficient Halon concentrations in the cargo compartments to extinguish or contain fire or smoke, and to prevent penetration of fire or smoke in areas of the airplane that are difficult to access for fire and smoke detection or suppression.

(f) Compliance

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

(g) BMS 8–39 Urethane Foam Seal Replacements

Within 72 months after the effective date of this AD, do the actions specified in paragraph (g)(1), (g)(2), or (g)(3) of this AD, as applicable.

(1) For Model 747–100, 747–100B, 747–100B SUD, 747–200B, 747–200F, 747–300, 747–400, 747–400D, 747–400F, 747SR, and 747SP series airplanes: Replace the BMS 8–39 urethane foam seals (including doing a general visual inspection of the airplane sidewalls for air baffles, and of the BMS 8–39 urethane foam for penetrations (e.g., wire penetrations)) with BMS 8–371 insulation foam or BMS 1–68 silicone foam rubber seals, as applicable, in accordance with the Accomplishment Instructions and Appendix A, as applicable, of Boeing Special Attention Service Bulletin 747–25–3381, Revision 1, dated May 17, 2012.

(2) For Model 767–200, –300, –300F, and –400ER series airplanes: Perform a general visual inspection for the presence of BMS 8–39 urethane foam, cover the BMS 8–39 foam with cargo liner joint sealing tape in certain areas, replace certain BMS 8–39 foam pads with Nomex felt in certain areas, and replace BMS 8–39 urethane foam seals with BMS 8–371 insulation foam or BMS 1–68 silicone foam rubber seals, as applicable, in accordance with the Accomplishment Instructions and Appendix A, as applicable, of Boeing Special Attention Service Bulletin 767–25–0381, Revision 1, dated September 17, 2012.

(3) For Model 777–200, –200LR, –300, and –300ER series airplanes: Replace BMS 8–39 urethane foam seals with BMS 1–68 silicone foam rubber seals in the forward and aft cargo compartments of the airplane, in accordance with the Accomplishment Instructions of Boeing Special Attention Service Bulletin 777–25–0362, dated August 19, 2010.

(h) Credit for Previous Actions

(1) For Groups 4 and 5 airplanes, as identified in Boeing Special Attention Service Bulletin 747–25–3381, Revision 1, dated May 17, 2012: This paragraph provides credit for the actions required by paragraph (g)(1) of this AD, if those actions were done before the effective date of this AD using Boeing Special Attention Service Bulletin 747–25–3381, dated August 19, 2010.

(2) For Model 767 airplanes: This paragraph provides credit for the actions required by paragraph (g)(2) of this AD, if those actions were done before the effective date of this AD using Boeing Special Attention Service Bulletin 767–25–0381, dated August 19, 2010.

(i) Parts Installation Prohibition

As of the effective date of this AD, no person may install a BMS 8–39 urethane foam seal in any location identified in paragraphs (g)(1), (g)(2), and (g)(3), as applicable, of this AD.

(j) 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.

(k) Related Information

(1) For more information about this AD, contact Eric M. Brown, Aerospace Engineer, Cabin Safety and Environmental Systems Branch, ANM–150S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue SW., Renton, WA 98057–3356; phone: 425–917–6476; fax: 425–917–6590; email: *Eric.M.Brown@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.

(l) Material Incorporated by Reference

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

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

(i) Boeing Special Attention Service Bulletin 747–25–3381, Revision 1, dated May 17, 2012.

(ii) Boeing Special Attention Service Bulletin 767–25–0381, Revision 1, dated September 17, 2012.

(iii) Boeing Special Attention Service Bulletin 777–25–0362, dated August 19, 2010.

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

(4) You may 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.

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

Issued in Renton, Washington, on May 16, 2013.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–12717 Filed 6–3–13; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0455; Directorate Identifier 2013–CE–013–AD; Amendment 39–17461; AD 2013–11–01]

RIN 2120–AA64

Airworthiness Directives; Iniziative Industriali Italiane S.p.A. Airplanes

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments

SUMMARY: We are adopting a new airworthiness directive (AD) for Iniziative Industriali Italiane S.p.A. Models Sky Arrow 650 TC, Sky Arrow 650 TCN, Sky Arrow 650TCS, and Sky Arrow 650TCNS airplanes. This AD results from mandatory continuing airworthiness information (MCAI) issued by the aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as improper installation of the spherical bearing on the central hinge lever and a crack on the weld length of the horizontal tail/elevator plane hinge assembly. We are issuing this AD to require actions to address the unsafe condition on these products.

DATES: This AD is effective June 19, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in the AD as of June 19, 2013.

We must receive comments on this AD by July 19, 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 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

For service information identified in this AD, contact Magnaghi Aeronautica S.p.A., Via G. Ferraris, 76, 80142 Napoli, Italy; telephone: + 39 081 5977 225; fax: + 39 081 5977 226; email: *dtedesco@magnaghiaeronautica.it;* Internet: *www.magnaghiaeronautica.it.* You may review copies of the referenced service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

Examining the AD Docket

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

FOR FURTHER INFORMATION CONTACT: Mike Kiesov, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4144; fax: (816) 329–4090; email: *mike.kiesov@faa.gov.*

SUPPLEMENTARY INFORMATION:

Discussion

The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued AD No. 2013–0073–E, dated March 21, 2013 (referred to after this as ''the MCAI''), to correct an unsafe condition for the specified products. The MCAI states:

> During an inspection on elevator/stabilizer hinges, improper installation of the spherical bearing part number (P/N) SKF GE–10 on the central hinge lever and a crack on the weld length of the horizontal tail/elevator plane hinge assembly have been reported.
>
> This condition, if not detected and corrected, could lead to the loss of the main elevator control.
>
> To address this potential unsafe condition, Magnaghi Aeronautica issued Service Bulletin (SB–C) n. SB–005–2013–SKY ARROW to inspect the affected areas of the pitch flight control system.
>
> For the reasons described above, this AD requires inspection of the spherical bearing and the horizontal tail/elevator plane hinge assembly to detect any crack, signs of corrosion or improper installation, and accomplishment of the applicable corrective actions.

The MCAI also requires sending a detailed report of any crack, signs of corrosion, or improper installation found during the required inspections to Magnaghi Aeronautica S.p.A.; requesting an FAA-approved repair scheme; and incorporating the repair . You may obtain further information by examining the MCAI in the AD docket.

Relevant Service Information

Magnaghi Aeronautica SpA has issued Service Bulletin SB–C n. SB–005–2013–SKY ARROW, Issue 1, dated March 13, 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 the 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 this State of Design Authority, they have notified us of the unsafe condition described in the MCAI and service information referenced above. We are issuing this AD because we evaluated all information provided by the State of Design Authority and determined the unsafe condition exists and is likely to exist or develop on other products of the same type design.

FAA's Determination of the Effective Date

An unsafe condition exists that requires the immediate adoption of this AD. The FAA has found that the risk to the flying public justifies waiving notice and comment prior to adoption of this rule because This condition, which, if not corrected, could lead to the loss of the main elevator control and result in loss of control. Therefore, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in fewer than 30 days.

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not precede it by notice and opportunity for public comment. We invite you to send any written relevant data, views, or arguments about this AD. Send your comments to an address listed under the **ADDRESSES** section. Include ''Docket No. FAA–2013–0455; Directorate Identifier 2013–CE–013–AD'' at the beginning of your comments. We specifically invite comments on the overall regulatory, economic, environmental, and energy aspects of this AD. We will consider all comments received by the closing date and may amend this AD because of those comments.

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

Costs of Compliance

We estimate that this AD will affect 9 products of U.S. registry. We also estimate that it will take about 2 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour.

Based on these figures, we estimate the cost of the AD on U.S. operators to be $1,530, or $170 per product.

We are unable to estimate the costs to accomplish any necessary repair that will be required based on the results of any required inspection. Magnaghi Aeronautica S.p.A. will evaluate the damage of each affected airplane and develop an appropriate repair scheme.

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

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

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

(2) Is not a ''significant rule'' under 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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2013–11–01 Iniziative Industriali Italiane S.p.A.: Amendment 39–17461; Docket No. FAA–2013–0455; Directorate Identifier 2013–CE–013–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective June 19, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Iniziative Industriali Italiane S.p.A. Models Sky Arrow 650 TC, Sky Arrow 650 TCN, Sky Arrow 650TCS, and Sky Arrow 650TCNS airplanes, all serial numbers, certificated in any category.

(d) Subject

Air Transport Association of America (ATA) Code 27: Flight Controls.

(e) Reason

This AD was prompted by mandatory continuing airworthiness information (MCAI) issued by the aviation authority of another country to identify and correct an unsafe condition on an aviation product. The MCAI describes the unsafe condition as improper installation of the spherical bearing on the central hinge lever and a crack on the weld length of the horizontal tail/elevator plane hinge assembly. We are issuing this AD to correct this condition, which, if not corrected, could lead to the loss of the main elevator control and could result in loss of control.

(f) Actions and Compliance

Unless already done, do the following actions.

(1) Before further flight after June 19, 2013 (the effective date of this AD), and thereafter at intervals not to exceed 25 hours time-in-service (TIS), perform detailed visual inspections of the horizontal tail/elevator plane hinge assembly part number (P/N) R26208/00 following paragraph 4. INSTRUCTIONS of Magnaghi Aeronautica SpA Service Bulletin SB–C n. SB–005–2013–SKY ARROW, Issue 1, dated March 13, 2013.

(2) If during any inspection required by paragraph (f)(1) of this AD, the spherical bearing is found partially or completely out of its seat and/or signs of cracks or corrosion of the hinges, hinge levers or hinge brackets are detected, before further flight send a detailed report to Magnaghi Aeronautica S.p.A. following paragraph 4. INSTRUCTIONS of Magnaghi Aeronautica SpA Service Bulletin SB–C n. SB–005–2013–SKY ARROW, Issue 1, dated March 13, 2013, to the address specified in paragraph (i)(3) of this AD, requesting an FAA-approved repair scheme and incorporating the repair.

(3) As of June 19, 2013 (the effective date of this AD) do not install any spherical bearing P/N SKF GE–10 or horizontal tail/elevator plane hinge assembly P/N R26208/00 on any airplane, unless it has passed the inspection following paragraph 4. INSTRUCTIONS of Magnaghi Aeronautica SpA Service Bulletin SB–C n. SB–005–2013–SKY ARROW, Issue 1, dated March 13, 2013.

(g) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, Standards Office, FAA, has the authority to approve AMOCs

for this AD, if requested using the procedures found in 14 CFR 39.19. Send information to ATTN: Mike Kiesov, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4144; fax: (816) 329–4090; email: *mike.kiesov@faa.gov.* Before using any approved AMOC on any airplane to which the AMOC applies, notify your appropriate principal inspector (PI) in the FAA Flight Standards District Office (FSDO), or lacking a PI, your local FSDO.

(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.

(3) *Reporting Requirements:* For any reporting requirement in this AD, a federal agency may not conduct or sponsor, and a person is not required to respond to, nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a current valid OMB Control Number. The OMB Control Number for this information collection is 2120–0056. Public reporting for this collection of information is estimated to be approximately 5 minutes per response, including the time for reviewing instructions, completing and reviewing the collection of information. All responses to this collection of information are mandatory. Comments concerning the accuracy of this burden and suggestions for reducing the burden should be directed to the FAA at: 800 Independence Ave. SW., Washington, DC 20591, Attn: Information Collection Clearance Officer, AES–200.

(h) Related Information

Refer to MCAI European Aviation Safety Agency (EASA) AD No. 2013–0073–E, dated March 21, 2013, for related information.

(i) Material Incorporated by Reference

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

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

(i) Magnaghi Aeronautica SpA Service Bulletin SB–C n. SB–005–2013–SKY ARROW, Issue 1, dated March 13, 2013.

(ii) Reserved.

(3) For Iniziative Industriali Italiane S.p.A. service information identified in this AD, contact Magnaghi Aeronautica S.p.A., Via G. Ferraris, 76, 80142 Napoli, Italy; telephone: + 39 081 5977 225; fax: + 39 081 5977 226; email: *dtedesco@magnaghiaeronautica.it;* Internet: *www.magnaghiaeronautica.it.*

(4) You may view this service information at FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

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

Issued in Kansas City, Missouri, on May 20, 2013.

Earl Lawrence,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–12516 Filed 6–3–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1322; Directorate Identifier 2012–NM–155–AD; Amendment 39–17466; AD 2013–11–06]

RIN 2120–AA64

Airworthiness Directives; Dassault Aviation Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Dassault Aviation Model Mystere-Falcon 900 and Falcon 900EX airplanes. This AD was prompted by reports of chafing between the tail strobe power supply and a hydraulic line. This AD requires modifying the tail strobe power supply wire routing. We are issuing this AD to prevent chafing between the tail strobe power supply and a hydraulic line, which could result in hydraulic fluid leakage and possible fire due to arcing, and consequent loss of control of the airplane due to structural failure of the tail.

DATES: This AD becomes effective July 9, 2013.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of July 9, 2013.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1137; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on February 5, 2013 (78 FR 8052). That NPRM proposed to correct an unsafe condition for the specified products. The European Aviation Safety Agency (EASA), which is the Technical Agent for the Member States of the European Community, has issued EASA Airworthiness Directive 2012–0162, dated August 29, 2012 (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:

> Two reports were received concerning Falcon 900 aeroplanes, where chafing between the tail strobe power supply and a hydraulic line was found. In the latest reported occurrence, the chafing damaged the power line and created an electrical arcing which created a pin hole in the hydraulic line, leading to hydraulic fluid leakage.
>
> This condition, if not corrected, could jeopardize the aeroplane's safe flight.
>
> To address this potential unsafe condition, Dassault Aviation developed modification (M5741) of the routing of the tail strobe power supply wire, which is available for accomplishment in service through Dassault Service Bulletin (SB) F900–431 or SB F900EX–437, as applicable to aeroplane model.
>
> For the reasons described above, this [EASA] AD requires modification of the routing of the tail strobe power supply wire.

The unsafe condition is chafing between the tail strobe power supply and a hydraulic line, which could result in hydraulic fluid leakage and possible fire due to arcing, and consequent loss of control of the airplane due to structural failure of the tail. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We received no comments on the NPRM (78 FR 8052, February 5, 2013) or on the determination of the cost to the public.

Conclusion

We reviewed the available data and determined that air safety and the public interest require adopting the AD as proposed—except for minor editorial changes. We have determined that these minor changes:

• Are consistent with the intent that was proposed in the NPRM (78 FR 8052, February 5, 2013) for correcting the unsafe condition; and

• Do not add any additional burden upon the public than was already proposed in the NPRM (78 FR 8052, February 5, 2013).

Costs of Compliance

We estimate that this AD will affect 180 products of U.S. registry. We also estimate that it will take about 2 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Required parts will cost about $31 per product. Where the service information lists required parts costs that are covered under warranty, we have assumed that there will be no charge for these parts. As we do not control warranty coverage for affected parties, some parties may incur costs higher than estimated here. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $36,180, or $201 per product.

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under 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 AD and placed it in the AD docket.

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 the NPRM (78 FR 8052, February 5, 2013), 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.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2013–11–06 Dassault Aviation: Amendment 39–17466. Docket No. FAA–2012–1322; Directorate Identifier 2012–NM–155–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective July 9, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to the airplanes specified in paragraphs (c)(1) and (c)(2) of this AD, certificated in any category.

(1) Dassault Aviation Model Mystere-Falcon 900 airplanes, serial numbers 142 and subsequent.

(2) Dassault Aviation Model Falcon 900EX airplanes, all serial numbers except those on which Dassault Aviation Modification M5741 has been embodied in production.

(d) Subject

Air Transport Association (ATA) of America Code 24, Electrical Power.

(e) Reason

This AD was prompted by reports of chafing between the tail strobe power supply and a hydraulic line. We are issuing this AD to prevent chafing between the tail strobe power supply and a hydraulic line, which could result in hydraulic fluid leakage and possible fire due to arcing, and consequent loss of control of the airplane due to structural failure of the tail.

(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) Actions

Within 65 days or 200 flight hours after the effective date of this AD, whichever occurs first: Modify the tail strobe power supply wire routing, in accordance with the Accomplishment Instructions of Dassault Mandatory Service Bulletin F900–431, dated November 8, 2011 (for Model Mystere-Falcon 900 airplanes); or Dassault Mandatory Service Bulletin F900EX–437, dated November 8, 2011 (for FALCON 900EX airplanes).

(h) 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: Tom Rodriguez, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–1137; 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.

(i) Related Information

Refer to Mandatory Continuing Airworthiness Information European

Aviation Safety Agency Airworthiness Directive 2012–0162, dated August 29, 2012, and the service information specified in paragraphs (i)(1) and (i)(2) of this AD, for related information.

(1) Dassault Mandatory Service Bulletin F900–431, dated November 8, 2011.

(2) Dassault Mandatory Service Bulletin F900EX–437, dated November 8, 2011.

(j) Material Incorporated by Reference

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

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

(i) Dassault Mandatory Service Bulletin F900–431, dated November 8, 2011.

(ii) Dassault Mandatory Service Bulletin F900EX–437, dated November 8, 2011.

(3) For service information identified in this AD, contact Dassault Falcon Jet, P.O. Box 2000, South Hackensack, NJ 07606; telephone 201–440–6700; Internet *http://www.dassaultfalcon.com.*

(4) You may review copies of the 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.

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

Issued in Renton, Washington, on May 17, 2013.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–12722 Filed 6–3–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–1227; Directorate Identifier 2012–NM–016–AD; Amendment 39–17467; AD 2013–11–07]

RIN 2120–AA64

Airworthiness Directives; Embraer S.A. Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Embraer S.A. Model ERJ 190 airplanes. This AD was prompted by reports of cracks on the side stay of the main landing gear (MLG). This AD requires repetitive measurements of the left-hand (LH) and right-hand (RH) MLG side stay support fitting to detect bushing migration, and eventual replacement of the bushing; and a detailed inspection for damage on the LH and RH MLG side stay support assembly, and related investigative and corrective actions if necessary. We are issuing this AD to prevent excessive bearing friction, which might compromise the MLG free fall extension and cause fatigue cracking on the MLG side stay and on its support assembly, resulting in reduced structural integrity of the MLG.

DATES: This AD becomes effective July 9, 2013.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in this AD as of July 9, 2013.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Cindy Ashforth, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2768; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on December 17, 2012 (77 FR 74628). That NPRM proposed to correct an unsafe condition for the specified products. The Mandatory Continuing Airworthiness Information (MCAI) states:

> This [Agência Nacional de Aviação Civil (ANAC)] AD results from reports of cracks on the Main Landing Gear (MLG) Side Stay. Further investigation has revealed that the cracks were caused by excessive friction on the MLG Side Stay Support Fitting due to its outer bushing migration. This [ANAC] AD is being issued to prevent such excessive bearing friction which may compromise the MLG free fall extension and; cause fatigue cracks on the MLG Side Stay and on the MLG Side Stay Support Assembly resulting in reduced structural integrity of the MLG.
>
> * * * * *

The required actions include repetitive measurements of the LH and RH MLG side stay support fitting to detect bushing migration, and eventual replacement of the bushing; and a detailed inspection for damage on the LH and RH MLG side stay support assembly, and related investigative and corrective actions if necessary. The related investigative actions include a general visual inspection and an eddy current inspection for any cracking on the upper and lower side stays of the affected side stay support assembly. The corrective actions include replacing or repairing the MLG side stay or MLG side stay assembly and removing corrosion. You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We have considered the comments received.

Request To Revise Compliance Time

JetBlue Airways requested that the compliance time for the inspection and replacement of the bushing for the MLG side stay support fitting be revised to match the EMBRAER service information. JetBlue Airways stated that according to EMBRAER Service Bulletin 190–57–0036, Revision 02, dated August 12, 2011, the reason for the replacement of the bushing of the MLG side stay support fitting is to ensure that the MLG side stay support fitting remains properly lubricated. In addition, JetBlue Airways stated that the service information is based on the difficulty of the lubrication of the MLG side stay fitting, which is lubricated using a certain maintenance manual and has a compliance time of intervals not to exceed 600 flight cycles. JetBlue Airways stated that if the bushing lubrication of the MLG side stay support fitting is normal with no difficulties, there should not be a technical reason to defer the replacement of the MLG side stay support fitting to an interval not to exceed 1,200 flight cycles after the effective date of the final rule. JetBlue Airways stated, however, that if the MLG side stay support fitting cannot be properly lubricated, then it is prudent to inspect the bushing for migration of the MLG side stay support fitting and replace the MLG side stay fitting in accordance with paragraphs (g) and (h) of the NPRM (77 FR 74628, December 17, 2012), respectively.

We disagree with the commenter's request. Agência Nacional de Aviação Civil (ANAC), which is the aviation authority for Brazil, has determined that an unsafe condition can occur regardless of whether or not the MLG side stay is properly lubricated. We have not received sufficient data to

deviate from ANAC's determination. Affected operators, however, may request approval of an alternative method of compliance (AMOC) under the provisions of paragraph (k)(1) of this AD by submitting data substantiating that the change would provide an acceptable level of safety. We have not changed this final rule in this regard.

Request for an AMOC

US Airways commented that approval of an AMOC will be needed for replacement of the bushing for the MLG side stay. US Airways stated that it already performed the tasks using an engineering order that differs from the Accomplishment Instructions presented in EMBRAER Service Bulletin 190–57–0036, dated September 20, 2010.

We disagree with the commenter's request. We need to clarify the AMOC process. AMOCs provide an alternative method of compliance to the methods required to be used in the associated AD. An AMOC is issued only after an AD has been issued and only after data are provided to show that the proposed solution is complete and addresses the unsafe condition. You may apply for an AMOC using the procedures in paragraph (k)(1) of this AD. We have not changed this final rule in this regard.

Conclusion

We reviewed the available data, including the comments received, and determined that air safety and the public interest require adopting the AD as proposed—except for minor editorial changes. We have determined that these minor changes:

- Are consistent with the intent that was proposed in the NPRM (77 FR 74628, December 17, 2012) for correcting the unsafe condition; and
- Do not add any additional burden upon the public than was already proposed in the NPRM (77 FR 74628, December 17, 2012).

Costs of Compliance

We estimate that this AD will affect 97 products of U.S. registry. We also estimate that it will take about 44 work-hours per product to comply with the basic requirements of this AD. The average labor rate is $85 per work-hour. Based on these figures, we estimate the cost of this AD to the U.S. operators to be $362,780, or $3,740 per product.

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under 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 AD and placed it in the AD docket.

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 the NPRM (77 FR 74628, December 17, 2012), 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.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2013–11–07 Embraer S.A.: Amendment 39–17467. Docket No. FAA–2012–1227; Directorate Identifier 2012–NM–016–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective July 9, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Embraer S.A. Model ERJ 190–100 STD, –100 LR, –100 ECJ, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes; certificated in any category; as identified in the service information specified in paragraphs (c)(1) and (c)(2) of this AD.

(1) EMBRAER Service Bulletin 190–57–0036, Revision 02, dated August 12, 2011.

(2) EMBRAER Service Bulletin 190LIN–57–0016, dated June 10, 2011.

(d) Subject

Air Transport Association (ATA) of America Code 32, Landing gear.

(e) Reason

This AD was prompted by reports of cracks on the side stay of the main landing gear (MLG). We are issuing this AD to prevent excessive bearing friction, which might compromise the MLG free fall extension and cause fatigue cracking on the MLG side stay and on its support assembly, resulting in reduced structural integrity of the MLG.

(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) Measurement for Bushing Migration of the MLG Side Stay Support Fitting

Within 100 flight cycles after the effective date of this AD: Measure the left-hand (LH) and right-hand (RH) MLG side stay support fitting to detect bushing migration, in accordance with Part I of the Accomplishment Instructions of EMBRAER Service Bulletin 190–57–0036, Revision 02,

dated August 12, 2011 (for Model ERJ 190–100 STD, –100 LR, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes); or EMBRAER Service Bulletin 190LIN–57–0016, dated June 10, 2011 (for Model ERJ 190–100 ECJ airplanes).

(1) If the distance of bushing migration is less than 5 millimeters (mm), repeat the measurement required by paragraph (g) of this AD thereafter at intervals not to exceed 100 flight cycles until the actions required by paragraph (h) of this AD are accomplished.

(2) If the distance of bushing migration is equal to or more than 5 mm, before further flight, do the actions required by paragraph (h) of this AD.

(h) Replacement of the MLG Side Stay Support Fitting Bushing

Within 1,200 flight cycles after the effective date of this AD, except as specified by the compliance time in paragraph (g)(2) of this AD: Replace the LH and RH MLG side stay support fitting bushing, in accordance with Part II and Part III, respectively, of the Accomplishment Instructions of EMBRAER Service Bulletin 190–57–0036, Revision 02, dated August 12, 2011 (for Model ERJ 190–100 STD, –100 LR, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes); or EMBRAER Service Bulletin 190LIN–57–0016, dated June 10, 2011 (for Model ERJ 190–100 ECJ airplanes). Replacing the bushings terminates the repetitive measurements required by paragraph (g)(1) of this AD.

(i) MLG Side Stay and MLG Side Stay Support Assembly Inspection and Repair

At the applicable time specified in paragraph (i)(1), (i)(2), or (i)(3) of this AD: Perform a detailed inspection for damage on the LH and RH MLG side stay support assembly, and do all applicable related investigative and corrective actions, in accordance with the Accomplishment Instructions of EMBRAER Service Bulletin 190–32–0043, Revision 02, dated August 23, 2011 (for Model ERJ 190–100 STD, –100 LR, and –100 IGW airplanes; and Model ERJ 190–200 STD, –200 LR, and –200 IGW airplanes); or EMBRAER Service Bulletin 190LIN–32–0017, dated June 10, 2011 (for Model ERJ 190–100 ECJ airplanes). Do all applicable related investigative and corrective actions before further flight.

(1) For airplanes on which the actions specified in Part II and Part III of EMBRAER Service Bulletin 190–57–0036, or EMBRAER Service Bulletin 190LIN–57–0016, as applicable, have been done as of the effective date of this AD: Within 100 flight cycles after the effective date of this AD.

(2) For airplanes on which the actions specified in EMBRAER Service Bulletin 190–57–0036, or EMBRAER Service Bulletin 190LIN–57–0016, as applicable, have not been done as of the effective date of this AD; except for airplanes identified in paragraph (i)(3) of this AD: Within 1,200 flight cycles after the effective date of this AD.

(3) For airplanes on which the actions specified in EMBRAER Service Bulletin 190–32–0043, dated March 1, 2011, have been done as the effective date of this AD, and a repair of the MLG side stay support assembly was done if damage was found: Within 600 flight cycles after the effective date of this AD.

(j) Credit for Previous Actions

(1) This paragraph provides credit for the actions required by paragraphs (g) and (h) of this AD, if those actions were performed before the effective date of this AD using EMBRAER Service Bulletin 190–57–0036, dated September 20, 2010; or EMBRAER Service Bulletin 190–57–0036, Revision 01, dated February 28, 2011; which are not incorporated by reference in this AD.

(2) This paragraph provides credit for the actions required by paragraph (i) of this AD, if those actions were performed before the effective date of this AD using EMBRAER Service Bulletin 190–32–0043, Revision 01, dated April 29, 2011, which is not incorporated by reference in this AD.

(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: Cindy Ashforth, Aerospace Engineer, International Branch, ANM–116, Transport Airplane Directorate, FAA, 1601 Lind Avenue SW., Renton, Washington 98057–3356; telephone (425) 227–2768; 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) Special Flight Permits

Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the airplane can be modified (if the operator elects to do so), provided that it is not a revenue flight and it meets weight limitations requirements specified by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA.

(m) Related Information

(1) Refer to MCAI Brazilian Airworthiness Directive 2012–01–01, effective January 28, 2012, and the service information specified in paragraphs (m)(1)(i) through (m)(1)(iv) of this AD, for related information.

(i) EMBRAER Service Bulletin 190–32–0043, Revision 02, dated August 23, 2011.

(ii) EMBRAER Service Bulletin 190–57–0036, Revision 02, dated August 12, 2011.

(iii) EMBRAER Service Bulletin 190LIN–32–0017, dated June 10, 2011.

(iv) EMBRAER Service Bulletin 190LIN–57–0016, dated June 10, 2011.

(2) For service information identified in this AD, contact Embraer S.A., Technical Publications Section (PC 060), Av. Brigadeiro Faria Lima, 2170–Putim–12227–901 São Jose dos Campos–SP–BRASIL; telephone +55 12 3927–5852 or +55 12 3309–0732; fax +55 12 3927–7546; email *distrib@embraer.com.br;* Internet *http://www.flyembraer.com.*

(n) Material Incorporated by Reference

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

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

(i) EMBRAER Service Bulletin 190–32–0043, Revision 02, dated August 23, 2011.

(ii) EMBRAER Service Bulletin 190–57–0036, Revision 02, dated August 12, 2011.

(iii) EMBRAER Service Bulletin 190LIN–32–0017, dated June 10, 2011.

(iv) EMBRAER Service Bulletin 190LIN–57–0016, dated June 10, 2011.

(3) For service information identified in this AD, contact Embraer S.A., Technical Publications Section (PC 060), Av. Brigadeiro Faria Lima, 2170–Putim–12227–901 São Jose dos Campos–SP–BRASIL; telephone +55 12 3927–5852 or +55 12 3309–0732; fax +55 12 3927–7546; email *distrib@embraer.com.br;* Internet *http://www.flyembraer.com.*

(4) You may review copies of the 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.

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

Issued in Renton, Washington, on May 17, 2013.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–12900 Filed 6–3–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2013–0470; Directorate Identifier 2013–SW–008–AD; Amendment 39–17465; AD 2013–11–05]

RIN 2120–AA64

Airworthiness Directives; Bell Helicopter Textron, Inc. (Bell) Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: We are adopting a new airworthiness directive (AD) for Bell Model 214B, 214B–1, and 214ST helicopters with a certain tail rotor hanger bearing (bearing) installed. This AD requires inspecting the bearing to determine whether an incorrectly manufactured seal material is installed on the bearing. This AD is prompted by a report that certain bearings were manufactured with an incorrect seal material that does not meet Bell specifications. The actions specified by this AD are intended to prevent loss of bearing grease, failure of the bearing, and subsequent loss of control of the helicopter.

DATES: This AD becomes effective June 19, 2013.

The Director of the Federal Register approved the incorporation by reference of certain documents listed in this AD as of June 19, 2013.

We must receive comments on this AD by August 5, 2013.

ADDRESSES: You may send comments by any of the following methods:

- *Federal eRulemaking Docket:* Go to *http://www.regulations.gov.* Follow the online instructions for sending your comments electronically.
- *Fax:* 202–493–2251.
- *Mail:* Send comments to the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.
- *Hand Delivery:* Deliver to the ''Mail'' address between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Examining the AD Docket

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

For service information identified in this AD, contact Bell Helicopter Textron, Inc., P.O. Box 482, Fort Worth, TX 76101; telephone (817) 280–3391; fax (817) 280–6466; or at *http://www.bellcustomer.com/files/.* You may review the referenced service information at the FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137.

FOR FURTHER INFORMATION CONTACT: James Blyn, Aviation Safety Engineer, Rotorcraft Certification Office, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5762; email *7-AVS-ASW-170@faa.gov.*

SUPPLEMENTARY INFORMATION:

Comments Invited

This AD is a final rule that involves requirements affecting flight safety, and we did not provide you with notice and an opportunity to provide your comments prior to it becoming effective. However, we invite you to participate in this rulemaking by submitting written comments, data, or views. We also invite comments relating to the economic, environmental, energy, or federalism impacts that resulted from adopting this AD. The most helpful comments reference a specific portion of the AD, explain the reason for any recommended change, and include supporting data. To ensure the docket does not contain duplicate comments, commenters should send only one copy of written comments, or if comments are filed electronically, commenters should submit them only one time. We will file in the docket all comments that we receive, as well as a report summarizing each substantive public contact with FAA personnel concerning this rulemaking during the comment period. We will consider all the comments we receive and may conduct additional rulemaking based on those comments.

Discussion

We are adopting a new AD for Bell Model 214B, 214B–1, and 214ST helicopters with certain bearings installed. Bell was notified by a supplier that all part number 214–040–606–005 and 214–040–606–101 bearings delivered between May 2011 and June 2012 were manufactured with incorrect seal material. The incorrect seal material does not meet Bell's operating and environmental temperature specifications and under extreme heat could result in seal failure and grease loss from the bearing. The incorrect seal material is black in color; the correctly manufactured bearings have a red/orange to brown colored seal.

FAA's Determination

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

Related Service Information

Bell has issued Alert Service Bulletin (ASB) 214–13–74, Revision A, dated March 25, 2013, for Model 214B and 214B–1 helicopters, serial number (S/N) 28001 through 28070, and ASB 214ST–13–90, Revision A, dated March 25, 2013, for Model 214ST helicopters, S/N 28101 through 28200. Both ASBs describe procedures for determining whether any bearing with incorrect seal material is installed on the helicopter and for inspecting any installed bearing with incorrect seal material every 10 hours time-in-service (TIS). Both ASBs also specify replacing any bearing with incorrect seal material that is leaking grease or damaged. Finally, the ASBs specify replacing any bearing with incorrect seal material within 500 hours TIS or by December 31, 2013.

AD Requirements

This AD requires:

- Inspecting each bearing within 10 hours TIS to determine whether the bearing has correct seal material.
- If a bearing has incorrect seal material, inspecting the bearing at intervals not to exceed 10 hours TIS for leakage, slung grease, or damage.
- If there is leakage, slung grease, or damage, before further flight, replacing the bearing with an airworthy bearing that does not have a black seal, which would be terminating action for the requirements of this AD.

Differences Between This AD and the Service Information

The Bell ASBs specify 25 hours TIS for the initial inspection, while this AD requires inspecting within 10 hours TIS. The ASBs specify replacing any bearing with black seal material within 500 hours TIS or by December 31, 2013. This AD requires repetitive inspections of the bearing until the bearing is replaced with an airworthy bearing that does not have a black seal.

Interim Action

We consider this AD to be an interim action. We are currently considering requiring the replacement of the defective bearings, which will constitute terminating action for the repetitive inspections required by this AD action. However, the planned compliance time for the replacement of the bearing would allow enough time to provide notice and opportunity for prior public comment on the merits of the replacement.

Costs of Compliance

We estimate that this AD will affect 26 helicopters of U.S. Registry. We estimate that operators may incur the following costs in order to comply with this AD. At an average labor cost of $85 per hour, inspecting the bearings would require about 2.5 work hours, for a cost per helicopter of $213 and a cost of $5,538 for the fleet. Replacing a defective bearing would require about 3 work hours, and required parts would cost $1,372 per bearing, for a cost per helicopter of $1,627.

According to Bell's service information some of the costs of this AD may be covered under warranty, thereby reducing the cost impact on affected individuals. We do not control warranty coverage by Bell. Accordingly, we have included all costs in our cost estimate.

FAA's Justification and Determination of the Effective Date

Providing an opportunity for public comments prior to adopting these AD requirements would delay implementing the safety actions needed to correct this known unsafe condition. Therefore, we find that the risk to the flying public justifies waiving notice and comment prior to the adoption of this rule because the required corrective actions must be accomplished within 10 hours TIS, a very short time period based on the average flight hour utilization rate of these helicopters.

Since an unsafe condition exists that requires the immediate adoption of this AD, we determined that notice and opportunity for public comment before issuing this AD are impracticable and that good cause exists for making this amendment effective in less than 30 days.

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

For the reasons discussed, I certify that this AD:

1. Is not a ''significant regulatory action'' under Executive Order 12866;

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

3. Will not affect intrastate aviation in Alaska to the extent that it justifies making a regulatory distinction; and

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

We prepared an economic evaluation of the estimated costs to comply with this 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.

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

2013–11–05 Bell Helicopter Textron, Inc. (Bell): Amendment 39–17465; Docket No. FAA–2013–0470; Directorate Identifier 2013–SW–008–AD.

(a) Applicability

This AD applies to Bell Model 214B helicopters, serial number (S/N) 28001 through 28070, Model 214B–1 helicopters, S/N 28001 through 28070, and Model 214ST helicopters, S/N 28101 through 28200, with a tail rotor hanger bearing (bearing), part number (P/N) 214–040–606–005 or 214–040–606–101 installed, certificated in any category.

(b) Unsafe Condition

This AD defines the unsafe condition as a bearing with incorrect seal material, which could fail under extreme temperature or environmental conditions, resulting in loss of tail rotor control and subsequent loss of control of the helicopter.

(c) Effective Date

This AD becomes effective June 19, 2013.

(d) Compliance

You are responsible for performing each action required by this AD within the specified compliance time.

(e) Required Actions

(1) Within 10 hours time in service (TIS):

(i) Inspect each bearing to determine whether the seal material is correct, as described in the Accomplishment Instructions, Part 1—Inspection, paragraphs 1.a. through 2. and Figure 1 of Bell Alert Service Bulletin (ASB) 214–13–74, Revision A, dated March 25, 2013, for Model 214B and 214B–1 helicopters and ASB 214ST–13–90, Revision A, dated March 25, 2013, for Model 214ST helicopters.

(ii) For each bearing with black seal material, before further flight and thereafter at intervals not to exceed 10 hours TIS, inspect the bearing for leakage, slung grease, or damage. If there is any leakage, slung grease, or damage, before further flight, replace the bearing with an airworthy bearing with red/orange to brown color seal material.

(2) Replacing a bearing with an airworthy bearing with the correct red/orange to brown color seal material terminates the inspection requirements of this AD.

(3) Do not install bearing P/N 214–040–606–005 or 214–040–606–101 with black seal material on any helicopter.

(f) Special Flight Permits

Special flight permits are prohibited.

(g) Alternative Methods of Compliance (AMOCs)

(1) The Manager, Rotorcraft Certification Office, FAA, may approve AMOCs for this AD. Send your proposal to: James Blyn, Aviation Safety Engineer, Rotorcraft Certification Office, Rotorcraft Directorate, FAA, 2601 Meacham Blvd., Fort Worth, Texas 76137; telephone (817) 222–5762; email *7-AVS-ASW-170@faa.gov.*

(2) For operations conducted under a 14 CFR part 119 operating certificate or under 14 CFR part 91, subpart K, we suggest that you notify your principal inspector, or lacking a principal inspector, the manager of the local flight standards district office or

certificate holding district office before operating any aircraft complying with this AD through an AMOC.

(h) Subject

Joint Aircraft Service Component (JASC) Code: 6500: Tail Rotor Drive Bearing.

(i) Material Incorporated by Reference

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

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

(i) Bell Alert Service Bulletin No. 214–13–74, Revision A, dated March 25, 2013.

(ii) Bell Alert Service Bulletin No. 214ST–13–90, Revision A, dated March 25, 2013.

(3) For Bell service information identified in this AD, contact Bell Helicopter Textron, Inc., P.O. Box 482, Fort Worth, TX 76101; telephone (817) 280–3391; fax (817) 280–6466; or at *http://www.bellcustomer.com/files/.*

(4) You may view this service information at FAA, Office of the Regional Counsel, Southwest Region, 2601 Meacham Blvd., Room 663, Fort Worth, Texas 76137. For information on the availability of this material at the FAA, call (817) 222–5110.

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

Issued in Fort Worth, Texas, on May 17, 2013.

Kim Smith,

Directorate Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 2013–12720 Filed 6–3–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. FAA–2012–0930; Directorate Identifier 2011–NM–251–AD; Amendment 39–17472; AD 2013–11–12]

RIN 2120–AA64

Airworthiness Directives; Bombardier, Inc. Airplanes

AGENCY: Federal Aviation Administration (FAA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: We are adopting a new airworthiness directive (AD) for certain Bombardier, Inc. Model BD–100–1A10 (Challenger 300) airplanes. This AD was prompted by reports of failure of a screw cap or end cap of the hydraulic system accumulator while on the ground, which resulted in loss of use of that hydraulic system and high-energy impact damage to adjacent systems and structures. This AD would require inspecting for the correct serial number of a certain hydraulic system accumulator, and replacing affected hydraulic system accumulators with new or serviceable accumulators. We are issuing this AD to prevent failure of a screw cap or end cap and loss of the related hydraulic system, which could result in damage to airplane structure and consequent reduced controllability of the airplane.

DATES: This AD becomes effective July 9, 2013.

The Director of the Federal Register approved the incorporation by reference of a certain publication listed in this AD as of July 9, 2013.

ADDRESSES: You may examine the AD docket on the Internet at *http://www.regulations.gov* or in person at the U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Cesar Gomez, Aerospace Engineer, Airframe and Mechanical Systems Branch, ANE–171, FAA, New York Aircraft Certification Office (ACO), 1600 Stewart Avenue, Suite 410, Westbury, New York 11590; telephone (516) 228–7318; fax (516) 794–5531.

SUPPLEMENTARY INFORMATION:

Discussion

We issued a notice of proposed rulemaking (NPRM) to amend 14 CFR part 39 to include an AD that would apply to the specified products. That NPRM was published in the **Federal Register** on September 6, 2012 (77 FR 54846). That NPRM proposed to correct an unsafe condition for the specified products. The Mandatory Continuing Airworthiness Information (MCAI) states:

> Seven cases of on-ground hydraulic accumulator screw cap/end cap failure have been experienced on CL–600–2B19 aeroplanes, resulting in loss of the associated hydraulic system and high-energy impact damage to adjacent systems and structure. To date, the lowest number of flight cycles accumulated at the time of failure has been 6991.
>
> Although there have been no failures to date on any BD–100–1A10 aeroplanes, accumulators similar to those installed on the CL–600–2B19 are installed on them. The affected part numbers (P/Ns) of the accumulators installed on BD–100–1A10 are 900095–1 (Auxiliary Hydraulic System accumulator), 08–60219–001 (Inboard Brake accumulator), and 08–60218–001 (Outboard Brake accumulator).
>
> A detailed analysis of the calculated line of trajectory of a failed screw cap/end cap for the accumulator has been conducted, resulting in the identification of areas where systems and/or structural components could potentially be damaged. Although all of the failures to date have occurred on the ground, an in-flight failure affecting such components could potentially have an adverse effect on the controllability of the aeroplane.
>
> This [TCCA] directive provides the initial action by mandating the replacement of the Auxiliary Hydraulic System accumulators that are not identified by the letter ''E'' after the serial number on the identification plate. Further corrective actions are anticipated to rectify similar safety concerns with the Inboard and Outboard Brake accumulators.

You may obtain further information by examining the MCAI in the AD docket.

Comments

We gave the public the opportunity to participate in developing this AD. We considered the comments received.

Request To Change Precipitating Event Language

Bombardier asked that the language specifying that the NPRM (77 FR 54846, September 6, 2012) was prompted by ''auxiliary hydraulic accumulator failure due to end cap or screw cap'' be changed. Bombardier stated that there is no record of such auxiliary hydraulic accumulator failure and added that the failures occurred on accumulators having a similar design. Bombardier asked that the word ''auxiliary'' be removed from the NPRM.

We agree with the commenter for the reason provided. We have removed the word ''auxiliary'' from the Summary section and paragraph (e) of this AD.

Request for Clarification of Effective Date of AD

Bombardier asked if the compliance time in paragraphs (g)(1) and (g)(3) of the NPRM (77 FR 54846, September 6, 2012) should refer to the date of Bombardier Service Bulletin 100–29–14, dated December 16, 2010, instead of the effective date of the AD. Bombardier stated that there is a significant difference between the release date of that service information and the effective date of the AD.

We acknowledge the commenter's concern and provide the following clarification. We do not agree that the compliance time should correspond to the release date of Bombardier Service Bulletin 100–29–14, dated December 16, 2010. We do not intend to ground airplanes, but that could occur if the release date of this service information is used. Therefore, we must provide a

compliance time to account for the time that has passed since this service information was issued.

Shortening the compliance time would mean issuing a supplemental NPRM, and we do not consider it appropriate to further delay issuance of this final rule. We determined that a compliance time following the effective date of the AD is appropriate and represents an acceptable interval in which the inspection can be performed in a timely manner within the fleet, while still maintaining an adequate level of safety. Additionally, operators are always permitted to accomplish the requirements of an AD at a time earlier than the specified compliance time. We have made no change to the AD in this regard.

Clarification of Address

Bombardier also asked if the email address for business airplanes identified in paragraph (k)(2) of the NPRM (77 FR 54846, September 6, 2012) is accurate.

We contacted the manufacturer and verified that the email address identified in paragraph (k)(2) of the NPRM (77 FR 54846, September 6, 2012) for obtaining service information from Bombardier, Inc., is the correct email address for business airplanes. We have made no change to the AD in this regard.

Conclusion

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

Costs of Compliance

We estimate that this AD affects 75 airplanes of U.S. registry. We estimate the following costs to comply with this AD.

ESTIMATED COSTS

Action	Labor cost	Parts cost	Cost per product	Cost on U.S. operators
Inspection to determine part numbers	1 work-hour × $85 per hour = $85	$0	$85	$6,375

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

ON-CONDITION COSTS

Action	Labor cost	Parts cost	Cost per product
Hydraulic accumulator replacement	4 work-hours × $85 per hour = $340	$0	$340

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

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

1. Is not a ''significant regulatory action'' under Executive Order 12866;

2. Is not a ''significant rule'' under 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 AD and placed it in the AD docket.

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 the NPRM (77 FR 54846, September 6, 2012), 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.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

■ 2. The FAA amends § 39.13 by adding the following new AD:

2013–11–12 Bombardier, Inc.: Amendment 39–17472. Docket No. FAA–2012–0930; Directorate Identifier 2011–NM–251–AD.

(a) Effective Date

This airworthiness directive (AD) becomes effective July 9, 2013.

(b) Affected ADs

None.

(c) Applicability

This AD applies to Bombardier, Inc. Model BD–100–1A10 (Challenger 300) airplanes, certificated in any category, having serial numbers 20003 through 20335 inclusive.

(d) Subject

Air Transport Association (ATA) of America Code 29, Hydraulic Power.

(e) Reason

This AD was prompted by reports of failure of a screw-cap or end cap of the hydraulic system accumulator while on the ground, which resulted in loss of use of that hydraulic system and high-energy impact damage to adjacent systems and structures. We are issuing this AD to prevent failure of a screw cap or end cap and loss of the related hydraulic system, which could result in damage to airplane structure and consequent reduced controllability of the airplane.

(f) Compliance

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

(g) Inspection

At the applicable time specified in paragraph (g)(1), (g)(2), or (g)(3) of this AD: Inspect the identification plate on the hydraulic system accumulator having part number (P/N) 900095–1 to determine if an ''E'' is part of the suffix of the serial number stamped on the identification plate, as listed in paragraph 2.B. of the Accomplishment Instructions of Bombardier Service Bulletin 100–29–14, dated December 16, 2010. A review of airplane maintenance records is acceptable in lieu of this inspection if the suffix of the serial number can be conclusively determined from that review.

(1) For an accumulator that has accumulated more than 3,150 total flight cycles as of the effective date of this AD, inspect that accumulator within 350 flight cycles after the effective date of this AD.

(2) For an accumulator that has accumulated 3,150 or fewer total flight cycles as of the effective date of this AD, inspect that accumulator before it has accumulated 3,500 total flight cycles.

(3) For an accumulator on which it is not possible to determine the total flight cycles accumulated as of the effective date of this AD, inspect that accumulator within 350 flight cycles after the effective date of this AD.

(h) Replacement

If, during the inspection required by paragraph (g) of this AD, any accumulator having P/N 900095–1 is found on which the letter ''E'' is not part of the suffix of the serial number on the identification plate: Before further flight, replace the accumulator with a new or serviceable accumulator, in accordance with paragraph 2.C. of the Accomplishment Instructions of Bombardier Service Bulletin 100–29–14, dated December 16, 2010.

(i) Parts Installation Prohibition

As of the effective date of this AD, no person may install on any airplane a hydraulic system accumulator having P/N 900095–1, on which the letter ''E'' is not part of the suffix of the serial number on the identification plate.

(j) Other FAA AD Provisions

The following provisions also apply to this AD:

(1) *Alternative Methods of Compliance (AMOCs):* The Manager, New York Aircraft Certification Office (ACO), ANE–170, 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 ACO, send it to the Program Manager, Continuing Operational Safety, FAA, New York ACO, 1600 Stewart Avenue, Suite 410, Westbury, NY 11590; telephone (516) 228–7300; fax (516) 794–5531. 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.

(k) Related Information

Refer to MCAI Canadian Airworthiness Directive CF–2011–41, dated October 31, 2011; and Bombardier Service Bulletin 100–29–14, dated December 16, 2010; for related information.

(l) Material Incorporated by Reference

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

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

(i) Bombardier Service Bulletin 100–29–14, dated December 16, 2010.

(ii) Reserved.

(3) For service information identified in this AD, contact Bombardier, Inc., 400 Côte-Vertu Road West, Dorval, Québec H4S 1Y9, Canada; telephone 514–855–5000; fax 514–855–7401; email *thd.crj@aero.bombardier.com;* Internet *http://www.bombardier.com.* You may review copies of the referenced service information at the FAA, Transport Airplane Directorate, 1601 Lind Avenue SW., Renton, WA.

(4) You may review copies of the 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.

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

Issued in Renton, Washington, on May 22, 2013.

Jeffrey E. Duven,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2013–12898 Filed 6–3–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 706

Certifications and Exemptions Under the International Regulations for Preventing Collisions at Sea, 1972

AGENCY: Department of the Navy, DoD.

ACTION: Final rule.

SUMMARY: The Department of the Navy (DoN) is amending its certifications and exemptions under the International Regulations for Preventing Collisions at Sea, 1972 (72 COLREGS), to reflect that the Deputy Assistant Judge Advocate General (DAJAG) (Admiralty and Maritime Law) of the DoN has determined that USS THEODORE ROOSEVELT (CVN 71) is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with certain provisions of the 72 COLREGS without interfering with its special function as a naval ship. The intended effect of this rule is to warn mariners in waters where 72 COLREGS apply.

DATES: This rule is effective June 4, 2013 and is applicable beginning May 20, 2013.

FOR FURTHER INFORMATION CONTACT: Lieutenant Jocelyn Loftus-Williams, JAGC, U.S. Navy, Admiralty Attorney, (Admiralty and Maritime Law), Office of the Judge Advocate General, Department of the Navy, 1322 Patterson Ave. SE., Suite 3000, Washington Navy Yard, DC 20374–5066, telephone number: 202–685–5040

SUPPLEMENTARY INFORMATION: Pursuant to the authority granted in 33 U.S.C. 1605, the DoN amends 32 CFR Part 706.

This amendment provides notice that the DAJAG (Admiralty and Maritime Law) of the DoN, under authority delegated by the Secretary of the Navy,

has certified that USS THEODORE ROOSEVELT (CVN 71) is a vessel of the Navy which, due to its special construction and purpose, cannot comply fully with the following specific provisions of 72 COLREGS without interfering with its special function as a naval ship: Annex I, paragraph 2(g), pertaining to the placement of the sidelights above the hull; and Annex I, paragraph 2(i) (iii), pertaining to the vertical line spacing of the task lights. The DAJAG (Admiralty and Maritime Law) has also certified that the lights involved are located in closest possible compliance with the applicable 72 COLREGS requirements.

Moreover, it has been determined, in accordance with 32 CFR Parts 296 and 701, that publication of this amendment for public comment prior to adoption is impracticable, unnecessary, and contrary to public interest since it is based on technical findings that the placement of lights on this vessel in a manner differently from that prescribed herein will adversely affect the vessel's ability to perform its military functions.

List of subjects in 32 CFR Part 706

Marine Safety, Navigation (Water), and Vessels.

For the reasons set forth in the preamble, amend part 706 of title 32 of the CFR as follows:

PART 706—CERTIFICATIONS AND EXEMPTIONS UNDER THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA, 1972

■ 1. The authority citation for part 706 continues to read:

Authority: 33 U.S.C. 1605

■ 2. Section 706.2 is amended as follows:

■ A. In Table Two by revising the entry for USS THEODORE ROOSEVELT (CVN 71); and

■ B. In Table Four by adding the following entry for USS THEODORE ROOSEVELT (CVN 71).

The additions read as follows:

§ 706.2 Certifications of the Secretary of the Navy under Executive Order 11964 and 33 U.S.C. 1605.

* * * * *

* * * * *

TABLE TWO

Vessel	Number	Masthead lights, distance to stbd of keel in meters; Rule 21(a)	Forward anchor light, distance below flight dk in meters; § 2(K), Annex I	Forward anchor light, number of; Rule 30(a)(i)	AFT anchor light, distance below flight dk in meters; Rule 21(e), Rule 30(a)(ii)	AFT anchor light, number of; Rule 30(a)(ii)	Side lights, distance below flight dk in meters; § 2 (g), Annex I	Side lights, distance forward of forward masthead light in meters; § 3(b), Annex I	Side lights, distance inboard of ship's sides in meters; § 3(b), Annex I
USS THEODORE ROOSEVELT.	CVN 71 ..	30.0	—	.....	—	.....	0.43	—	—

* * * * *

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TABLE FOUR

Vessel	No	Vertical separation of the task light array is not equally spaced, the separation between the middle and lower task light exceed the separation between the upper and middle light by
USS THEODORE ROOSEVELT	CVN 71	0.18 meter

* * * * *

A. B. Fischer,

Captain, JAGC, U.S. Navy, Deputy Assistant Judge Advocate, General (Admiralty and Maritime Law).

C. K. Chiappetta,

Lieutenant Commander, Office of the Judge Advocate General, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 2013–13138 Filed 6–3–13; 8:45 am]

BILLING CODE 3810–FF–P

OFFICE OF SCIENCE AND TECHNOLOGY POLICY

32 CFR Part 2402

Implementation of the Freedom of Information Act

AGENCY: Office of Science and Technology Policy.

ACTION: Final rule.

SUMMARY: The White House Office of Science and Technology Policy (OSTP) issues this final rule to implement the Freedom of Information Act (FOIA), as amended. This final rule implements the requirement of the FOIA by setting forth procedures for requesting access to, and making disclosures of, information contained by OSTP.

This final rule contains provisions to comply with the President's January 21, 2009, Executive Memoranda on ''The Freedom of Information Act'' and ''Transparency and Open Government,'' and Attorney General Holder's March 19, 2009, Memorandum on ''The Freedom of Information Act (FOIA).'' In addition, this rule reflects OSTP's policy and practices and reaffirms its

commitment to provide the fullest possible disclosure of records to the public.

DATES: This rule is effective July 5, 2013.

FOR FURTHER INFORMATION CONTACT: Rachael Leonard, General Counsel, Chief FOIA Officer and FOIA Public Liaison, Office of Science and Technology Policy, Executive Office of the President, *ostpfoia@ostp.eop.gov,* (202) 456–4444.

SUPPLEMENTARY INFORMATION:

I. Background

The Office of Science and Technology Policy (OSTP) is issuing regulations to govern its implementation of the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended. FOIA requires Federal agencies, as defined by the Act, to make official documents and other records available to the public upon request, unless the material requested falls under one of several statutorily prescribed exemptions. FOIA also requires agencies to publish rules stating the time, place, fees, and procedures to apply in making records available pursuant to a proper request.

On May 9, 2012 (77 FR 27151), OSTP requested public comments on a proposed rule that would implement the requirements of the FOIA. The proposed rule, among other things, described how information would be made available and the timing and procedures for public requests.

II. This Final Rule and Discussion of Public Comments

The comment period closed on June 11, 2012, and OSTP received two comments. This section of the preamble discusses the issues raised by the commenters.

Section 2402.3 (b)

Commenter #1

Proposed § 2402.3(b) requires OSTP to publish available records on its e-FOIA Reading Room (''Reading Room'') as well as other documents that, because of the nature of their subject matter, are likely to be the subject of FOIA requests. In addition to the proposed language, Commenter #1 recommends that the Chief FOIA Officer be assigned responsibility of the Reading Room.

OSTP has created a ''Reading Room'' on its Web site. This section contains records disclosed in response to a FOIA request that ''the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.'' *See* 5 U.S.C. 552(a)(2)(D). Furthermore, this section will be updated by the contribution of various staff members, not just the Chief FOIA Officer. To save both time and money, OSTP strongly urges requesters to review documents available at the Reading Room before submitting a FOIA request.

Section 2402.3(c)

Commenter #1

As proposed, § 2402.3(c) defines the term ''search'' as referring to ''the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.'' Commenter #1 suggests that this definition should ''explicitly state that 'search' shall not include time spent reviewing a record for release.''

FOIA law resolves whether time spent reviewing a record should be included in the ''search'' definition. Specifically, the current FOIA language found in 5 U.S.C. 552(a)(3)(D) provides that the term ''search'' means ''to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.'' Under this definition, time spent in reviewing a record to determine whether it is responsive material to a FOIA request is implied for the task at hand. Therefore, OSTP does not adopt Commenter #1's proposal.

Section 2402.3(c)

Commenter # 2

As proposed, § 2402.3(c) defines the term ''representative of the news media'' or ''news media requester'' as any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. For purposes of this definition, the term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in those instances where they can qualify as disseminators of ''news'') who make their products available for purchase or subscription by the general public. For ''freelance'' journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract would be the clearest proof, but OSTP shall also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for a commercial use. A request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use.

Commenter # 2 proposes a definition that mirrors FOIA's language in 5 U.S.C. 552(a)(4)(A)(ii) (as amended by the OPEN Government Act of 2007, Pub. L. 110–175, 121 Stat. 2524) which provides that the term ''representative of the news media'' means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term 'news' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

OSTP accepts Commenter # 2's proposal and hereby adopts the current language found in the FOIA.

Section 2402.4(a)(1)

Commenter # 1

As proposed, § 2402.4(a)(1) provides that, when requesters do not specify the preferred form or format of the response, OSTP shall produce printed copies of responsive records. Commenter # 1 suggests that this approach is problematic because ''inexperienced requesters do not recognize that they can specify a preferred format.'' Moreover, Commenter # 1 notes that ''[p]rinted copies are typically more expensive than electronic copies due to the cost of duplication.'' Accordingly,

he proposes the following definition: ''When requesters do not specify the preferred form or format of the response, OSTP shall either inquire of the requester or alternatively produce the records in the least expensive format. OSTP will endeavor to provide electronic/digital copies wherever possible to minimize duplication costs.''

OSTP believes that Commenter # 1's approach can reduce overhead costs; however, we do not adopt his suggested definition because, based on years of experience in processing FOIA requests, the list of responsive documents may be of such large volume that some email accounts cannot handle the digital file. Additionally, there are many FOIA requesters who do not have access to email or a means of reading an electronic file. Nevertheless, OSTP recognizes that it is useful for requesters to have the option to seek FOIA records in electronic format. Therefore, OSTP will add clear and conspicuous language on its FOIA page informing the public that they can choose an electronic/digital response with their FOIA. If no particular preference is indicated, OSTP will continue to provide printed copies of the responsive records.

Section 2402.8

Commenter # 1

Commenter # 1 suggests the adoption of a threshold amount below which fees are not charged as they would cost more to collect than would be collected. Commenter # 1 suggests the amount of $15.00 as a threshold fee for OSTP.

OSTP is adopting various provisions which address Commenter # 1's suggestion, *see* § 2402.8. To illustrate, § 2402.8(b)(3) provides that OSTP will not charge duplication fees for the first 100 page of copies unless the copies are requested for a commercial use. Similarly, OSTP will not charge a fee provided that the FOIA record being sought is ''easily identifiable'' as provided by § 2402.8(b)(1)(A). OSTP believes that the provisions mentioned above, and the others provided by § 2402.8, serve the same purpose as Commenter # 1's suggestion; therefore, OSTP does not find it necessary to adopt a threshold fee.

Section 2402.8(b)(3)

Commenter # 1

As proposed, the duplication fee for photocopied records is $0.15 per page. Commenter # 1 is concerned that this fee may be too high, which may, in turn, discourage FOIA requests from the public. Instead, he suggests a fee of $0.10 per page.

OSTP hereby adopts a duplication fee of $0.10, which is consistent with Department of Justice guidelines.

Section 2402.9(c)

Commenter # 1

Commenter # 1 argues that the proposed rules ''incorporate a new standard that is not found in the law'' regarding fee waivers. Specifically, Commenter # 1 cites to the second sentence in proposed subsection § 2402.9(c) that provides ''[i]n exceptional cases, however, a partial waiver may be granted if the request for records would impose an exceptional burden or require an exceptional expenditure of OSTP resources.''

OSTP finds that the standard for fee waivers is properly stated by § 2402.9(a), which provides that ''OSTP shall waive part or all of the fees'' if two conditions are met: (1) disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations of activities of the government; and (2) disclosure is not primarily in the commercial interest of the requester. This provision mirrors the current legal standard found in the FOIA, *see* 5 U.S.C. 552(a)(4)(A)(iii).

OSTP understands Commenter # 1's concern to be that OSTP would charge a partial fee to a FOIA requester under § 2402.9(c) even when the requester meets the conditions for a waiver under § 2402.9(a); however, the first part of § 2402.9(c) states that ''[i]f the two conditions in paragraph (a) of this section are met, OSTP will ordinarily waive all fees.'' OSTP thus finds that the standard we are proposing adheres to the FOIA. When a requester meets the standard under § 2402.9(a), OSTP's general policy is to waive all fees. Nevertheless, for the sake of clarity, OSTP will modify the second part of § 2402.9(c) to apply only if the requester does not meet the conditions stated in § 2402.9(a).

Section 2402.9(d)

Commenter # 1

Commenter # 1 notes that the proposed rules do not define ''exceptional circumstances'' for purposes of failure to comply with statutory time limits but provides no further comment. OSTP takes no further action regarding this subsection.

Consultation With the National Archives and Records Administration

The National Archives and Records Administration's Office of Government Information Services (OGIS) reviewed OSTP's draft regulations and made recommendations, which OSTP took into account in drafting this final rule.

III. Statutory and Executive Order Reviews

Executive Order 12866

These regulations have been drafted and reviewed in accordance with Executive Order 12866, Regulatory Planning and Review, Section 1(b), Principles of Regulation. These regulations are not a significant regulatory action under Section 3(f) of Executive Order 12866.

Paperwork Reduction Act

OSTP has determined that the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* does not apply because these regulations do not contain any information collection requirements subject to approval by OMB.

Executive Order 12988

These regulations meet the applicable standards set forth in Executive Order 12988, Civil Justice Reform.

Executive Order 13132

These regulations will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, OSTP has determined that these regulations do not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Regulatory Flexibility Act

OSTP, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), has reviewed these proposed regulations and certifies that they will not have a significant economic impact on a substantial number of small entities because they pertain to administrative matters affecting the agency.

Unfunded Mandates Reform Act of 1995

These regulations will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1501, *et seq.*

Small Business Regulatory Enforcement Fairness Act of 1996

These regulations are not major regulations as defined by section 251 of

the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. They will not result in an annual effect on the economy of $100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

National Environmental Policy Act of 1969

OSTP has reviewed this action for purposes of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321–4347, and has determined that this action will not have a significant effect on the human environment.

List of Subjects in 32 CFR Part 2402

Classified information.

Therefore, according to the reasons stated in the preamble, the Office of Science and Technology Policy adds 32 CFR Part 2402 to read as follows:

PART 2402—REGULATIONS IMPLEMENTING THE FREEDOM OF INFORMATION ACT

Sec.

2402.1 Purpose and scope.
2402.2 Delegation of authority and responsibilities.
2402.3 General policy and definitions.
2402.4 Procedure for requesting records.
2402.5 Responses to requests.
2402.6 Business information.
2402.7 Appeal of denials.
2402.8 Fees.
2402.9 Waiver of fees.
2402.10 Maintenance of statistics.
2402.11 Disclaimer.

Authority: 5 U.S.C. 552; E.O. 13392, 70 FR 75373 (Dec. 14, 2005).

§ 2402.1 Purpose and scope.

The regulations in this part prescribe procedures to obtain information and records from the Office of Science and Technology Policy (OSTP) under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The regulations in this part apply only to records that are:

(a) Either created or obtained by OSTP; and

(b) Under OSTP control at the time of the FOIA request.

§ 2402.2 Delegation of authority and responsibilities.

(a) The Director of the Office of Science and Technology Policy designates the OSTP General Counsel as the Chief FOIA Officer, and hereby delegates to the Chief FOIA Officer the authority to act upon all requests for agency records and to re-delegate such authority at his or her discretion.

(b) The Chief FOIA Officer shall designate a FOIA Public Liaison, who shall serve as the supervisory official to whom a FOIA requester can raise concerns about the service the FOIA requester has received following an initial response. The FOIA Public Liaison will be listed on the OSTP Web site (*http://www.whitehouse.gov/administration/eop/ostp*) and may re-delegate the FOIA Public Liaison's authority at his or her discretion.

(c) The Director establishes a FOIA Requester Service Center that shall be staffed by the Chief FOIA Officer and the FOIA Public Liaison. The contact information for the FOIA Requester Service Center is Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Ave. NW., Washington, DC 20504; Telephone: (202) 456–4444 Fax: (202) 456–6021; Email: *ostpfoia@ostp.eop.gov.* Updates to this contact information will be made on the OSTP Web site.

§ 2402.3 General policy and definitions.

(a) *Non-exempt records available to public.* Except for records exempt from disclosure by 5 U.S.C. 552(b) or published in the **Federal Register** under 5 U.S.C. 552(a)(1), agency records of OSTP subject to FOIA are available to any person who requests them in accordance with these regulations.

(b) *Record availability at the OSTP e-FOIA Reading Room.* OSTP shall make records available on its Web site in accordance with 5 U.S.C. 552(a)(2), as amended, and other documents that, because of the nature of their subject matter, are likely to be the subject of FOIA requests. To save both time and money, OSTP strongly urges requesters to review documents available at the OSTP e-FOIA Reading Room before submitting a request.

(c) *Definitions.* For purposes of this part:

(1) All of the terms defined in the Freedom of Information Act, and the definitions included in the ''Uniform Freedom of Information Act Fee Schedule and Guidelines'' issued by the Office of Management and Budget apply, unless otherwise defined in this subpart.

(2) The term ''commercial use request'' means a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation. OSTP shall determine, whenever reasonably possible, the use to which a requester will put the requested records. When it appears that the requester will put the records to a commercial use, either because of the nature of the request itself or because OSTP has reasonable cause to doubt a requester's stated use, OSTP shall provide the requester a reasonable opportunity to submit further clarification.

(3) The terms ''disclose'' or ''disclosure'' refer to making records available, upon request, for examination and copying, or furnishing a copy of records.

(4) The term ''duplication'' means the making of a copy of a record, or of the information contained in it, necessary to respond to a FOIA request. Copies can take the form of paper, microform, audiovisual materials, or electronic records (for example, magnetic tape or disk), among others.

(5) The term ''educational institution'' means a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

(6) The term ''fee waiver'' means the waiver or reduction of processing fees if a requester can demonstrate that certain statutory standards are satisfied.

(7) The term ''FOIA Public Liaison'' means an agency official who is responsible for assisting in reducing delays, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes.

(8) The term ''noncommercial scientific institution'' means an institution that is not operated on a ''commercial'' basis, as that term is defined in these regulations, and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scientific research.

(9) The term ''perfected request'' means a FOIA request for records that adequately describes the records sought, that has been received by OSTP, and for

which there is no remaining question about the payment of applicable fees.

(10) The terms ''representative of the news media'' or ''news media requester'' mean any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of 'news') who make their products available for purchase by or subscription by or free distribution to the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Government may also consider the past publication record of the requester in making such a determination.

(11) The term ''search'' refers to the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of information within records and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format.

(12) The term ''working day'' means a regular Federal working day. It does not include Saturdays, Sundays, or legal Federal holidays.

§ 2402.4 Procedure for requesting records.

(a) *Format of requests.* (1) *In general.* Requests for information must be made in writing and may be delivered by mail, fax, or electronic mail, as specified in § 2402.2(c). All requests must be made in English. Requests for information must specify the preferred form or format (including electronic formats) of the response. When requesters do not specify the preferred form or format of the response, OSTP shall produce printed copies of responsive records.

(2) *Electronic format records.* (i) OSTP shall provide the responsive record or records in the form or format requested if the record or records are readily reproducible by OSTP in that form or format. OSTP shall make reasonable efforts to maintain its records in forms or formats that are reproducible for the purpose of disclosure. For purposes of this paragraph, the term readily reproducible means, with respect to electronic format, a record or records that can be downloaded or transferred intact to a floppy disk, computer disk (CD), tape, or other electronic medium using equipment currently in use by the office or offices processing the request. Even though some records may initially be readily reproducible, the need to segregate exempt from nonexempt records may cause the releasable material to be not readily reproducible.

(ii) In responding to a request for records, OSTP shall make reasonable efforts to search for the records in electronic form or format, except where such efforts would significantly interfere with the operation of the agency's automated information system(s). For purposes of this paragraph, the term ''search'' means to locate, manually or by automated means, agency records for the purpose of identifying those records that are responsive to a request.

(iii) Searches for records maintained in electronic form or format may require the application of codes, queries, or other minor forms of programming to retrieve the requested records.

(b) *Contents.* A request must describe the records sought in sufficient detail to enable OSTP personnel to locate the records with a reasonable amount of effort. OSTP will regard a request for a specific category of records as fulfilling the requirements of this paragraph if it enables responsive records to be identified by a technique or process that is not unreasonably burdensome or disruptive to OSTP operations. Whenever possible, a request should include specific information about each record sought, such as the date, number, title or name, author, recipient, and subject matter of the record. If OSTP determines that a request does not reasonably describe the records sought, it will either provide notice of any additional information needed or otherwise state why the request is insufficient. OSTP will offer a requester reasonable opportunity to reformulate the request so that it meets the requirements of this section.

(c) *Date of receipt.* A request that complies with paragraphs (a) and (b) of this section is deemed a ''perfected request.'' A perfected request is deemed received on the actual date it is received by OSTP. A request that does not comply with paragraphs (a) and (b) of this section is deemed received when sufficient information to perfect the request is actually received by OSTP. For requests that are expected to result in fees exceeding $250, the request shall not be deemed to have been received until OSTP has received full payment or satisfactory assurance of full payment as provided under § 2402.8.

§ 2402.5 Responses to requests.

(a) *Responses within 20 working days.* OSTP will exercise all reasonable efforts to acknowledge, grant, partially grant, or deny a request for records within 20 working days after receiving a perfected request.

(b) *Extensions of response time in ''unusual circumstances.''* In circumstances where a determination as provided in paragraph (a) of this section is not possible within 20 working days, OSTP may extend the time limit prescribed in paragraph (a) of this section as necessary to adequately respond to a request. OSTP shall notify the requester of the extension, the reasons for the extension, and the date on which a determination is expected. In such instances, the requester will be provided an opportunity to limit the scope of the request so that it may be processed within the time limit, or to agree to a reasonable alternative time frame for processing. Circumstances justifying a time limit extension as provided in this paragraph (b) include, but are not limited to, requests that require OSTP to:

(1) Search for and collect the requested records from off-site storage facilities;

(2) Search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are demanded in a single request;

(3) Consult, with all practicable speed, with another agency having a substantial interest in the determination of the request; or

(4) Perform searches of records of former employees.

(c) *Two-track processing.* To ensure the most equitable treatment possible for all requesters, OSTP will process requests on a first-in, first-out basis, using a two-track processing system based upon the estimated time it will take to process the request.

(1) *Simple requests.* The first track is for requests of simple to moderate complexity that are expected to be completed within 20 working days. A requester whose request does not qualify as a simple request may be given an opportunity to limit the scope of his or her request in order to qualify for faster processing.

(2) *Complex requests.* The second track is for requests involving ''unusual circumstances,'' as described in paragraph (b) of this section, that are expected to take more than 20 working days to complete.

(d) *Expedited processing.* (1) Expedited requests: OSTP may take requests out of order and expedite the processing of a request upon receipt of a written statement that clearly demonstrates a compelling need for expedited processing. Requesters must provide detailed explanations to support their expedited requests. For purposes of determining expedited processing, the term compelling need means:

(i) That a failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of any individual; or

(ii) That a request is made by a person primarily engaged in disseminating information, and the person establishes that there is an urgency to inform the public concerning actual or alleged Federal Government activity.

(2) A person requesting expedited processing must include a statement certifying that the compelling need provided is true to the best of the requester's knowledge and belief.

(3) OSTP may grant or deny a request for expedited processing as a matter of agency discretion. A determination of whether to provide expedited processing shall be made, and notice of the determination shall be provided to the person making the request, within 10 working days after receipt of the perfected request.

(e) *Content of denial.* When OSTP denies a request for records, either in whole or in part, the written notice of the denial shall state the reason for denial, and cite the applicable statutory exemption(s), unless doing so would harm an interest protected by the exemption(s) under which the request was denied, and notify the requester of the right to appeal the determination as specified in § 2402.7. The requester's failure to make advance payment or to give a satisfactory assurance of full payment required under § 2402.8 may be treated as a denial of the request and appealed under § 2402.7.

(f) *Identifying responsive records.* In determining which records are responsive to a request, OSTP ordinarily will include only records in its possession as of the date the component begins its search for them.

(g) *Consultations and referrals.* When OSTP receives a request for a record in its possession, it shall determine whether another agency of the Federal Government is better able to determine whether the record is exempt from disclosure under FOIA and, if so, whether it should be disclosed as a matter of administrative discretion. If the receiving component determines that it is best able to process the record in response to the request, then it shall do so. If the receiving component determines that it is not best able to process the record, then it shall either:

(1) Respond to the request regarding that record after consulting with the agency best able to determine whether to disclose it and with any other agency that has a substantial interest in it; or

(2) Refer the responsibility for responding to the request regarding that record to the agency best able to determine whether to disclose it, or to another agency that originated the record (but only if that agency is subject to the FOIA). Ordinarily, the agency that originated a record will be presumed to be best able to determine whether to disclose it. OSTP shall notify the FOIA requester in writing that a referral of records has been made, provide the name of the agency to which the referral was directed, and include that agency's FOIA contact information.

(h) *Redactions.* For redactions within disclosed records, OSTP shall:

(1) Indicate the FOIA exemption under which a redaction is made, unless including that exemption would harm an interest protected by the exemption; and

(2) Indicate, if technically feasible and reasonable, the amount of information deleted and the exemption under which the deletion is made at the place in the record where the deletion is made.

§ 2402.6 Business information.

(a) *In general.* Business information obtained by OSTP from a submitter will be disclosed under FOIA only under this section.

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

(1) *Business information* means commercial or financial information obtained by OSTP from a submitter that may be protected from disclosure under Exemption 4 of FOIA.

(2) *Submitter* means any person or entity from whom OSTP obtains business information, directly or indirectly. The term includes corporations; state, local, and tribal governments; and foreign governments.

(c) *Designation of business information.* A submitter of business information will use good-faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire ten years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period.

(d) *Notice to submitters.* OSTP shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information. The notice shall either describe the business information requested or include copies of the requested records or record portions containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish it.

(e) *Where notice is required.* Notice shall be given to a submitter wherever:

(1) The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(2) OSTP has reason to believe that the information may be protected from disclosure under Exemption 4.

(f) *Opportunity to object to disclosure.* OSTP will allow a submitter a reasonable time to respond to the notice described in paragraph (d) of this section and will specify that time period within the notice. If a submitter has any objection to disclosure, the submitter is required to provide a detailed written statement of objections. The statement must specify all grounds for withholding any portion of the information under any exemption of FOIA and, in the case of Exemption 4, the submitter must show why the information is a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to respond to the notice within the time specified, the submitter will be considered to have no objection to disclosure of the information. Information provided by the submitter that OSTP does not receive within the time specified shall not be considered by OSTP. Information provided by a submitter under this paragraph may itself be subject to disclosure under FOIA.

(g) *Notice of intent to disclose.* OSTP shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever OSTP decides to disclose business information over the objection of a submitter, OSTP shall

give the submitter written notice, which shall include:

(1) A statement of the reason(s) why each of the submitter's disclosure objections was not sustained;

(2) A description of the business information to be disclosed; and

(3) A specified disclosure date, which shall be a reasonable time subsequent to the notice.

(h) *Exceptions to notice requirements.* The notice requirements of paragraphs (d) and (g) of this section shall not apply if:

(1) OSTP determines that the information should not be disclosed;

(2) The information lawfully has been published or has been officially made available to the public;

(3) Disclosure of the information is required by statute (other than FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600 (3 CFR, 1988 Comp., p. 235); or

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous—except that, in such a case, OSTP shall, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

(i) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of business information, OSTP shall promptly notify the submitter.

(j) *Corresponding notice to requesters.* Whenever OSTP provides a submitter with notice and an opportunity to object to disclosure under paragraph (d) of this section, OSTP shall also notify the requester(s). Whenever OSTP notifies a submitter of its intent to disclose requested information under paragraph (g) of this section, OSTP shall also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, OSTP shall notify the requester(s).

§ 2402.7 Appeal of denials.

(a) A denial of a request for records, either in whole or in part, may be appealed in writing to the Chief FOIA Officer within 30 working days of the date of the letter denying an initial request.

(b) Appeals may be sent via email to ostpfoia@ostp.eop.gov or by mail to: Chief FOIA Officer, Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Ave. NW., Washington, DC 20504. Updates to this contact information will be made on the OSTP Web site. The appeal letter should specify the internal control number assigned to the FOIA request by OSTP in its response, the records requested, and the basis for the appeal.

(c) The Chief FOIA Officer shall make a determination on the appeal under 5 U.S.C. 552(a)(6)(A)(ii) within 20 working days after the receipt of the appeal. If the denial is wholly or partially upheld, the Chief FOIA Officer shall:

(1) Notify the requester that judicial review is available pursuant to 5 U.S.C. 552(a)(4)(B)–(G); and

(2) Notify the requester that the Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. OGIS' contact information is: Office of Government Information Services, National Archives and Records Administration, 8601 Adelphi Road-OGIS, College Park, MD 20740, Email: *ogis@nara.gov,* Telephone: 202–741–5770, Facsimile: 202–741–5769, Toll-free: 1–877–684–6448.

(d) If OGIS' services are requested, OSTP will work with OGIS and the FOIA requester to resolve any dispute as a non-exclusive alternative to litigation.

§ 2402.8 Fees.

(a) *Fees generally required.* OSTP shall use the most efficient and least costly methods to comply with requests for documents made under FOIA. OSTP shall charge fees in accordance with paragraph (b) of this section unless fees are waived in accordance with § 2402.9.

(b) *Calculation of fees.* In general, fees for searching, reviewing, and duplication will be based on the direct costs of these services, including the average hourly salary (base plus locality payment plus 16 percent) for the employee(s) making the search.

(1) *Search fee.* Search fees may be charged even if responsive documents are not located or if they are located but withheld on the basis of an exemption. However, search fees shall be limited or not charged as follows:

(i) *Easily identifiable records.* Search fees shall not be charged for records that are identified by the requester by title of the record and name of the person possessing the record

(ii) *Educational, scientific or news media requests.* No search fee shall be charged if the request is not sought for a commercial use and is made by an educational or scientific institution, whose purpose is scholarly or scientific research, or by a representative of the news media.

(iii) *Other non-commercial requests.* No search fee shall be charged for the first two hours of searching if the request is not for a commercial use but is not by an educational or scientific institution, or a representative of the news media.

(iv) *Requests for records about self.* No search fee shall be charged to search for records performed under the terms of the Privacy Act, 5 U.S.C. 552a(f)(5).

(2) *Review fee.* A review fee shall be charged only for commercial requests. A review fee shall be charged for the initial examination of documents located in response to a request to determine the documents may be withheld from disclosure and for the redaction of document portions exempt from disclosure. Records or portions of records withheld in full under an exemption that is subsequently determined not to apply may be reviewed again to determine the applicability of other exemptions not previously considered. The costs for such a subsequent review are also assessable.

(3) *Duplication fee.* Records will be photocopied at a rate of $0.10 per page. For other methods of reproduction or duplication, OSTP will charge the actual direct costs of producing the document(s). Duplication fees shall not be charged for the first 100 pages of copies unless the copies are requested for a commercial use.

(c) *Aggregation of requests.* When OSTP determines that a requester, or a group of requesters acting in concert, is attempting to evade the assessment of fees by submitting multiple requests in the place of a single more complex request, OSTP may aggregate any such requests and charge accordingly.

(d) *Fees likely to exceed $25.* If the total fee charges are likely to exceed $25, OSTP shall notify the requester of the estimated amount of the charges. The estimate shall include a breakdown of the fees for search, review, and/or duplication. The notification shall offer the requester an opportunity to confer with the FOIA Public Liaison to reformulate the request to meet the requester's needs at a lower cost.

(e) *Advance payments.* Advance payment of fees will generally not be required. If, however, charges are likely to exceed $250, OSTP shall notify the requester of the likely cost and:

(1) Obtain satisfactory assurance of full payment; or

(2) Regardless of when a FOIA request becomes perfected under § 2402.4(c), if the requester has no history of payment or has failed to pay a fee within 30 days of the date of billing, OSTP may require the requester to pay the full amount of any fees owed and/or to make an advance payment of the full amount of

the estimated charges before OSTP begins to process the new request or a pending request from that requester. In this case, OSTP's working days to process the request as described in § 2402.5 will not begin to run until the date OSTP receives the full amount of any fees owed and/or the advance payment of the full amount of the estimated charges.

(f) *Other charges.* OSTP will recover the full costs of providing services such as those enumerated below when it elects to provide them:

(1) Certifying that records are true copies;

(2) Sending records by special methods such as express mail.

(g) *Remittances.* Remittances shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the Treasury of the United States and mailed to the Chief FOIA Officer, Office of Science and Technology Policy, Eisenhower Executive Office Building, 1650 Pennsylvania Ave. NW., Washington, DC 20504. Updates to this contact information will be made on the OSTP Web site.

(h) *Receipts and refunds.* A receipt for fees paid will be given upon request. A refund of fees paid for services actually rendered will not be made.

§ 2402.9 Waiver of fees.

(a) *In general.* OSTP shall waive part or all of the fees assessed under § 2402.8 if the following conditions are satisfied:

(1) Disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and

(2) Disclosure is not primarily in the commercial interest of the requester.

(b) *Clarification.* Where OSTP has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, OSTP may seek clarification from the requester before assigning the request to a specific category for fee assessment purposes.

(c) *Partial waiver of fees.* If the two conditions stated in paragraph (a) of this section are met, OSTP will ordinarily waive all fees. In exceptional cases and provided that the requester does not meet the conditions stated in paragraph (a), however, a partial waiver may be granted if the request for records would impose an exceptional burden on OSTP or require an exceptional expenditure of OSTP resources.

(d) *Failure to comply.* OSTP will not assess fees under § 2402.8 if the Agency fails to comply with any time limit and no exceptional circumstances apply to processing the request.

(e) *Waivers.* OSTP may waive fees in other circumstances solely at its discretion, consistent with 5 U.S.C. 552 and the Fee Waiver Policy Guidance issued by the Department of Justice.

§ 2402.10 Maintenance of statistics.

(a) OSTP shall maintain records that are sufficient to allow accurate reporting of FOIA processing statistics, as required under 5 U.S.C. 552 and all guidelines for the preparation of annual FOIA reports issued by the Department of Justice.

(b) OSTP shall annually, on or before February 1 of each year, prepare and submit to the Attorney General an annual report compiling the statistics maintained in accordance with paragraph (a) of this section for the previous fiscal year. A copy of the report will be available for public inspection at the OSTP Web site.

§ 2402.11 Disclaimer.

Nothing in this part shall be construed to entitle any person, as a right, to any service or to the disclosure of any record to which such person is not entitled under FOIA.

Ted Wackler,

Deputy Chief of Staff and Assistant Director.

[FR Doc. 2013–13072 Filed 6–3–13; 8:45 am]

BILLING CODE 3270–F3–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2013–0325]

RIN 1625–AA08

Temporary Change of Dates for Recurring Marine Event in the Fifth Coast Guard District, Mattaponi Drag Boat Race, Mattaponi River; Wakema, VA

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary change to the enforcement period of special local regulation for one recurring marine event in the Fifth Coast Guard District. This event is the Mattaponi Drag Boat Race, which is a series of power boat races to be held on the waters of the Mattaponi River, near Wakema, Virginia. This special local regulation is necessary to provide for the safety of life on navigable waters during the event. This action is intended to restrict vessel traffic during the power boat races on the Mattaponi River immediately adjacent to the Rainbow Acres Campground, located in King and Queen County, near Wakema, Virginia.

DATES: This rule is effective June 22–23, 2013.

This rule will be enforced from 10 a.m. to 6 p.m. on June 22, 2013. In the event of inclement weather on June 22, 2013, this rule will be enforced from 10 a.m. to 6 p.m. on June 23, 2013.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2013–0325]. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov*, type the docket number 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.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Hector Cintron, Waterways Management Division Chief, Sector Hampton Roads, Coast Guard; telephone 757–668–5581, email *Hector.L.Cintron@uscg.mil*. If you have questions on viewing or submitting material to the docket, call Barbara Hairston, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Table of Acronyms

DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

This rule involves an annually occurring marine event that is scheduled to take place on the 3rd or 4th Saturday in August, as published in the table to 33 CFR 100.501. The Mattaponi Volunteer Rescue Squad has changed the date of the event to take place on June 22, 2013 from 10 a.m. to 6 p.m. The ''rain date'' is June 23, 2013.

The Coast Guard is issuing this final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are

''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because any delay encountered in this regulation's effective date by publishing a NPRM would be contrary to public interest. On April 8, 2013 the Coast Guard was informed about the date change. It appears that the original sponsoring organization for this event is now defunct and a new sponsor has taken over. The new sponsor did not submit the requisite Application for a marine event on time.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. The measures contemplated by this rule are intended to protect the safety of the persons participating in the event, spectators to the event and any other vessels that may pass through the restricted area. Any delaying of the effective date would be contrary to the public interest since immediate action is needed to ensure the safety of those noted.

B. Basis and Purpose

The Mattaponi Volunteer Rescue Squad is sponsoring a series of power boat racing events titled the ''Mattaponi Madness Drag Boat Event.'' The power boat races will be held on the following dates: June 22, 2013, and in the case of inclement weather, the event will be rescheduled to June 23, 2013. The races will be held on the Mattaponi River immediately adjacent to the Rainbow Acres Campground, King and Queen County, Virginia. The power boat races will consist of approximately 40 vessels conducting high speed straight line runs along the river and parallel to the shoreline. A fleet of spectator vessels is expected to gather near the event site to view the competition. To provide for the safety of participants, spectators and other transiting vessels, the Coast Guard will temporarily restrict vessel traffic in the event area during the power boat races.

C. Discussion of the Final Rule

The regulation listing annual marine events within the Fifth Coast Guard District and corresponding dates is 33 CFR 100.501. The Table to § 100.501 identifies marine events by Captain of the Port zone. This particular marine event is listed in section (c.) line No. 23 of the table.

The current regulation described in section (c.) line No. 23 of the table indicates that the drag boat race event should take place this year either on the 3rd Saturday and Sunday or 4th Saturday and Sunday in August. The Coast Guard is establishing a temporary suspension of the regulation listed at section (c.) line No. 23 in the Table to § 100.501 and inserting this new temporary regulation at the Table to § 100.501 line No. 24 in order to reflect the change of date for this year's event. This change is needed to accommodate the change in date of the annual Mattaponi Drag Boat Race. No other portion of the Table to § 100.501 or other provisions in § 100.501 shall be affected by this regulation.

As such this special local regulation will restrict vessel movement in the regulated area during the marine event. The regulated area is needed to control vessel traffic and enhance the safety of participants and spectators of the Mattaponi Drag Boat Race. The regulation will be enforced from 10 a.m. to 6 p.m. on June 22, 2013, with an inclement weather date of June 23, 2013, from 10 a.m. to 6 p.m. Except for persons or vessels authorized by the Coast Guard Patrol Commander, no person or vessel may enter or remain in the regulated area during the effective period.

In addition to notice in the **Federal Register**, the maritime community will be provided extensive advance notification via the Local Notice to Mariners, and marine information broadcasts.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders.

Although this regulation will prevent traffic from transiting a portion of the Mattaponi River during the events, the effect of this regulation will not be significant due to the limited duration that the regulated area will be in effect and the advance notification that will be made to the maritime community via marine information broadcast, local radio stations and area newspapers so mariners can adjust their plans accordingly. Additionally, the regulated area has been designed to impose the least impact on general navigation yet provide the level of safety deemed necessary. Vessel traffic will be able to transit the regulated area between heats and when the Coast Guard Patrol Commander deems it is safe to do so.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities: owners or operators of vessels intending to transit this section of the Mattaponi River from 9 a.m. to 6 p.m. on June 22, 2013 and on June 23, 2013. This proposed rule would not have a significant economic impact on a substantial number of small entities for the following reasons: (i) Although the regulated area will apply to a ¾ mile segment of the Mattaponi River, traffic may be allowed to pass through the regulated area with the permission of the Coast Guard Patrol Commander between races; (ii) In the case where the Patrol Commander authorizes passage through the regulated area during the event, vessels shall proceed at the minimum speed necessary to maintain a safe course that minimizes wake near the race course; (iii) Before the enforcement period, we will issue maritime advisories so mariners can adjust their plans accordingly.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to

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

4. Collection of Information

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

5. Federalism

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

6. Protest Activities

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

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

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

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have concluded this action is one of a category of actions which do not individually or cumulatively have a significant effect on the human environment. This rule is categorically excluded, under figure 2–1, paragraph (34)(h), of the Instruction. This rule involves implementation of regulations within 33 CFR Part 100 that apply to organized marine events on the navigable waters of the United States that may have potential for negative impact on the safety or other interest of waterway users and shore side activities in the event area. The category of water activities includes but is not limited to sail boat regattas, boat parades, power boat racing, swimming events, crew racing, and sail board racing. Under figure 2–1, paragraph (34)(h), of the Instruction, an environmental analysis checklist and a categorical exclusion determination will be available in the docket where indicated under **ADDRESSES**.

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. In § 100.501, in ''Table to § 100.501,'' under ''(c.) Coast Guard Sector Hampton Roads—COTP Zone,'' suspend entry 23 and add entry 24 to read as follows:

§ 100.501–35T05–0325 Special Local Regulations; Mattaponi Drag Boat Race, Mattaponi River; Wakema, VA.

* * * * *

(c.) Coast Guard Sector Hampton Roads—COTP Zone

Number	Date	Event	Sponsor	Location
*	*	*	*	* * *
24	June 22, 2013 with an inclement weather date of June 23, 2013.	Mattaponi Drag Boat Race.	Mattaponi Volunteer Rescue Squad and Dive Team.	All waters of Mattaponi River immediately adjacent to Rainbow Acres Campground, King and Queen County, Virginia. The regulated area includes a section of the Mattaponi River approximately three-quarter mile long and bounded in width by each shoreline, bounded to the east by a line that runs parallel along longitude 076°52′43″ W, near the mouth of Mitchell Hill Creek, and bounded to the west by a line that runs parallel along longitude 076°53′41″ W just north of Wakema, Virginia.

* * * * *

Dated: May 13, 2013.

John K. Little,

Captain, U.S. Coast Guard, Captain of the Port Hampton Roads.

[FR Doc. 2013–13001 Filed 6–3–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2013–0156]

RIN 1625–AA08

Special Local Regulations; Swim Across the Potomac, Potomac River; National Harbor Access Channel, MD

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing special local regulations during the ''Swim Across the Potomac'' swimming competition, to be held on the waters of the Potomac River on June 2, 2013. These special local regulations are necessary to provide for the safety of life on navigable waters during the event. This action is intended to temporarily restrict vessel traffic in a portion of the Potomac River during the event.

DATES: This rule is effective from 7 a.m. until 11 a.m. on June 2, 2013.

ADDRESSES: Documents mentioned in this preamble are part of docket [USCG–2013–0156]. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number 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.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Ronald Houck, U.S. Coast Guard Sector Baltimore, MD; telephone 410–576–2674, email *Ronald.L.Houck@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:

Table of Acronyms

DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

On April 8, 2013, we published a notice of proposed rulemaking (NPRM) entitled ''Special Local Regulations for Marine Events, Potomac River; National Harbor Access Channel, MD'' in the **Federal Register** (78 FR 67). We received no comments on the proposed rule. No public meeting was requested, and none was held.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Event planners did not provide the Coast Guard adequate advance notice of the event to allow 30 days after publication. The Application for Marine Event (Form CG–4423) for this event was submitted in Homeport for COTP Baltimore on March 7, 2013.

B. Basis and Purpose

The legal basis for the rule is the Coast Guard's authority to establish special local regulations: 33 U.S.C. 1233. The purpose of the rule is to ensure safety of life on navigable waters of the United States during the Swim Across the Potomac event.

C. Discussion of Comments, Changes and the Final Rule

The Coast Guard received no comments in response to the NPRM. No public meeting was requested and none was held.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders.

Although this regulation will prevent traffic from transiting portions of the Potomac River and National Harbor Access Channel during the event, the effect of this regulation will not be significant due to the following reasons: (1) The regulated area will be in effect for only 4 hours; (2) the regulated area has been narrowly tailored to impose the least impact on general navigation, yet provide the level of safety deemed necessary; (3) vessel traffic will be able to transit safely through a portion of the regulated area, but only after the last participant has cleared that portion of the regulated area and when the Coast Guard Patrol Commander deems it safe to do so; and (4) the Coast Guard will provide advance notification of the special local regulations to the local maritime community by Local Notice to Mariners and Broadcast Notice to Mariners.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard received no comments from the Small Business Administration on this rule. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule may affect the following entities, some of which may be small entities: The owners or operators of vessels intending to enter, transit through, anchor in, or remain within that portion of Potomac River encompassed within the special local regulations from 7 a.m. until 11 a.m. on June 2, 2013. For the reasons discussed in the Regulatory Planning and Review section above, this rule will not have a significant economic impact on a substantial number of small entities.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

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

4. Collection of Information

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

5. Federalism

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

6. Protest Activities

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

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

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

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves special local regulations issued in conjunction with a regatta or marine parade. This rule is categorically excluded from further review under paragraph 34(h) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 100

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

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233.

■ 2. Add a temporary section, § 100.35T05–0156 to read as follows:

§ 100.35T05–0156 Special Local Regulations; Swim Across the Potomac, Potomac River; National Harbor Access Channel, MD.

(a) *Regulated Area.* The following regulated area is established as special local regulations. All coordinates are North American Datum 1983.

(1) Regulated Area: All water of the Potomac River, from shoreline to shoreline, bounded to the north by a line drawn that originates at Jones Point Park, VA at the west shoreline latitude 38°47′35″ N, longitude 077°02′22″ W, thence east to latitude 38°47′12″ N, longitude 077°00′58″ W, at east shoreline near National Harbor, MD. The regulated area is bounded to the south by a line drawn originating at George Washington Memorial Parkway highway overpass and Cameron Run, west shoreline latitude 38°47′23″ N, longitude 077°03′03″ W thence east to latitude 38°46′52″ N, longitude 077°01′13″ W, at east shoreline near National Harbor, MD.

(b) *Definitions.* (1) *Coast Guard Patrol Commander* means a commissioned, warrant, or petty officer of the U. S. Coast Guard who has been designated by the Commander, Coast Guard Sector Baltimore.

(2) *Official Patrol* means any vessel assigned or approved by Commander, Coast Guard Sector Baltimore with a commissioned, warrant, or petty officer on board and displaying a Coast Guard ensign.

(3) *Participant* means all persons and vessels participating in the Swim Across the Potomac event under the auspices of the Marine Event Permit issued to the event sponsor and approved by Commander, Coast Guard Sector Baltimore.

(c) *Special local regulations.* (1) The Coast Guard Patrol Commander may forbid and control the movement of all vessels and persons in the regulated area. When hailed or signaled by an official patrol vessel, a vessel or person in the regulated area shall immediately comply with the directions given. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

(2) Persons desiring to transit the regulated area must first obtain authorization from the Captain of the Port Baltimore or his designated representative. To seek permission to transit the area, the Captain of the Port Baltimore and his designated representatives can be contacted at telephone number 410–576–2693 or on Marine Band Radio, VHF–FM channel 16 (156.8 MHz). All Coast Guard vessels enforcing this regulated area can be contacted on marine band radio VHF–FM channel 16 (156.8 MHz).

(3) The Coast Guard Patrol Commander may terminate the event, or the operation of any participant in the event, at any time it is deemed necessary for the protection of life or property.

(4) The Coast Guard will publish a notice in the Fifth Coast Guard District Local Notice to Mariners and issue a marine information broadcast on VHF–FM marine band radio announcing specific event date and times.

(d) Enforcement period: This section will be enforced from 7 a.m. until 11 a.m. on June 2, 2013.

Dated: May 15, 2013.

Kevin C. Kiefer,

Captain, U.S. Coast Guard, Captain of the Port Baltimore.

[FR Doc. 2013–13144 Filed 6–3–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2013–0160]

RIN 1625–AA08

Special Local Regulation; Annual Swim Around Key West, Atlantic Ocean and Gulf of Mexico; Key West, FL

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a special local regulation on the waters of the Atlantic Ocean and the Gulf of Mexico surrounding the island of Key West, Florida during the Annual Swim around Key West on June 8, 2013. The event entails a large number of participants who will begin at Smather's Beach and swim one full circle clockwise around the island of Key West, Florida. The special local regulation is necessary to provide for the safety of the spectators, participants, participating support vessels and kayaks, and other vessels and users of the waterway during the event. The special local regulation will consist of a moving area that will temporarily restrict vessel traffic in a portion of both the Atlantic Ocean and the Gulf of Mexico, and will prevent non-participant vessels from entering, transiting through, anchoring in, or remaining within the area unless authorized by the Captain of the Port Key West or a designated representative.

DATES: This rule will be enforced from 7:30 a.m. until 3:30 p.m. on June 8, 2013.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number 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.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Marine Science Technician First Class William Winegar, Sector Key West Prevention Department, U.S. Coast Guard; Telephone (305) 292–8809, email *William.G.Winegar@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:

Table of Acronyms

DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking

A. Regulatory History and Information

The Coast Guard is issuing this final rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it only recently came to the attention that this event had been inadvertently excluded from the Coast Guard Seventh District Regulation of Recurring Marine Events at 33 CFR part 701; although an identical race, in the same month with a different sponsor had been so included. To ensure there is no confusion regarding the date of the race, or the enforcement of the regulation, and to ensure the safety of life on the Navigable Waters of the United States, publication of a NPRM would be

impracticable, unnecessary, and contrary to the public interest.

B. Basis and Purpose

The legal basis for the rule is the Coast Guard's authority to establish special local regulations: 33 U.S.C. 1233. The purpose of the rule is to ensure safety of life and property on navigable waters of the United States during the Annual Swim around Key West FL.

C. Discussion of the Final Rule

The special local regulation encompasses certain waters of the Atlantic Ocean and Gulf of Mexico. The special local regulation will be enforced on Saturday, June 8, 2013 from 7:30 a.m. until 3:30 p.m. The special local regulation consists of a moving race area where all persons and vessels, except those participating in the race or serving as safety vessels, are prohibited from entering, transiting through, anchoring in, or remaining within these areas unless authorized by the Captain of the Port Key West or a designated representative. The race area will commence at Smather's Beach at 7:30 a.m., transit West to the area offshore of Fort Zach State Park, North through Key West Harbor, East through Flemming Cut, South on Cow Key Channel and West back to origin. Safety vessels will precede the first participating swimmers and follow the last participating swimmers. This event poses significant risks to participants, spectators, and the boating public because of the large number of swimmers and recreational vessels that are expected in the area of the event. The special local regulation is necessary to ensure the safety of participants, spectators, and vessels from the hazards associated with the event.

The special local regulation will be enforced from 7:30 a.m. to 3:30 p.m. on June 8, 2013. Persons and vessels who are neither participating in the race or serving as safety vessels may not enter, transit through, anchor in, or remain within the regulated area unless authorized by the Captain of the Port Key West or a designated representative.

Persons and vessels desiring to enter, transit through, anchor in, or remain within the regulated area may contact the Captain of the Port Key West by telephone at (305) 292–8727, or a designated representative via VHF radio on channel 16, to request authorization. If authorization to enter transit through, anchor in, or remain within regulated area is granted by the Captain of the Port Key West or a designated representative, all persons and vessels receiving such authorization must comply with the instructions of the Captain of the Port Key West or a designated representative. The Coast Guard will provide notice of the special local regulation by Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

D. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders.

The economic impact of this rule is not significant for the following reasons: (1) The rule will be enforced for a total of only 8 hours; (2) Non-participant persons and vessels may enter, transit through, anchor in, or remain within the regulated area during the enforcement period if authorized by the Captain of the Port Key West or a designated representative; (3) vessels not able to enter, transit through, anchor in, or remain within the regulated area without authorization from the Captain of the Port Key West or a designated representative may operate in the surrounding areas during the enforcement period; and (4) advance notification of the event will be made to the local maritime community via local notice to mariners, marine safety information bulletins, and broadcast notice to mariners.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities, some of which may be small entities: Owners or operators of vessels intending to enter, transit through, anchor in, or remain within the regulated are during the enforcement period. For the reasons discussed in Regulatory Planning and Review section above, this rule will not have a significant economic impact on a substantial number of small entities. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L.104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

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

4. Collection of Information

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

5. Federalism

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

6. Protest Activities

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

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children

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

11. Indian Tribal Governments

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

12. Energy Effects

This proposed rule is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

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

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA)(42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves a special local regulation issued in conjunction with a regatta or marine parade. This rule is categorically excluded from further review under paragraph 34(h) of Figure 2–1 of the Commandant Instruction. A preliminary environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 100

Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 33 U.S.C. 1233

■ 2. Add a temporary § 100.35T07–0160 to read as follows:

§ 100.35T07–0160 Special Local Regulation; Annual Swim around Key West, Atlantic Ocean and Gulf of Mexico; Key West, FL.

(a) *Regulated Area.* The following regulated area is established as a special local regulation. All waters within a moving zone, beginning at Smather's Beach in Key West, FL. The regulated area will move, West to the area offshore of Fort Zach State Park, North through Key West Harbor, East through Flemming Cut, South on Cow Key Channel and West back to origin. The center of the regulated area will at all times remain approximately 50 yards offshore of the island of Key West Florida; extend 50 yards in front of the lead safety vessel preceding the first race participants; extend 50 yards behind the safety vessel trailing the last race participants; and at all times extend 100 yards on either side of the race participants and safety vessels.

(b) *Definition.* The term ''designated representative'' means Coast Guard Patrol Commanders, including Coast Guard coxswains, petty officers, and other officers operating Coast Guard vessels, and Federal, State, and local officers designated by or assisting the Captain of the Port Key West in the enforcement of the regulated area.

(c) *Regulations.*

(1) All persons and vessels, except authorized race participants or safety vessels, are prohibited from entering, transiting through, anchoring in, or remaining within the race area. Persons and vessels desiring to enter, transit through, anchor in, or remain within the race area, may contact the Captain of the Port Key West by telephone at (305) 292–8727, or a designated representative via VHF radio on channel 16, to request authorization. If authorization to enter, transit through, anchor in, or remain with the race area, is granted by the Captain of the Port Key West or a designated representative.

(2) The Coast Guard will provide notice of the regulated area by Marine Safety Information Bulletins, Local Notice to Mariners, Broadcast Notice to Mariners, and on-scene designated representatives.

(d) *Enforcement Date.* This rule will be enforced from 7:30 a.m. to 3:30 p.m. June 8, 2013.

Dated: May 8, 2013.

A.S. Young, Sr.,

Captain, U.S. Coast Guard, Captain of the Port Sector Key West.

[FR Doc. 2013–13148 Filed 6–3–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 117

[Docket No. USCG–2013–0357]

Drawbridge Operation Regulation; York River, Between Yorktown and Gloucester Point, VA

AGENCY: Coast Guard, DHS.

ACTION: Notice of deviation from drawbridge regulations.

SUMMARY: The Coast Guard has issued a temporary deviation from the operating schedule that governs the draw of the US 17/George P. Coleman Memorial Swing Bridge across the York River, mile 7.0, between Gloucester Point and Yorktown, VA. This deviation is necessary to facilitate electrical motor maintenance on the George P. Coleman Memorial Swing Bridge. This temporary deviation allows the drawbridge to remain in the closed-to-navigation position.

DATES: This deviation is effective from 7 a.m. on June 9, 2013 to 5 p.m. June 16, 2013.

ADDRESSES: The docket for this deviation, [USCG–2013–0357] is available at *http://www.regulations.gov.* Type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this deviation. 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.

FOR FURTHER INFORMATION CONTACT: If you have questions on this temporary deviation, call or email Mr. Jim Rousseau, Bridge Administration Branch Fifth District, Coast Guard; telephone (757) 398–6557, email *James.L.Rousseau2@uscg.mil.* If you have questions on reviewing the docket, call Barbara Hairston, Program Manager, Docket Operations, 202–366–9826.

SUPPLEMENTARY INFORMATION: The Virginia Department of Transportation, who owns and operates this swing bridge, has requested a temporary deviation from the current operating regulations set out in 33 CFR 117.1025, to facilitate electric motor maintenance on the structure.

Under the regular operating schedule, the Coleman Memorial Bridge, mile 7.0, between Gloucester Point and Yorktown, VA, opens on signal except from 5 a.m. to 8 a.m. and 3 p.m. to 7 p.m. Monday through Friday, except Federal holidays the bridge shall remain closed to navigation. The Coleman Memorial Bridge has vertical clearances in the closed position of 60 feet above mean high water.

Under this temporary deviation, the drawbridge will be closed to navigation from 7 a.m. to 5 p.m. on Sunday June 9, 2013; with an inclement weather date from 7 a.m. to 5 p.m. on Sunday June 16, 2013. Emergency openings cannot be provided. There are no alternate routes for vessels transiting this section of the York River.

The York River is used by a variety of vessels including military, tugs, and recreational vessels. The Coast Guard has carefully coordinated the restrictions with these waterway users. The Coast Guard will also inform additional waterway users through our Local and Broadcast Notices to Mariners of the closure periods for the bridge so that vessels can arrange their transits to minimize any impacts caused by the temporary deviation. Mariners able to pass under the bridge in the closed position may do so at any time and are advised to proceed with caution.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the effective period of this temporary deviation. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: May 20, 2013.

Waverly W. Gregory, Jr.,

Bridge Program Manager, Fifth Coast Guard District.

[FR Doc. 2013–13139 Filed 6–3–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2013–0010]

RIN 1625–AA00

Safety Zone; Grain-Shipment and Grain-Shipment Assist Vessels, Columbia and Willamette Rivers

AGENCY: Coast Guard, DHS.

ACTION: Temporary interim rule and request for comments.

SUMMARY: The Coast Guard is establishing a temporary safety zone around all inbound and outbound grain-shipment and grain-shipment assist vessels involved in commerce with the Columbia Grain facility on the Willamette River in Portland, OR, the United Grain Corporation facility on the Columbia River in Vancouver, WA, the Temco Irving facility on the Willamette River in Portland, OR, or the Temco Kalama facility on the Columbia River in Kalama, WA, or the Louis Dreyfus Commodities facility on the Willamette River in Portland, OR while they are located on the Columbia and Willamette Rivers and their tributaries. For grain-shipment vessels, this safety zone extends to waters 500 yards ahead of the vessel and 200 yards abeam and astern of the vessel. For grain-shipment assist vessels, this safety zone extends to waters 100 yards ahead of the vessel and 50 yards abeam and astern of the vessel. These safety zones are being established to ensure that protest activities related to a labor dispute do not create hazardous navigation conditions for any vessel or other river user in the vicinity of these safety zones.

DATES: Effective June 4, 2013. This rule has been enforced with actual notice since May 14, 2013 and it will be enforced until September 3, 2013.

Comments and related material must be received by the Coast Guard on or before July 5, 2013.

Requests for public meetings must be received by the Coast Guard on or before June 11, 2013.

ADDRESSES: Documents mentioned in this preamble are part of Docket Number USCG–2013–0010. To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number 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.

You may submit comments, identified by docket number, using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* (202) 493–2251.

(3) *Mail or Delivery:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001. Deliveries accepted between 9 a.m. and 5 p.m., Monday through Friday, except federal holidays. The telephone number is 202–366–9329.

See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for further instructions on submitting comments. To avoid duplication, please use only one of these three methods.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Ensign Ian P. McPhillips, Waterways Management Division, Marine Safety Unit Portland, U.S. Coast

Guard; telephone (503) 240–9319, email *msupdxwwm@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:

Table of Acronyms

DHS Department of Homeland Security
FR Federal Register
NPRM Notice of Proposed Rulemaking

A. Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

1. Submitting Comments

If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online at *http://www.regulations.gov,* or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online, it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on ''Submit a Comment'' on the line associated with this rulemaking.

If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

2. Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type the docket number in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rulemaking. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

3. Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

4. Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one, using one of the methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a later notice in the **Federal Register**.

B. Regulatory History and Information

On January 30, 2013, the Coast Guard published a temporary interim rule and request for comments titled, ''Safety Zone; Grain-Shipment Vessels; Columbia and Willamette Rivers'' in the **Federal Register** (78 FR 6209). In that temporary interim rule, the Coast Guard established temporary safety zones around all inbound and outbound grain-shipment vessels. This rule defines grain-shipment assist vessels and adds an additional waterfront facility, Louis Dreyfus Commodities on the Willamette River in Portland, OR. The portions of this rulemaking that are unchanged from the previous rulemaking were previously subject to notice and comment.

The Coast Guard is issuing this temporary interim rule without prior notice and opportunity to comment pursuant to authority under section 4(a) of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)). This provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' Under 5 U.S.C. 553(b)(B), the Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because to do so would be impracticable since neither grain shipment vessels nor potential protest activity can be postponed by the Coast Guard. Additionally, delayed promulgation may result in injury or damage to the maritime public, vessel crews, the vessels themselves, the facilities, and law enforcement personnel from protest activities that could occur prior to conclusion of a notice and comment period before promulgation.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register** because to do otherwise would be impracticable. The Coast Guard does not control the arrival of grain-shipment vessels or planned protest activities. Protest activities are unpredictable and potentially volatile and increased and unpredictable vessel traffic associated with protest activities may result in injury to persons, property, or the environment. Delaying the effective date until 30 days after publication may mean that grain-shipment vessels will have arrived or departed the Columbia and Willamette Rivers before the end of the 30 day period. This delay would eliminate the safety zone's effectiveness and usefulness in protecting persons, property, and the safe navigation of maritime traffic before 30 days have elapsed.

The previous rule was published in the **Federal Register** on January 30, 2013 (78 FR 6209). Although the Coast Guard had good cause to issue that temporary interim rule without first publishing a proposed rule, it invited the submission of post-promulgation comments and related material regarding that rule through March 1, 2013. The Coast Guard received no comments.

Although the Coast Guard has good cause to issue this temporary rule without first publishing a proposed rule, you are invited to submit post-promulgation comments and related material regarding this rule through July 5, 2013. All comments will be reviewed as they are received. Your comments will assist us in drafting future rules should they be necessary, and may result in changes to this temporary interim rule before it expires.

C. Basis and Purpose

This safety zone is being implemented to ensure the safe navigation of maritime traffic on the Columbia and Willamette Rivers and their tributaries while grain-shipment and grain-shipment assist vessels transit to and from grain export facilities, anchorages, moorings, and launches in the Sector Columbia River Captain of the Port Zone. In addition, this safety zone is intended to ensure that members of the maritime public, those participating in protest activities on the water, law enforcement personnel, and vessel crews are not injured. Recreational boating, fishing, and protest activity afloat in these safety zones is particularly hazardous because of the effects of strong river currents, the maneuvering characteristics of grain-shipment vessels, and the safety sensitive mid-stream personnel transfers conducted by grain-shipment assist vessels with which recreational boaters and protesters may be unfamiliar. This safety zone applies equally to all waterway users and is intended to allow maximum use of the waterway consistent with safe navigation. The impact of the safety zone on maritime activity in the area is minimal because it has been and will only be enforced at times when grain-shipment and grain-shipment assist vessels are actively maneuvering. Grain-shipment vessel means any vessel bound for or departing or having previously loaded cargo at any of the following waterfront facilities: Columbia Grain in Portland, OR, United Grain Corporation in Vancouver, WA, Temco Irving in Portland, OR, Temco Kalama in Kalama, WA, or Louis Dreyfus Commodities in Portland, OR. This includes any vessel leaving anchor in the Columbia and Willamette Rivers that is bound for or had previously departed from the aforementioned waterfront facilities. Grain-shipment assist vessel means any vessel bound for or departing from a grain-shipment vessel to assist it in navigation during the movement of the grain-shipment vessel in the Columbia and Willamette Rivers and their tributaries. This includes but is not limited to tugs, pilot boats, and launches.

D. Discussion of the Interim Rule

This rule establishes a temporary safety zone around grain-shipment and grain-shipment assist vessels involved in commerce with the Columbia Grain facility on the Willamette River in Portland, OR, the United Grain Corporation facility on the Columbia River in Vancouver, WA, the Temco Irving facility on the Willamette River in Portland, OR, or the Temco Kalama facility on the Columbia River in Kalama, WA, or the Louis Dreyfus Commodities facility on the Willamette River in Portland, OR while they are located on the Columbia and Willamette Rivers and their tributaries. For grain-shipment vessels, this safety zone extends to waters 500 yards ahead of the vessel and 200 yards abeam and astern of the vessel. For grain-shipment assist vessels, this safety zone extends to waters 100 yards ahead of the vessel and 50 yards abeam and astern of the vessel. No person or vessel may enter or remain in the safety zone without authorization from the Sector Columbia River Captain of the Port or his designated representatives.

This rule has been enforced with actual notice since May 14, 2013 and it will be enforced until 90 days from the date of publication in the **Federal Register**.

E. Regulatory Analyses

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

1. Regulatory Planning and Review

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866, Regulatory Planning and Review, as supplemented by Executive Order 13563, Improving Regulation and Regulatory Review, and does not require an assessment of potential costs and benefits under section 6(a)(3) of Executive Order 12866 or under section 1 of Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. Although this rule will restrict access to the regulated area, the effect of this rule will not be significant because: (i) The safety zone is limited in size; (ii) the official on-scene patrol may authorize access to the safety zone; (iii) the safety zone will effect a limited geographical location for a limited time; and (iv) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

2. Impact on Small Entities

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities. This rule may affect the following entities some of which may be small entities: the owners and operators of vessels intending to operate in the area covered by the safety zone created in this rule.

This rule will not have a significant economic impact on a substantial number of small entities for the following reasons: (i) The safety zone is limited in size; (ii) the official on-scene patrol may authorize access to the safety zone; (iii) the safety zone will effect a limited geographical location for a limited time; and (iv) the Coast Guard will make notifications via maritime advisories so mariners can adjust their plans accordingly.

3. Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact the person listed in the **FOR FURTHER INFORMATION CONTACT**, above.

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

4. Collection of Information

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

5. Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and

the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and determined that this rule does not have implications for federalism.

6. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. In preparing this temporary rule, the Coast Guard carefully considered the rights of lawful protestors. The safety zones created by this rule do not prohibit members of the public from assembling on shore or expressing their points of view from locations on shore. In addition, the Captain of the Port has, in coordination with protesters, identified waters in the vicinity of these safety zones where those desiring to do so can assemble and express their views without compromising navigational safety. Protesters are asked to contact the person listed in the **FOR FURTHER INTFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people or property in the area.

7. Unfunded Mandates Reform Act

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

8. Taking of Private Property

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

9. Civil Justice Reform

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

10. Protection of Children From Environmental Health Risks

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

11. Indian Tribal Governments

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

12. Energy Effects

This action is not a ''significant energy action'' under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.

13. Technical Standards

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

14. Environment

We have analyzed this rule under Department of Homeland Security Management Directive 023–01 and Commandant Instruction M16475.lD, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves the establishment of a temporary safety zone around grain-shipment vessels involved in commerce with grain export facilities on the Columbia and Willamette Rivers. This rule is categorically excluded from further review under paragraph 34(g) of Figure 2–1 of the Commandant Instruction. An environmental analysis checklist supporting this determination and a Categorical Exclusion Determination are available in the docket where indicated under **ADDRESSES**. We seek any comments or information that may lead to the discovery of a significant environmental impact from this rule.

List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701, 3306, 3703; 50 U.S.C. 191, 195; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. Add § 165.T13–239 to read as follows:

§ 165.T13–239 Safety Zone; Grain-Shipment and Grain-Shipment Assist Vessels, Columbia and Willamette Rivers.

(a) *Definitions.* As used in this section:

(1) *Federal Law Enforcement Officer* means any employee or agent of the United States government who has the authority to carry firearms and make warrantless arrests and whose duties involve the enforcement of criminal laws of the United States.

(2) *Navigable waters of the United States* means those waters defined as such in 33 CFR part 2.

(3) *Navigation Rules* means the Navigation Rules, International-Inland.

(4) *Official Patrol* means those persons designated by the Captain of the Port to monitor a vessel safety zone, permit entry into the zone, give legally enforceable orders to persons or vessels within the zone and take other actions authorized by the Captain of the Port. Federal Law Enforcement Officers authorized to enforce this section are designated as the Official Patrol.

(5) *Public vessel* means vessels owned, chartered, or operated by the United States, or by a State or political subdivision thereof.

(6) *Grain-shipment vessel* means any vessel bound for or departing or having previously loaded cargo at any of the following waterfront facilities: Columbia Grain in Portland, OR, United Grain Corporation in Vancouver, WA, Temco Irving in Portland, OR, Temco Kalama in Kalama, WA, or Louis Dreyfus Commodities in Portland, OR. This includes any vessel leaving anchor in the Columbia and Willamette Rivers that is bound for or had previously departed from the aforementioned waterfront facilities.

(7) *Grain-shipment assist vessel* means any vessel bound for or departing from a grain-shipment vessel to assist it in navigation during the movement of the grain-shipment vessel in the Columbia and Willamette Rivers and their tributaries. This includes but is not limited to tugs, pilot boats, and launches.

(8) *Oregon Law Enforcement Officer* means any Oregon Peace Officer as

defined in Oregon Revised Statutes section 161.015.

(9) *Washington Law Enforcement Officer* means any General Authority Washington Peace Officer, Limited Authority Washington Peace Officer, or Specially Commissioned Washington Peace Officer as defined in Revised Code of Washington section 10.93.020.

(b) *Location.* The following areas are safety zones: All navigable waters of the United States within the Sector Columbia River Captain of the Port Zone, extending from the surface to the sea floor, that are:

(1) Not more than 500 yards ahead of grain-shipment vessels and 200 yards abeam and astern of grain-shipment vessels underway on the Columbia and Willamette Rivers and their tributaries.

(2) Not more than 100 yards ahead of grain-shipment assist vessels and 50 yards abeam and astern of grain-shipment assist vessels underway on the Columbia and Willamette Rivers and their tributaries.

(3) Within a maximum 200-yard radius of grain-shipment vessels when anchored, at any berth, moored, or in the process of mooring on the Columbia and Willamette Rivers.

(c) *Enforcement periods.* (1) The Sector Columbia River Captain of the Port will cause notice of the enforcement of the grain-shipment and grain-shipment assist vessels safety zones to be made by all appropriate means to effect the widest publicity among the affected segments of the public as practicable, in accordance with 33 CFR 165.7. This notification of enforcement will identify the grain-shipment vessel by name and IMO number and the grain-shipment assist vessels by name. Such means of notification may include, but are not limited to, Broadcast Notices to Mariners or Local Notices to Mariners. The Sector Columbia River Captain of the Port will issue a Broadcast Notice to Mariners and Local Notice to Mariners notifying the public when enforcement of the safety zone is suspended.

(2) Upon notice of enforcement by the Sector Columbia River Captain of the Port, the Coast Guard will enforce the safety zone in accordance with rules set out in this section. Upon notice of suspension of enforcement by the Sector Columbia River Captain of the Port, all persons and vessels are authorized to enter, transit, and exit the safety zone, consistent with the Navigation Rules.

(d) *Regulation.* (1) In accordance with the general regulations in section 165.23 of this part, entry into or movement within these zones is prohibited unless authorized by the Sector Columbia River Captain of the Port, the official patrol, or other designated representatives of the Captain of the Port.

(2) To request authorization to enter or operate within the safety zone contact the on-scene official patrol on VHF–FM channel 16 or 13, or the Sector Columbia River Command Center at phone number (503) 861–6211. Authorization will be granted based on the necessity of access and consistent with safe navigation.

(3) Vessels authorized to enter or operate within the safety zone shall operate at the minimum speed necessary to maintain a safe course and shall proceed as directed by the on-scene official patrol. The Navigation Rules shall apply at all times within the safety zone.

(4) Maneuver-restricted vessels. When conditions permit, the on-scene official patrol, or a designated representative of the Captain of the Port at the Sector Columbia River Command Center, should:

(i) Permit vessels constrained by their navigational draft or restricted in their ability to maneuver to enter or operate within the safety zone in order to ensure a safe passage in accordance with the Navigation Rules; and

(ii) Permit commercial vessels anchored in a designated anchorage area to remain at anchor within the safety zone; and

(iii) Permit vessels that must transit via a navigable channel or waterway to enter or operate within the safety zone in order to do so.

(e) *Exemption.* Public vessels as defined in paragraph (a) of this section are exempt from complying with paragraph (e) of this section.

(f) *Enforcement.* Any Coast Guard commissioned, warrant, or petty officer may enforce the rules in this section. In the navigable waters of the United States to which this section applies, when immediate action is required and representatives of the Coast Guard are not present or are not present in sufficient force to provide effective enforcement of this section, any Federal Law Enforcement Officer, Oregon Law Enforcement Officer, or Washington Law Enforcement Officer may enforce the rules contained in this section pursuant to 46 U.S.C. 70118. In addition, the Captain of the Port may be assisted by other federal, state, or local agencies in enforcing this section.

(g) *Waiver.* The Captain of the Port Columbia River may waive any of the requirements of this section for any vessel or class of vessels upon finding that operational conditions or other circumstances are such that application of this section is unnecessary or impractical for the purpose of port safety or environmental safety.

Dated: May 14, 2013.

B.C. Jones,

Captain, U.S. Coast Guard, Captain of the Port, Sector Columbia River.

[FR Doc. 2013–13137 Filed 6–3–13; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF EDUCATION

34 CFR Chapter III

Final Waiver and Extension of the Project Period for the National Dropout Prevention Center for Students With Disabilities

[Catalog of Federal Domestic Assistance (CFDA) Number: 84.326W.]

AGENCY: Office of Special Education Programs, Office of Special Education and Rehabilitative Services, Department of Education.

ACTION: Final waiver and extension of the project period.

SUMMARY: The Secretary waives the requirements in the Education Department General Administrative Regulations that generally prohibit project periods exceeding five years and extensions of project periods involving the obligation of additional Federal funds. This waiver and extension of the project period enables the currently funded National Dropout Prevention Center for Students with Disabilities (Center) to receive funding from October 1, 2013, through September 30, 2014.

DATES: The waiver and extension of the project period are effective June 4, 2013.

FOR FURTHER INFORMATION CONTACT: Selete Avoke, U.S. Department of Education, 400 Maryland Avenue SW., room 4158, Potomac Center Plaza, Washington, DC 20202–2600. Telephone: (202) 245–7260.

If you use a telecommunications device for the deaf or a text telephone, call the Federal Relay Service, toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

On February 20, 2013, we published a notice in the **Federal Register** (78 FR 11803) proposing an extension of project period and a waiver of 34 CFR 75.250 and 75.261(a) and (c)(2) in order to—

(1) Enable the Secretary to provide additional funds to the currently funded Center for an additional 12-month period, from October 1, 2013, through September 30, 2014; and

(2) Request comments on the proposed extension of project period and waiver.

There are no substantive differences between the proposed waiver and extension and this final waiver and extension.

Public Comment

In response to our invitation in the notice of proposed waiver and extension of the project period, we did not receive any substantive comments. Generally, we do not address comments that raise concerns not directly related to the proposed waiver and extension of project period.

Background

On June 23, 2008, the Department published a notice in the **Federal Register** (73 FR 35376) inviting applications for new awards for fiscal year (FY) 2008 for a National Dropout Prevention Center for Students with Disabilities. The Center was funded under the Technical Assistance and Dissemination to Improve Services and Results for Children with Disabilities (TA&D) program, authorized under section 663 of the Individuals with Disabilities Education Act (IDEA). Its purpose is to provide States and local educational agencies (LEAs) with technical assistance (TA) on (1) Implementing and evaluating effective comprehensive dropout prevention, reentry, and school completion models and practices for students with disabilities; (2) developing and improving data collection systems to track students at risk of dropping out; and (3) designing training for policymakers, administrators, and practitioners that will help them support efforts to improve dropout prevention, reentry, and school completion for students with disabilities.

Based on the selection criteria published in the 2008 notice inviting applications, the Department made one award for a period of 60 months to Clemson University to establish the Center, which is currently known as the National Dropout Prevention Center for Students with Disabilities. The Center has the following four interrelated goals that reflect its overarching purpose:

- Goal 1: Increase the awareness of policymakers, administrators, and practitioners about dropout prevention, reentry, and school completion.
- Goal 2: Increase the number of States that set and meet reasonable and rigorous performance targets for State Performance Plan Indicators 1 [1] and 2.[2]
- Goal 3: Help State educational agencies (SEAs) and LEAs develop and improve data systems to track students at risk of dropping out.
- Goal 4: Help SEAs and LEAs implement and evaluate effective comprehensive school-completion models, practices, and systems for students with disabilities.

The Center works to accomplish these goals through a combination of the following: (1) Knowledge development activities to synthesize what is currently known about dropout prevention for students with disabilities and to develop a series of high-quality products that can be used by States in designing and developing effective dropout prevention programs; (2) TA to SEAs, LEAs, and organizations to increase their capacity to design and implement effective dropout prevention, reentry, and school completion models and practices; (3) collaboration with a variety of organizations that provide direct program services and TA to education agencies that provide educational programs and services to students with disabilities in order to prepare and disseminate information and materials that will increase the awareness and use of research-validated practices by a variety of audiences; and (4) dissemination of knowledge and information about effective dropout prevention programs, policies, and resources to SEAs and LEAs.

The Center's current project period is scheduled to end on September 30, 2013. We do not believe that it would be in the public interest to run a competition for a new Center this year because the Department is planning to change the organization of its TA activities to better meet the needs of States and LEAs for TA relating to transition to college and the workforce, including dropout prevention, for students with disabilities. We also have concluded that it would be contrary to the public interest to have a lapse in the provision of TA services currently provided by the Center pending the changes to the organization of the Department's TA activities. For these reasons, the Secretary waives the requirements in 34 CFR 75.250, which prohibit project periods exceeding five years, and waives the requirements in 34 CFR 75.261(a) and (c)(2), which limit the extension of a project period if the extension involves the obligation of additional Federal funds. The waiver allows the Department to issue a continuation award in the amount of $665,000 to Clemson University (H326W080003) for an additional 12-month period, which should ensure that the Center's TA, training, and dissemination of information to families, SEAs, LEAs, and other State agencies will not be interrupted.

Any activities to be carried out during the year of the continuation award must be consistent with, or be a logical extension of, the scope, goals, and objectives of the grantee's application as approved in the 2008 National Dropout Prevention Center for Students with Disabilities competition.

The requirements applicable to continuation awards for this competition, set forth in the June 23, 2008, notice inviting applications, and the requirements in 34 CFR 75.253 apply to any continuation awards sought by the current National Dropout Prevention Center for Students with Disabilities grantee. We base our decisions regarding a continuation award on the program narrative, budget, budget narrative, and program performance report submitted by the current grantee, and the requirements in 34 CFR 75.253.

Waiver of Delayed Effective Date

The Administrative Procedure Act requires that a substantive rule must be published at least 30 days before its effective date, except as otherwise provided for good cause (5 U.S.C. 553(d)(3)). We received no substantive comments on the proposed waiver and extension of project period, and we have not made any substantive changes to the proposed waiver and extension of project period. The Secretary has made a determination to waive the delayed effective date to ensure provision of TA services currently provided by the Center pending the changes to the organization of the Department's TA activities.

Regulatory Flexibility Act Certification

The Secretary certifies that this waiver and extension of the project period would not have a significant economic impact on a substantial number of small entities.

The only entity that would be affected by this waiver and extension of the project period is the current grantee.

The Secretary certifies that this waiver and final extension would not have a significant economic impact on this entity because the extension of an existing project imposes minimal compliance costs, and the activities

[1] Indicator 1: Percent of youth with individualized education programs (IEPs) graduating from high school with a regular diploma (20 U.S.C. 1416 (a)(3)(A)).

[2] Indicator 2: Percent of youth with IEPs dropping out of high school (20 U.S.C. 1416 (a)(3)(A)).

required to support the additional year of funding would not impose additional regulatory burdens or require unnecessary Federal supervision.

Paperwork Reduction Act of 1995

This notice of final waiver and extension of the project period does not contain any information collection requirements.

Intergovernmental Review

This program is subject to Executive Order 12372 and the regulations in 34 CFR part 79. One of the objectives of the Executive order is to foster an intergovernmental partnership and a strengthened federalism. The Executive order relies on processes developed by State and local governments for coordination and review of proposed Federal financial assistance. This document provides early notification of our specific plans and actions for this program.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT**.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available via the Federal Digital System at: *www.gpo.gov/fdsys.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at 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: May 29, 2013.

Michael Yudin,

Delegated the authority to perform the functions and duties of the Assistant Secretary for Special Education and Rehabilitative Services.

[FR Doc. 2013–13070 Filed 6–3–13; 8:45 am]

BILLING CODE 4000–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 52 and 81

[EPA–R09–OAR–2012–0971;FRL–9818–1]

Approval and Promulgation of Implementation Plans and Designation of Areas for Air Quality Planning Purposes; State of California; Redesignation of San Diego County to Attainment for the 1997 8-Hour Ozone Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving, as a revision of the California state implementation plan, a request from the California Air Resources Board to redesignate the San Diego County ozone nonattainment area to attainment of the 1997 8-hour ozone National Ambient Air Quality Standard (1997 ozone standard) because the request meets the statutory requirements for redesignation under the Clean Air Act. EPA is also approving the State's plan for maintaining the 1997 ozone standard in San Diego County for ten years beyond redesignation, and the inventories and related motor vehicle emissions budgets within the plan, because they meet the applicable requirements for such plans and budgets.

DATES: This final rule is effective on July 5, 2013.

ADDRESSES: EPA has established a docket for this action: Docket ID No. EPA–R05–OAR–2012–0791. Generally, documents in the docket for this action are available electronically at *www.regulations.gov* and in hard copy at EPA Region IX, 75 Hawthorne Street, San Francisco, California. While all documents in the docket are listed at *www.regulations.gov,* some information may be publicly available only at the hard copy location (e.g., copyrighted material, large maps), and some may not be publicly available in either location (e.g., CBI). To inspect the hard copy materials, please schedule an appointment during normal business hours with the contact listed in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: John Ungvarsky, Air Planning Office (AIR–2), U.S. Environmental Protection Agency, Region IX, (415) 972–3963, *ungvarsky.john@epa.gov*.

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

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I. Summary of Today's Final Action
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I. Summary of Today's Final Action

EPA is approving several related actions. First, under Clean Air Act (CAA or ''Act'') section 110(k)(3), EPA is approving a maintenance plan for the 1997 8-hour ozone standard (''San Diego 8-hour maintenance plan'') for the San Diego County 1997 ozone nonattainment area (''San Diego 8-hour area'') as a revision to the California state implementation plan (SIP).[1] The San Diego 8-hour maintenance plan is included in a document titled *Redesignation Request and Maintenance Plan for the 1997 National Ozone Standard for San Diego County (December 2012)* submitted by the California Air Resources Board (CARB) on December 28, 2012.

In connection with the San Diego 8-hour maintenance plan, EPA finds that the maintenance demonstration showing how the area will continue to attain the 1997 8-hour ozone national ambient air quality standard (1997 ozone NAAQS or 1997 ozone standard) for at least 10 years beyond redesignation (i.e., through 2025) and the contingency provisions describing the actions that the San Diego County Air Pollution Control District (SDCAPCD) will take in the event of a future monitored violation meet all applicable requirements for maintenance plans and related contingency provisions in CAA section 175A. EPA is also approving the motor vehicle emissions budgets (MVEBs) in the San Diego 8-hour maintenance plan because we find that they meet the applicable transportation conformity requirements under 40 CFR 93.118(e).

Second, under CAA section 107(d)(3)(D), EPA is approving CARB's request that accompanied the submittal of the San Diego 8-hour maintenance plan, that is, to redesignate the San Diego 8-hour area to attainment for the 1997 ozone standard. We are doing so based on our conclusion that the area has met the five criteria for redesignation under CAA section 107(d)(3)(E). Our conclusion in this

[1] On March 27, 2008 (73 FR 16436), EPA promulgated a revised 8-hour ozone standard of 0.075 ppm (the 2008 8-hour ozone standard), and on May 21, 2012, EPA designated San Diego County as nonattainment for the 2008 8-hour ozone standard (77 FR 30088). This rulemaking relates only to the 1997 8-hour ozone standard and does not relate to the 2008 8-hour ozone standard.

regard is based on our determination that the area has attained the 1997 ozone standard; that relevant portions of the California SIP are fully approved; that the improvement in air quality is due to permanent and enforceable reductions in emissions; that California has met all requirements applicable to the San Diego 8-hour area with respect to section 110 and part D of the CAA; and is based on our approval of the San Diego 8-hour maintenance plan, which is part of this action.

II. Background

On March 25, 2013 (78 FR 17902), EPA issued a notice of rulemaking proposing to approve California's request to redesignate the San Diego County area to attainment for the 1997 8-hour ozone standard, as well as proposing to approve California's ten-year ozone maintenance plan for the area, and the volatile organic compound (VOC) and oxides of nitrogen (NO_X) MVEBs, and VOC and NO_X emission inventories as revisions of the California SIP.[2] The proposed rulemaking set forth the basis for determining that California's redesignation request meets the CAA requirements for redesignation for the 1997 8-hour ozone NAAQS. The proposed rulemaking provided an extensive background on the ozone standards and their relationship to historical air quality in San Diego County. The proposed rulemaking also described the complete, quality-assured air quality monitoring data for San Diego County for 2009–2011 showing that this area attained the 1997 8-hour ozone NAAQS. Preliminary data available to date for 2012 are consistent with continued attainment of the 1997 8-hour ozone NAAQS.

III. What comments did EPA receive on the proposed rule?

EPA's proposed rule provided a 30-day public comment period. During this period, we received comment letters from the United States Department of the Navy and the Industrial Environmental Association in support of EPA's March 25, 2013, proposed rule. During the public comment period, we did not receive any comments opposing the proposed rule.

IV. What actions is EPA taking?

Under CAA section 110(k)(3), and for the reasons provided in the proposed rule and summarized herein, EPA is approving CARB's submittal dated December 28, 2012 of the *Redesignation Request and Maintenance Plan for the 1997 National Ozone Standard for San Diego County* (December 2012) as a revision to the California state implementation plan (SIP). In connection with the San Diego 8-hour maintenance plan, EPA finds that the maintenance demonstration showing how the area will continue to attain the 1997 8-hour ozone NAAQS for 10 years beyond redesignation (i.e., through 2025) and the contingency provisions describing the actions that SDCAPCD and CARB will take in the event of a future monitored violation meet all applicable requirements for maintenance plans and related contingency provisions in CAA section 175A. EPA is approving the MVEBs in the San Diego 8-hour maintenance plan (shown in table 7 of this document) because we find they meet the applicable transportation conformity requirements under 40 CFR 93.118(e).

Second, under CAA section 107(d)(3)(D), we are approving CARB's request, which accompanied the submittal of the maintenance plan, to redesignate the San Diego County 8-hour ozone nonattainment area to attainment for the 1997 8-hour ozone NAAQS. We are doing so based on our conclusion that the area has met the five criteria for redesignation under CAA section 107(d)(3)(E). Our conclusion in this regard is in turn based on our determination that the area has attained the 1997 ozone NAAQS; that relevant portions of the California SIP are fully approved; that the improvement in air quality is due to permanent and enforceable reductions in emissions; that California has met all requirements applicable to the San Diego 8-hour area with respect to section 110 and part D of the CAA; and is based on our approval of the San Diego 8-hour maintenance plan, which is part of this action.

V. Statutory and Executive Order Reviews

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

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

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law. Nonetheless, in accordance with EPA's 2011 Policy on Consultation and Coordination with Tribes, EPA has

[2] Ground-level ozone is generally not emitted directly by sources. Rather, directly-emitted NO_X and VOC react in the presence of sunlight to form ground-level ozone, as a secondary pollutant, along with other secondary compounds. NO_X and VOC are ''ozone precursors.'' Reduction of peak ground-level ozone concentrations is typically achieved through controlling VOC and NO_X emissions.

notified Tribes located within the San Diego County 8-hour ozone nonattainment.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

40 CFR Part 81

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

Dated: May 14, 2013.

Jared Blumenfeld,

Regional Administrator, Region IX.

Chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52— APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

Subpart F—California

■ 2. Section 52.220 is amended by adding paragraph (c)(425) to read as follows:

§ 52.220 Identification of plan.

* * * * *

(c) * * *

(425) A plan was submitted on December 28, 2012, by the Governor's designee.

(i) [Reserved]

(ii) Additional material

(A) San Diego County Air Pollution Control District (SDAPCD).

(1) Redesignation Request and Maintenance Plan for the 1997 National Ozone Standard for San Diego County, including motor vehicle emissions budgets (MVEBs) and inventories.

(2) SDAPCD Resolution Number 12–175, dated December 5, 2012. ''Resolution Adopting the Redesignation Request and Maintenance Plan for the 1997 National Ozone Standard for San Diego County,'' including inventories and motor vehicle emissions budgets for 2020 and 2025.

(B) State of California Air Resources Board (CARB)

(1) CARB Resolution Number 12–36, dated December 6, 2012. ''Approval of the San Diego 8-Hour Ozone SIP Redesignation Request and Maintenance Plan,'' including inventories and motor vehicle emissions budgets for 2020 and 2025.

PART 81—DESIGNATION OF AREAS FOR AIR QUALITY PLANNING PURPOSES

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

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

■ 4. Section 81.305 is amended by revising the entry for San Diego County, CA in the table entitled ''California—1997 8-Hour Ozone NAAQS (Primary and Secondary)'' to read as follows:

§ 81.305 California.

* * * * *

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

Designated area	Designation [a]		Category/Classification	
	Date [1]	Type	Date [1]	Type
* *	*	* *	*	*
San Diego, CA.				
San Diego County (part).				
That portion of San Diego County that excludes the areas listed below: La Posta Areas #1 and #2,[b] Cuyapaipe Area,[b] Manzanita Area,[b] Campo Areas #1 and #2[b].	July 5, 2013	Attainment		
La Posta Areas #1 and #2,[b]		Unclassifiable/Attainment		
Cuyapaipe Area,[b]		Unclassifiable/Attainment		
Manzanita Area,[b]		Unclassifiable/Attainment		
Campo Areas #1 and #2[b]		Unclassifiable/Attainment		
* *	*	* *	*	*

[a] Includes Indian Country located in each county or area, except as otherwise specified.

[b] The boundaries for these designated areas are based on coordinates of latitude and longitude derived from EPA Region 9's GIS database and are illustrated in a map entitled ''Eastern San Diego County Attainment Areas for the 8-Hour Ozone NAAQS,'' dated March 9, 2004, including an attached set of coordinates. The map and attached set of coordinates are available at EPA's Region 9 Air Division office. The designated areas roughly approximate the boundaries of the reservations for these tribes, but their inclusion in this table is intended for CAA planning purposes only and is not intended to be a federal determination of the exact boundaries of the reservations. Also, the specific listing of these tribes in this table does not confer, deny, or withdraw Federal recognition of any of the tribes so listed nor any of the tribes not listed.

* * * * *

[1] This date is June 15, 2004, unless otherwise noted.

* * * * *

[FR Doc. 2013–13064 Filed 6–3–13; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

45 CFR Parts 155 and 156

[CMS–9964–F2]

RIN 0938–AR76

Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Small Business Health Options Program

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: This final rule implements provisions of the Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 (collectively referred to as the Affordable Care Act) related to the Small Business Health Options Program (SHOP). Specifically, this final rule amends existing regulations regarding triggering events and special enrollment periods for qualified employees and their dependents and implements a transitional policy regarding employees' choice of qualified health plans (QHPs) in the SHOP.

DATES: These regulations are effective on July 1, 2013.

FOR FURTHER INFORMATION CONTACT: Leigha Basini at (301) 492–4307.

SUPPLEMENTARY INFORMATION:

I. Executive Summary

Beginning in 2014, individuals and small businesses will be able to purchase private health insurance through competitive marketplaces, called Affordable Insurance Exchanges or ''Exchanges'' (also called Health Insurance Marketplaces). Section 1311(b)(1)(B) of the Affordable Care Act contemplates that in each State there will be a SHOP that assists qualified employers in providing health insurance options for their employees. The final rule, Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers (Exchange Establishment Rule),[1] as modified by the Notice of Benefit and Payment Parameters for 2014,[2] sets forth standards for the administration of SHOP Exchanges. In this rule, we finalize provisions proposed in the Establishment of Exchanges and Qualified Health Plans; Small Business Health Options Program Notice of Proposed Rule Making,[3] which amends some of the standards established in the Exchange Establishment Rule.

In the Exchange Establishment Rule, we established standards for special enrollment periods for people enrolled through an individual market Exchange, and provided that, in most instances, a special enrollment period is 60 days from the date of the triggering event. *See* 45 CFR 155.420. We also made these provisions applicable to SHOPs, at § 155.725(a)(3). In the proposed rule we proposed and this final rule amends, the special enrollment period for the SHOP to 30 days for most applicable triggering events, so that it aligns with the special enrollment periods for the group market established by the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[4] To further align the SHOP provisions with HIPAA, we also proposed that if an employee or dependent becomes eligible for premium assistance under Medicaid or the Children's Health Insurance Program (CHIP) or loses eligibility for Medicaid or CHIP, this would be a triggering event, and the employee or dependent would have a 60-day special enrollment period to select a QHP. This triggering event had previously been inadvertently omitted from the regulations because it applies only to group health plans and health insurance coverage in the group market. We also proposed to make a conforming change to § 156.285(b)(2), so that this section references the SHOP special enrollment periods in a way that is consistent with our proposed changes to § 155.725.

In the Exchange Establishment Rule, we also set forth the minimum functions of a SHOP, including that the SHOP must allow employers the option to offer employees all QHPs at a level of coverage chosen by the employer, and that the SHOP may allow employers to offer one or more QHPs to qualified employees by other methods. We proposed and are now finalizing the following transitional policy. For plan years beginning on or after January 1, 2014 and before January 1, 2015, a SHOP will not be required to permit qualified employers to offer their qualified employees a choice of QHPs at a single level of coverage, but will have the option of doing so. Federally-facilitated SHOPs (FF–SHOPs) will not exercise this option, but will instead allow employers to choose a single QHP from the choices available in FF–SHOP to offer their qualified employees. This transitional policy is intended to provide additional time to prepare for an employee choice model and to increase the stability of the small group market while providing small groups with the benefits of SHOP in 2014 (such as a choice among competing QHPs and access for qualifying small employers to the small business health care tax credit). We also proposed changes to the effective date of the SHOP premium aggregation function set forth at § 155.705(b)(4) in the Exchange Establishment Rule consistent with this transitional policy, which we are finalizing in this rule.

II. Background

A. Legislative Overview

Section 1311(b) of the Affordable Care Act establishes that there will be a SHOP in each State to assist qualified small employers in providing health insurance options to their employees.

Section 1311(c)(6) of the Affordable Care Act sets forth that the Secretary of Health and Human Services (HHS) shall direct Exchanges to provide for special enrollment periods. Section 155.420 of the Exchange Establishment Rule established special enrollment periods for the individual market, and § 155.725(a)(3) established them for the SHOP.

Section 1312(a)(2) of the Affordable Care Act provides that qualified employers may offer qualified employees a choice among all QHPs at a level of coverage chosen by the employer. Section 1312(f)(2)(A) defines a qualified employer as a small employer that elects to make all full-time employees of such employer eligible for one or more QHPs offered in the small group market through an Exchange that offers QHPs. The Exchange Establishment Rule set forth standards for the SHOP and implemented section 1312 at 45 CFR, part 155, subpart H.

B. Stakeholder Consultation and Input

HHS has consulted with a wide range of interested stakeholders on policy matters related to the SHOP, including through regular conversations with the

[1] Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Exchange Standards for Employers, 77 FR 18310 (March 27, 2012) (to be codified at 45 CFR parts 155, 156, & 157).

[2] Patient Protection and Affordable Care Act; CMS Notice of Benefit and Payment Parameters for 2014, 78 FR 15410 (March 11, 2013) (to be codified at 45 CFR parts 153, 155, 156, 157, & 158).

[3] Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Small Business Health Options Program, 77 FR 15553 (March 11, 2013) (to be codified at 45 CFR parts 155 & 156).

[4] HIPAA added section 9801(f) to the Internal Revenue Code (the Code), section 701(f) to the Employee Retirement Income Security Act (ERISA), and section 2704(f) to the Public Health Service Act.

National Association of Insurance Commissioners (NAIC), employers, health insurance issuers, trade groups, consumer advocates, agents and brokers, and other interested parties. HHS has also held many consultations with States about the SHOP, both individually and through group conversations. HHS received many comments in response to the Exchange Establishment proposed rule,[5] including comments regarding the statutory provisions on SHOP employee choice and special enrollment periods for employees and their dependents, to which we responded in the Exchange Establishment Rule. HHS also received comments in response to the December 2012 Notice of Benefit and Payment Parameters for 2014 proposed rule,[6] to which we responded in the Notice of Benefit and Payment Parameters for 2014 final rule (78 FR 15410). We considered these stakeholder comments in developing this final rule.

C. Structure of the Final Rule

The regulations outlined in this final rule will be codified in 45 CFR parts 155 and 156. The provisions in part 155 outline the standards relative to the establishment, operation, and functions of Exchanges, including the SHOP. The provisions in part 156 outline the health insurance issuer standards under the Affordable Care Act, including standards related to Exchanges and SHOPs.

This final rule finalizes provisions set forth in the March 11, 2013 proposed rule (78 FR 15553).

III. Provisions of the Proposed Rule and Responses to Public Comments

We received 40 comments to the proposed rule, including comments from consumer advocacy groups, health care providers, employers, health insurers, health care associations, Members of Congress, and individuals. The comments ranged from general support or opposition to the proposed provisions to very specific questions or comments regarding proposed changes. In this section, we summarize the provisions of the proposed rule and discuss and provide responses to the comments. We have carefully considered these comments in finalizing this rule.

[5] Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans; Proposed Rule, 76 FR 41866 (July 15, 2011) (to be codified at 45 CFR parts 155 & 156).

[6] Patient Protection and Affordable Care Act; HHS Notice of Benefit and Payment Parameters for 2014; Proposed Rule, 77 FR 73118 (December 7, 2012) (to be codified at 45 CFR parts 153, 155, 156, 157, & 158).

Brief summaries of each proposed provision, a summary of the public comments we received and our responses to the comments are as follows. We received a number of comments that fall outside the scope of these regulations, which we do not address in this final rule.

The following summarizes comments about the rule, in general, or regarding issues not contained in specific provisions:

Comment: Two commenters suggested that HHS should revisit § 156.200(g), as finalized in the Notice of Benefit and Payment Parameters for 2014. Section 156.200(g) is a QHP certification requirement linking, or tying, federally-facilitated Exchange and FF–SHOP participation. Generally, the certification requirement applies when an issuer or a member of the same issuer group as the issuer (defined at § 156.20 as a group under common ownership and control, or using a common national service mark) has a share of the small group market in a State with a federally-facilitated Exchange/FF–SHOP that exceeds 20 percent, as determined from the most recent earned premiums data reported to HHS. .Specifically, the certification requirement applies in the following circumstances: We interpret § 156.200(g)(1) to require that issuers that have greater than 20 percent small group market share offer at least one silver-level QHP and one gold-level QHP through the FF–SHOP as a condition of participation in the federally facilitated individual market Exchange.

We also interpret § 156.200(g)(1) to require that issuers that do not have greater than 20 percent market share in a State's small group market, but that are members of an issuer group that has at least one member with greater than 20 percent market share, have to offer the required silver and gold level coverage through the SHOP as a condition of participation in the individual market Exchange.

Under § 156.200(g)(2), issuers that do not offer small group market products in a State, but that are members of an issuer group that has at least one member with greater than 20 percent market share, would not have to offer the required SHOP coverage themselves. Instead, another issuer in that issuer's group would do so, and in light of the fact that we intend the tying provision to fall primarily on issuers with greater than 20 percent market share, we interpret § 156.200(g)(2) to require that the issuer meeting the requirement in these circumstances be an issuer whose small group market share exceeds 20 percent.

The commenters on this certification requirement stated that tying Exchange participation to SHOP participation could lead to higher costs in the SHOPs and may have a disparate effect on larger issuers in the small group market.

Response: Section 156.200(g) has been finalized and will apply in the 2014 plan year. HHS intends to evaluate in future years the effect this certification standard is having generally on a State's small group market and specifically on employee choice in SHOPs.

A. Part 155—Exchange Establishment Standards and Other Related Standards Under the Affordable Care Act

1. Subpart H—Exchange Functions: Small Business Health Options Program (SHOP)

a. Functions of a SHOP (§ 155.705)

Facilitating employee choice at a single level of coverage selected by the employer—bronze, silver, gold, or platinum—is a required SHOP function established in the Exchange Establishment Rule (45 CFR 155.705(b)(2)) and discussed in greater detail in the preamble to the December 2012 HHS Notice of Benefit and Payment Parameters for 2014 proposed rule. In addition, the rules permit SHOPs to allow a qualified employer to choose one QHP for employees (§ 155.705(b)(3)).

When we proposed this policy, we also sought comments on a transitional policy in which a FF–SHOP would allow employers to offer to their employees a single QHP from those offered through the SHOP (77 FR 73184). A few commenters suggested that each FF–SHOP should provide employee choice. Most commenters on this issue, however, supported allowing employers to choose a single QHP option for employees, either as an additional option or as the only option in the initial years of the FF–SHOP. The commenters who supported providing a qualified employer only the option choosing a single QHP to offer in the initial years of FF–SHOP operation cited several concerns, including the following: whether issuers could meet the deadlines for submission of small group market QHPs given the new small group market rating rules; whether issuers could complete enrollment and accounting system changes required to interact with the SHOP enrollment and premium aggregation systems required by employee choice. The commenters stated that issuer efforts to prepare and price QHPs for an employee choice environment and to make the systems and operational changes required for SHOP enrollment and premium

aggregation could compete with efforts to prepare for participation in the Exchange (both individual and SHOP).

In light of these concerns, we concluded in the final HHS Notice of Benefit and Payment Parameters for 2014 that the FF–SHOP would provide employers the choice of offering only a single QHP, as employers customarily do today, in addition to the choice of offering all QHPs at a single level of coverage.

To respond to these comments we proposed a transition policy until 2015 that allows, but does not require implementation of the employee choice model for all SHOPs. We also proposed that FF–SHOPs should assist qualified employers in offering qualified employees a single QHP choice for plan years beginning during calendar year 2014.

The Exchange Establishment Rule also included a premium aggregation function for the SHOP that was designed to assist employers whose employees were enrolled in multiple QHPs. Because this function will not be necessary in 2014 for SHOPs that delay implementation of the employee choice model, we also proposed at § 155.705(b)(4) that the premium aggregation function be optional for plan years beginning before January 1, 2015.

Specifically, we proposed amendments to § 155.705(b)(2), (b)(3), and (b)(4) providing as follows: (1) The effective date of the employer choice requirements at § 155.705(b)(2) and the premium aggregation requirements at § 155.705(b)(4) for both State-based SHOPs and FF–SHOPs will be January 1, 2015; (2) State-based SHOPs could elect to offer employee choice and perform premium aggregation for plan years beginning before January 1, 2015, but need not do so; and (3) FF–SHOPs will begin to offer employee choice and premium aggregation in plan years beginning on or after January 1, 2015. We received the following comments concerning these proposals.

Comment: Many commenters expressed support for the proposed transition policy for both the employer choice requirement of § 155.705(b)(2) and the premium aggregation requirement of § 155.705(b)(4), stating that the transition would provide the additional time needed to build the systems necessary to ensure the success of employee choice and premium aggregation. Other commenters opposed the delay, believing that transitioning to employee choice would undermine the value proposition of the SHOP in any State that exercised this option and reduce enrollment in the SHOP. One commenter suggested that during the transitional policy SHOPs operate under a simplified implementation that does not include a web portal and plan comparison tool.

Response: Section 1312 of the Affordable Care Act permits an employer to select a level of coverage and an employee to have the choice of enrolling in any qualified health plan that offers coverage at that level. We have serious concerns that issuers would not be operationally ready to offer QHPs through the SHOP if we implemented employee choice for 2014.

As described in the proposed rule, HHS proposed a transitional period for employee choice and premium aggregation in the SHOP based on comments issuers made about whether issuers could complete the enrollment and accounting system changes required to interact with the SHOP enrollment and premium aggregation systems required by employee choice and whether issuers could meet the deadlines for submission of small group market QHPs.

As finalized at 45 CFR 147.102, the new rating rules for coverage beginning on January 1, 2014 significantly reform rating practices in many States. In comments to the Final Notice of Benefit and Payment Parameters for 2014, issuers expressed concern that implementation of employee choice would complicate SHOP pricing in light of the compressed timeframe for finalizing rates because employee choice may significantly modify the population expected to participate in a plan in a manner that will be difficult for issuers to predict.

In other comments to the Exchange Establishment Rule and Notice of Benefit and Payment Parameters for 2014, issuers also expressed concern with the compressed timeline for completing the modifications to their information technology systems necessitated by employee choice and premium aggregation. For example, many health insurance issuers expect that their accounting and enrollment systems will be the sole system of record. Integrating such a system into a SHOP with employee choice and premium aggregation might require additional modifications to the system, as the system must be synchronized with the SHOP's enrollment and accounting systems and responsibility for determining certain group changes in enrollment and billing might be effectuated by the SHOP instead of the issuer.

Issuers also expressed concern that there would be inadequate time to educate employers, employees, and agents and brokers about how they are expected to interact with the SHOP. For example, issuers noted that they accommodate many of the unique needs of small businesses through changes in enrollment at the time of payment. Under employee choice and premium aggregation, some standardization of these processes is necessary because an employee group may interact with a variety of carriers, each potentially with its own set of rules. Issuers suggested that they needed additional time to educate employers and agents and brokers about these new standardized processes.

We believe that even in SHOPs that elect to transition to employee choice, there is still significant value to the SHOP for small employers when compared to the small group market outside the SHOP and therefore significant value to operating a SHOP under this transitional policy. Employers participating in the SHOP may qualify for a small business health care tax credit of up to 50 percent of the employer paid premium cost of coverage. The SHOP will still provide employers with a streamlined comparison of health plans from multiple health insurance issuers, assistance modeling employee contributions, and real-time premium quotes. These benefits would not be available to employers under simplified implementation suggested by one commenter. Further, plans sold on the SHOP must be certified as QHPs, meaning that they must meet minimum standards in order for issuers to sell them on the SHOP. We believe that because of this strong value proposition, the SHOP may still have robust enrollment despite the adoption of this transitional policy.

Comment: Some commenters suggested that HHS further delay full implementation of employee choice and extend the transitional period for up to five years. Two commenters suggested that HHS test employee choice and premium aggregation in a few States to study their effect on the small group market before requiring their implementation in every SHOP.

Response: We believe a one-year transitional period best addresses these concerns, as it provides issuers with a year's worth of experience under the new small group rating methodology, gives issuers significantly more time to design and implement the modifications to their systems necessary for employee choice and premium aggregation, and allows additional time for education and outreach about employee choice.

HHS will monitor through any information provided under § 155.720(i)

the effect of implementing employee choice in States that elect to implement it in 2014. This process will provide much of the systematic testing suggested by commenters.

Comment: Some commenters suggested that HHS use the additional time afforded to SHOPs to implement employee choice under the proposed rule to further streamline the paperwork and regulatory burden on employers and to streamline other Exchange-related employer reporting requirements.

Response: We received comments on the ''Data Collection to Support Eligibility Determinations and Enrollment for Employees in the Small Business Health Options Program'' Paperwork Reduction Act packages through both the 60-day **Federal Register** Notice published on January 29, 2013 (78 FR 6109) and the 30-day **Federal Register** Notice published on July 6, 2012 (77 FR 40061). These comments helped us to reduce the burden of SHOP applications on small employers by streamlining the application form. HHS has used these opportunities to create application questions for determining an employer's size that are easier for an employer to understand. HHS, the Departments of Labor, and the Treasury continue to explore methods to minimize any employer burden.

Comment: One commenter requested HHS clarify how the proposed FF–SHOP transitional employee choice policy would affect the ability of employers to offer stand-alone pediatric dental coverage in the FF–SHOP.

Response: We do not believe that the transitional employee choice policy would prevent an employer from selecting and offering a single stand-alone dental plan in addition to a QHP.

Comment: Some commenters requested that HHS clarify how the transitional employee choice policy would affect the employer contribution methodology for the FF–SHOP that was issued in the Notice of Benefit and Payment Parameters for 2014 and codified at § 155.705(b)(11)(ii), as these commenters suggested the purpose of this contribution model may no longer be pertinent without employee choice, specifically the ability to calculate composite premiums.

Response: This rule does not modify the premium contribution methodology codified in § 155.705(b)(11)(ii), which permits either State law or employers to require the FF–SHOP to base contributions on a calculated composite premium for employees. In the case of the FF–SHOP before 2015 operating with the employee choice transitional policy, we now clarify that the benchmark plan selected by the employer will be the single QHP offered by the employer to its employees, simplifying this process for the employer.

Comment: One commenter supporting the FF–SHOP transitional employee choice policy questioned how the delay of premium aggregation would affect the collection of user fees from QHP issuers participating in the FF–SHOP.

Response: We do not believe this transitional employee choice policy will impact the collection of user fees from QHP issuers participating in the FF–SHOP. We noted in the preamble to the Notice of Benefit and Payment Parameters for 2014 (78 FR 15496) that we anticipate user fees for the FF–SHOP to be collected in the same manner as they will be collected for the FFE. We anticipate collecting user fees by deducting the user fee from the federally-administered Exchange-related program payments. If a QHP issuer does not receive any Exchange-related program payments, the issuer would be billed for the user fee on a monthly basis and receive an invoice as described in the ''Supporting Statement for Paperwork Reduction Act Submissions: Initial Plan Data Collection to Support QHP Certification and other Financial Management and Exchange Operations'' posted on the CMS Web site in conjunction with the **Federal Register** Notice (77 FR 40061).

b. Enrollment Periods Under SHOP (§ 155.725)

The Exchange Establishment Rule established special enrollment periods for Exchanges serving the individual market (§ 155.420), and the SHOP regulations adopted most of these provisions by reference (§ 155.725(a)(3)). Under these regulations, unless specifically stated otherwise in the regulations, a qualified individual has 60 days from the date of the triggering event to select a QHP (§ 155.420(c)).

This SHOP provision differs from the length of special enrollment periods in group markets provided by HIPAA, which last for 30 days after loss of eligibility for other group health plan or health insurance coverage or after a person becomes a dependent through marriage, birth, adoption, or placement for adoption.[7] Because we believe that there is no rationale for providing a longer special enrollment period in a SHOP than is provided in the group market outside the SHOP, we proposed amendments to § 155.725 to clarify that a qualified employee or dependent of a qualified employee who has obtained coverage through the SHOP would have 30 days from the date of most of the triggering events specified in § 155.420 to select a QHP. Additionally, consistent with revisions to HIPAA enacted by section 311 of the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) (Pub. L. 111–3, enacted on February 4, 2009), we proposed that a qualified employee or dependent of a qualified employee who has lost eligibility for Medicaid or CHIP coverage, or who has become eligible for State premium assistance under a Medicaid or CHIP program would be eligible for a special enrollment period in a SHOP and would have 60 days from the date of the triggering event to select a QHP. Specifically, we proposed striking § 155.725(a)(3) and adding a new paragraph (j) consolidating the proposed SHOP special enrollment provisions in one paragraph. We proposed a provision clarifying that a dependent of a qualified employee is eligible for a special enrollment period only if the employer offers coverage to dependents of qualified employees. We also proposed paragraphs (j)(5) and (j)(6) that retain certain provisions relating to effective dates of coverage and loss of minimum essential coverage from the original § 155.420. We proposed conforming revisions to § 156.285(b)(2), so that provision would reference the special enrollment periods in proposed § 155.725(j) instead of those set forth at § 155.420. We believe these changes appropriately align the SHOP provisions with provisions applicable to the rest of the group market, and welcome comment on the proposal. We received the following comments concerning these proposals.

Comment: We received many comments supporting the proposed alignment of the length of special enrollment periods in the SHOP with the small group market at large. Some of these commenters stated that aligning with the existing market standards will reduce confusion, simplify public education, and prevent adverse selection. However, some commenters were concerned that reducing the length of special enrollment periods may not provide sufficient time for an employee to understand and compare the plan or plans offered to the employee. These commenters were particularly concerned that an employee choice model would require additional time for an employee to make an informed decision, as employees would have

[7] See 26 CFR 54.9801–6, 29 CFR 2590.701–6, and 45 CFR 146.117 for regulations regarding special enrollment periods under HIPAA.

many more plans to compare before making a decision.

Response: We believe that even with the employee choice model, the existing HIPAA standard for the length of special enrollment periods reduces confusion and balances an employee's need for sufficient time to review his or her plan options while limiting the potential for adverse selection. Today, many employers, agents and brokers, and employees are familiar with the existing HIPAA standard. Maintaining a policy inconsistent with the HIPAA standard would be confusing to many employers, agents and brokers, and employees, as they may rationally expect the market standard to apply inside the SHOP.

Additionally, with the assistance of the SHOP, employees will have online tools that will assist them in easily viewing and comparing information regarding the premium cost and benefits of their plan options. These tools were specifically designed to assist employees in making an informed decision when presented with a large number of plans. Therefore, we believe that the employee choice model does not inherently require that employees have additional time to make a plan selection.

c. Provisions for the Additional Standards Specific to SHOP

In § 156.285, we proposed requiring QHPs in the SHOP to provide the special enrollment periods added to § 155.725. While we received many comments on the proposed special enrollment periods, we received no comments on this conforming amendment. We are finalizing this provision as proposed.

IV. Provisions of the Final Regulations

This final rule incorporates the provisions of the proposed rule, and we are finalizing these provisions primarily as proposed.

V. Collection of Information Requirements

This final rule has not imposed new or altered existing 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.

VI. Regulatory Impact Analysis

We have examined the impact of this final rule as required by Executive Order 12866 on Regulatory Planning and Review (September 30, 1993) and Executive Order 13563 on Improving Regulation and Regulatory Review (January 18, 2011), the Regulatory Flexibility Act (RFA) (September 19, 1980, Pub. L. 96–354), section 202 of the Unfunded Mandates Reform Act of 1995 (March 22, 1995; Pub. L. 104–4), Executive Order 13132 on Federalism (August 4, 1999), and the Congressional Review Act (5 U.S.C. 804(2)).

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). A regulatory impact analysis (RIA) must be prepared for major rules with economically significant effects ($100 million or more in any 1 year). It is HHS's belief that this final rule does not reach this economic threshold and thus is not considered a major rule.

This final rule consists of a provision to amend the duration of certain special enrollment periods to correspond to the duration in group markets under HIPAA. The rule also adds a triggering event that creates a special enrollment period for qualified employees and/or their eligible dependents when an employee or qualified dependent with coverage through the SHOP becomes eligible for State premium assistance under Medicaid or CHIP or loses eligibility for Medicaid or CHIP. HIPAA, as revised by CHIPRA, already includes this triggering event, which was inadvertently omitted from the original list in § 155.420(d). We do not believe either of these actions would impose any new costs on issuers, employers, enrollees, or the SHOP. In fact, the amendment would create alignment of SHOP regulations with laws for the existing group market and could potentially create efficiencies for QHP issuers.

Finally, this rule provides a transition so that SHOPs provide qualified employers the option to offer qualified employees a choice of any QHP at a single metal level starting with plan years beginning on or after January 1, 2015, instead of January 1, 2014. For plan years beginning in CY 2014, qualified employers will offer qualified employees coverage through a single QHP in FF–SHOPs; State-based SHOPs will have the flexibility to offer either employer or employee choice in 2014. In our analysis of the impact of employer and employee choices in the Notice of Benefit and Payment Parameters for 2014 final rule (78 FR 15410), we noted that adding the option for employers to offer a single QHP would have the potential effect of reducing adverse selection and any associated risk premium and a slight effect of decreasing the consumer benefit resulting from choice. We believe the same analysis applies to our proposal to provide employer choice in 2014.

Issuers will incur costs adapting their enrollment and financial systems to interact with a SHOPs enrollment and premium aggregation systems. The costs and benefits of Exchange and SHOP implementation were assessed in the RIA for the Exchange Establishment final rule, titled Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans, Exchange Standards for Employers and Standards Related to Reinsurance, Risk Corridors and Risk Adjustment Regulatory Impact Analysis (Exchange RIA).[8] Because issuers may now have an additional year to develop these systems and may thus be able to stage their efforts rather than implementing all system changes by October 1, 2013, we believe that the total cost will be unchanged.

From the Exchange perspective, in the Exchange RIA, we noted that a State-based Exchange could incur costs in establishing a premium aggregation function for the SHOP. Therefore, the policy in this final rule could decrease costs to States that operate a State-based Exchange for the 2014 plan year.

VII. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) (RFA) requires agencies to prepare an initial regulatory flexibility analysis to describe the impact of the rule on small entities, unless the head of the agency can certify that the rule would not have a significant economic impact on a substantial number of small entities. The RFA generally defines a ''small entity'' as—(1) A proprietary firm meeting the size standards of the Small Business Administration (SBA); (2) a not-for-profit organization that is not dominant in its field; or (3) a small government jurisdiction with a population of less than 50,000. States and individuals are not included in the definition of ''small entity.'' HHS uses as its measure of significant economic impact on a substantial number of small entities a change in revenues of more than 3 percent.

[8] Patient Protection and Affordable Care Act; Establishment of Exchanges and Qualified Health Plans, Exchange Standards for Employers and Standards Related to Reinsurance, Risk Corridors and Risk Adjustment Regulatory Impact Analysis, March 2012. Available at: *http://cciio.cms.gov/resources/files/Files2/03162012/hie3r-ria-032012.pdf.*

The RFA requires agencies to analyze options for regulatory relief of small businesses, if a rule has a significant impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small government jurisdictions. Small businesses are those with sizes below thresholds established by the SBA. For the purposes of the regulatory flexibility analysis, we expect the following types of entities to be affected by this proposed rule: (1) Small employers and (2) QHP issuers.

As discussed in Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements Under the Patient Protection and Affordable Care Act; Interim Final Rule,[9] few, if any, issuers are small enough to fall below the size thresholds for small business established by the SBA. In that rule, we used a data set created from 2009 NAIC Health and Life Blank annual financial statement data to develop an updated estimate of the number of small entities that offer comprehensive major medical coverage in the individual and group markets. For purposes of that analysis, HHS used total Accident and Health earned premiums as a proxy for annual receipts. We estimated that there are 28 small entities with less than $7 million in accident and health earned premiums offering individual or group comprehensive major medical coverage.[10] However, this estimate may overstate the actual number of small health insurance issuers offering such coverage, since it does not include receipts from these companies' other lines of business. We further estimate that any issuers that would be considered small businesses are likely to be subsidiaries of larger issuers that are not small businesses.

The SHOP is limited by statute to employers with at least one but not more than 100 employees. Until 2016, States have the option to reduce this threshold to 50. For this reason, we expect that many employers would meet the SBA standard for small entities. We do not believe that this rule imposes requirements on employers offering coverage through the SHOP that are more restrictive than current requirements on employers offering employer-sponsored health insurance. Specifically, small employers are currently required to offer the special enrollment period that the final rule applies to eligible employees and dependents with coverage through the SHOP, and the triggering event that the final rule applies to eligible individuals and dependents, as well. The rule merely applies existing standards to the SHOP. Additionally, the transitional policy regarding employee choice does not impose new requirements on small employers because most small employers currently offer only one health insurance plan to their employees.

Therefore, we are not preparing an analysis for the RFA because we have determined, and the Secretary certifies, that this final rule will not have a significant economic impact on a substantial number of small entities.

VIII. Unfunded Mandates

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a proposed rule (and subsequent final rule) that includes any federal mandate that may result in expenditures in any one year by a State, local, or tribal governments, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. In 2013, that threshold is approximately $141 million. UMRA does not address the total cost of a rule. Rather, it focuses on certain categories of costs, mainly those ''federal mandate'' costs resulting from: (1) Imposing enforceable duties on State, local, or tribal governments, or on the private sector; or (2) increasing the stringency of conditions in, or decreasing the funding of, State, local, or tribal governments under entitlement programs.

This rule does not place any financial mandates on State, local, or tribal governments. It applies a triggering event and special enrollment period to coverage through the SHOP, modifies the duration of certain special enrollment periods, and implements employee choice in the SHOP starting with plan years beginning on or after January 1, 2015. These amendments would affect State governments only to the extent that they operate a SHOP and, if they are affected, would not place any new financial mandates on them.

IX. Federalism

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct costs on State and local governments, preempts State law, or otherwise has Federalism implications. This rule does not impose any costs on State or local governments not otherwise imposed by already-finalized provisions of the regulations implementing the Affordable Care Act.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have Federalism implications or limit the policy-making discretion of the States, HHS has engaged in efforts to consult with and work cooperatively with affected States, including participating in conference calls with and attending conferences of the NAIC, and consulting with State insurance officials on an individual basis. We believe that this rule does not impose substantial direct costs on State and local governments, preempt State law, or otherwise have federalism implications. We note that we have attempted to provide States that choose to operate a SHOP with flexibility such that States may, if they choose, offer employee choice beginning with plan years starting on or after January 1, 2014, or they may implement this policy in plan years starting on or after January 1, 2015.

Under the requirements set forth in section 8(a) of Executive Order 13132, and by the signatures affixed to this regulation, the Department of Health and Human Services certifies that CMS has complied with the requirements of Executive Order 13132 for the attached proposed regulation in a meaningful and timely manner.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

X. Congressional Review Act

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

[9] Health Insurance Issuers Implementing Medical Loss Ratio (MLR) Requirements Under the Patient Protection and Affordable Care Act; Interim Final Rule, 75 FR 74864, 74918–20 (December 1, 2010) (codified at 45 CFR part 158).

[10] According to SBA size standards, entities with average annual receipts of $7 million or less would be considered small entities for North American Industry Classification System (NAICS) Code 524114 (Direct Health and Medical Insurance Carriers). For more information, see ''Table of Size Standards Matched To North American Industry Classification System Codes,'' effective March 26, 2012, U.S. Small Business Administration, available at *http://www.sba.gov.*

States prior to publication of the rule in the **Federal Register**. This final rule is not a ''major rule'' as defined by 5 U.S.C. 804(2).

List of Subjects

45 CFR Part 155

Administrative practice and procedure, Advertising, Advisory Committees, Brokers, Conflict of interest, Consumer protection, Grant programs—health, Grants administration, Health care, Health insurance, Health maintenance organization (HMO), Health records, Hospitals, American Indian/Alaska Natives, Individuals with disabilities, Loan programs—health, Organization and functions (Government agencies), Medicaid, Public assistance programs, Reporting and recordkeeping requirements, State and local governments, Sunshine Act, Technical assistance, Women, and Youth.

45 CFR Part 156

Administrative practice and procedure, Advertising, Advisory Committees, Brokers, Conflict of interest, Consumer protection, Grant programs—health, Grants administration, Health care, Health insurance, Health maintenance organization (HMO), Health records, Hospitals, Indians, Individuals with disabilities, Loan programs—health, Organization and functions (Government agencies), Medicaid, Public assistance programs, Reporting and recordkeeping requirements, Safety, State and local governments, Sunshine Act, Technical assistance, Women, and Youth.

For the reasons set forth in the preamble, the Department of Health and Human Services amends 45 CFR parts 155 and 156 as set forth below:

PART 155—EXCHANGE ESTABLISHMENT STANDARDS AND OTHER RELATED STANDARDS UNDER THE AFFORDABLE CARE ACT

■ 1. The authority citation for part 155 continues to read as follows:

Authority: Title I of the Affordable Care Act, sections 1301, 1302, 1303, 1304, 1311, 1312, 1313, 1321, 1322, 1331, 1334, 1402, 1411, 1412, 1413.

■ 2. Section 155.705 is amended by revising paragraphs (b)(2) through (4) to read as follows:

§ 155.705 Functions of a SHOP.

* * * * *

(b) * * *

(2) *Employer choice requirements.* With regard to QHPs offered through the SHOP for plan years beginning on or after January 1, 2015, the SHOP must allow a qualified employer to select a level of coverage as described in section 1302(d)(1) of the Affordable Care Act, in which all QHPs within that level are made available to the qualified employees of the employer.

(3) *SHOP options with respect to employer choice requirements.* (i) For plan years beginning before January 1, 2015, a SHOP may allow a qualified employer to make one or more QHPs available to qualified employees:

(A) By the method described in paragraph (b)(2) of this section, or

(B) By a method other than the method described in paragraph (b)(2) of this section.

(ii) For plan years beginning on or after January 1, 2015, a SHOP:

(A) Must allow an employer to make available to qualified employees all QHPs at the level of coverage selected by the employer as described in paragraph (b)(2) of this section, and

(B) May allow an employer to make one or more QHPs available to qualified employees by a method other than the method described in paragraph (b)(2) of this section.

(iii) For plan years beginning before January 1, 2015, a Federally-facilitated SHOP will provide a qualified employer the choice to make available to qualified employees a single QHP.

(iv) For plan years beginning on or after January 1, 2015, a Federally-facilitated SHOP will provide a qualified employer a choice of two methods to make QHPs available to qualified employees:

(A) The employer may choose a level of coverage as described in paragraph (b)(2) of this section, or

(B) The employer may choose a single QHP.

(4)(i) *Premium aggregation.* Consistent with the effective dates set forth in paragraph (b)(4)(ii) of this section, the SHOP must perform the following functions related to premium payment administration:

(A) Provide each qualified employer with a bill on a monthly basis that identifies the employer contribution, the employee contribution, and the total amount that is due to the QHP issuers from the qualified employer;

(B) Collect from each employer the total amount due and make payments to QHP issuers in the SHOP for all enrollees; and

(C) Maintain books, records, documents, and other evidence of accounting procedures and practices of the premium aggregation program for each benefit year for at least 10 years.

(ii) *Effective dates.* (A) A State-based SHOP may elect to perform these functions for plan years beginning before January 1, 2015, but need not do so.

(B) A Federally-facilitated SHOP will perform these functions only in plan years beginning on or after January 1, 2015.

* * * * *

■ 3. Section 155.725 is amended by:
■ A. Amending paragraph (a)(1) by adding ''and'' at the end of the paragraph.
■ B. Amending paragraph (a)(2) by removing ''; and'' and by adding a period in its place at the end of the paragraph.
■ C. Removing paragraph (a)(3), and
■ D. Adding paragraph (j).

The addition reads as follows:

§ 155.725 Enrollment periods under SHOP.

* * * * *

(j)(1) *Special enrollment periods.* The SHOP must provide special enrollment periods consistent with this section, during which certain qualified employees or a dependent of a qualified employee may enroll in QHPs and enrollees may change QHPs.

(2) The SHOP must provide a special enrollment period for a qualified employee or dependent of a qualified employee who:

(i) Experiences an event described in § 155.420(d)(1), (2), (4), (5), (7), (8), or (9);

(ii) Loses eligibility for coverage under a Medicaid plan under title XIX of the Social Security Act or a State child health plan under title XXI of the Social Security Act; or

(iii) Becomes eligible for assistance, with respect to coverage under a SHOP, under such Medicaid plan or a State child health plan (including any waiver or demonstration project conducted under or in relation to such a plan).

(3) A qualified employee or dependent of a qualified employee who experiences a qualifying event described in paragraph (j)(2) of this section has:

(i) Thirty (30) days from the date of a triggering event described in paragraph (j)(2)(i) of this section to select a QHP through the SHOP; and

(ii) Sixty (60) days from the date of a triggering event described in paragraph (j)(2)(ii) or (iii) of this section to select a QHP through the SHOP;

(4) A dependent of a qualified employee is not eligible for a special election period if the employer does not extend the offer of coverage to dependents.

(5) The effective dates of coverage are determined using the provisions of § 155.420(b).

(6) Loss of minimum essential coverage is determined using the provisions of § 155.420(e).

PART 156—HEALTH INSURANCE ISSUER STANDARDS UNDER THE AFFORDABLE CARE ACT, INCLUDING STANDARDS RELATED TO EXCHANGES

■ 4. The authority citation for part 156 continues to read as follows:

Authority: Title I of the Affordable Care Act, sections 1301–1304, 1311–1312, 1321, 1322, 1324, 1334, 1341–1343, and 1401–1402, Pub l. 111–148, 124 Stat. 119 (42 U.S.C. 18042).

■ 5. Section 156.285 is amended by revising paragraph (b)(2) to read as follows:

§ 156.285 Additional standards specific to SHOP.

* * * * *

(b) * * *

(2) Provide special enrollment periods as described in § 155.725(j);

* * * * *

Dated: May 13, 2013.

Marilyn Tavenner,

Administrator, Centers for Medicare & Medicaid Services.

Approved: May 15, 2013

Kathleen Sebelius,

Secretary, Department of Health and Human Services.

[FR Doc. 2013–13149 Filed 5–31–13; 11:15 am]

BILLING CODE 4120–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 300

[Docket No. 120814337–3488–02]

RIN 0648–BC44

International Fisheries; Pacific Tuna Fisheries; Fishing Restrictions in the Eastern Pacific Ocean

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

ACTION: Final rule.

SUMMARY: NMFS is issuing regulations under the Tuna Conventions Act of 1950 to implement Resolution C–12–09 of the Inter-American Tropical Tuna Commission (IATTC) by establishing limits on commercial retention of Pacific bluefin tuna by U.S. fishing vessels operating in the Eastern Pacific Ocean (EPO) in 2013. This action is necessary for the United States to satisfy its obligations as a member of the IATTC and to limit fishing on the stock.

DATES: This rule becomes effective July 5, 2013 through December 31, 2013.

ADDRESSES: Copies of the proposed and final rules, the Environmental Assessment, the Finding of No Significant Impact, and the Regulatory Impact Review for this action are available via the Federal e-Rulemaking portal, at *http://www.regulations.gov,* and are also available from the Regional Administrator, Rodney R. McInnis, NMFS Southwest Regional Office, 501 W. Ocean Boulevard, Suite 4200, Long Beach, CA 90802. Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS Southwest Regional Office and by email to *OIRA_Submission@omb.eop.gov,* or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Heidi Taylor, NMFS SWR, 562–980–4039.

SUPPLEMENTARY INFORMATION: On December 12, 2012, NMFS published a proposed rule in the **Federal Register** (76 FR 560790) to implement Resolution C–12–09 of the IATTC by revising regulations at 50 CFR part 300, subpart C. The proposed rule was open to public comment through January 11, 2012. In addition, a public hearing was held in Long Beach, CA on January 11, 2012.

Background on the IATTC

The United States is a member of the IATTC, which was established under the 1949 Convention for the Establishment of an Inter-American Tropical Tuna Commission. The full text of the 1949 Convention is available at: *http://www.iattc.org/PDFFiles/IATTC_convention_1949.pdf.* The Antigua Convention, which was negotiated to strengthen and replace the 1949 Convention establishing the IATTC, entered into force in 2010. The United States has not yet ratified the Antigua Convention. The IATTC serves as an international arrangement to ensure for conservation and management of highly migratory species of fish in the Convention Area (defined as the waters of the EPO). Since 1998, conservation resolutions adopted by the IATTC have further defined the Convention Area as the area bounded by the coast of the Americas, the 50° N. and 50° S. parallels, and the 150° W. meridian. The IATTC has maintained a scientific research and fishery monitoring program for many years, and regularly assesses the status of tuna and billfish stocks in the EPO to determine appropriate catch limits and other measures deemed necessary to prevent overexploitation of these stocks and to promote sustainable fisheries. Current IATTC membership includes: Belize, Canada, China, Chinese Taipei (Taiwan), Colombia, Costa Rica, Ecuador, El Salvador, the European Union, France, Guatemala, Japan, Kiribati, the Republic of Korea, Mexico, Nicaragua, Panama, Peru, the United States, Vanuatu, and Venezuela. Bolivia and the Cook Islands are cooperating non-members.

International Obligations of the United States Under the Convention

As a Contracting Party to the 1949 Convention and a member of the IATTC, the United States is legally bound to implement resolutions of the IATTC. The Tuna Conventions Act (16 U.S.C. 951–962) directs the Secretary of Commerce, after approval by the Secretary of State, to promulgate such regulations as may be necessary to implement resolutions adopted by the IATTC. The authority to promulgate such regulations has been delegated to NMFS.

IATTC Resolutions in 2012

At its 83rd Meeting, in June 2012, the IATTC adopted Resolution C–12–09, Conservation and Management Measures for Bluefin Tuna in the EPO. All active resolutions and recommendations of the IATTC are available on the following Web site: *http://iattc.org/ResolutionsActiveENG.htm.*

The main objective of Resolution C–12–09 is to conserve Pacific bluefin tuna (*Thunnus orientalis*) by establishing limits on the commercial catches of Pacific bluefin tuna in the EPO. Before Resolution C–12–09, the IATTC had not adopted catch limits for Pacific bluefin tuna in the EPO. The IATTC recognizes the need to reduce fishing mortality of Pacific bluefin tuna throughout its range. Accordingly, Resolution C–12–09 included both a cumulative catch limit of 10,000 metric tons for all commercial fishing vessels of all IATTC member countries and cooperating non-member countries (CPCs) fishing in the EPO for 2012 and 2013 combined, and an annual catch limit of 500 metric tons for each CPC with a historical record of Eastern Pacific bluefin catch to allow these nations some opportunity to catch Pacific bluefin tuna if the cumulative limit is reached. The IATTC emphasizes that the measures in Resolution C–12–09 are intended as an interim means for assuring viability of the Pacific bluefin tuna resource. Future conservation

measures are expected to be based in part on information and advice from the International Scientific Committee for Tuna and Tuna-like Species in the North Pacific Ocean and the IATTC scientific staff.

While Pacific bluefin tuna catch by U.S. vessels fishing in the EPO exceeded 1,000 metric tons as recently as the early 1990's, catches have remained below 500 metric tons for more than a decade. Table 1 below shows the U.S. commercial catch of Pacific bluefin tuna for the years 1999 to 2012 in the EPO. The Pacific bluefin tuna catch by U.S. vessels fishing in the EPO have been greater than those from the WCPO. However, the average annual Pacific bluefin tuna landings (i.e., records of catch) by U.S. vessels fishing in the EPO from 2007 through 2011 represent only two percent of the average annual landings from all fleets fishing in the EPO during that time (for information on Pacific bluefin tuna harvests in the EPO, see: *http://isc.ac.affrc.go.jp/pdf/ISC12pdf/ISC12_Plenary_Report-FINAL.pdf*).

TABLE 1—U.S. COMMERCIAL CATCH OF PACIFIC BLUEFIN TUNA IN THE EPO

[In metric tons]

Year	Pacific Bluefin Tuna catch (in metric tons)
1999	186
2000	313
2001	196
2002	11
2003	36
2004	10
2005	207
2006	1
2007	45
2008	1
2009	415
2010	1
2011	118
2012	*42

Source: Highly Migratory Species Stock Assessment and Fishery Evaluation: *http://www.pcouncil.org/highly-migratory-species/stock-assessment-and-fishery-evaluation-safe-documents/current-hms-safe-document/.*

*Preliminary PacFIN estimate of 2012 Pacific bluefin tuna landings by U.S., extracted February 22, 2013.

In 2010, the Western and Central Pacific Fisheries Commission (WCPFC) adopted conservation and management measures for Pacific bluefin tuna to ensure that the current level of fishing mortality is not increased. Resolution C–12–09 complements the action taken by the WCPFC in 2010 that set effort controls in the western central Pacific Ocean. In 2011, NMFS determined overfishing is occurring on Pacific bluefin tuna (76 FR 28422, May 17, 2011). Based on a 2013 stock assessment, NMFS determined Pacific bluefin tuna was not only experiencing overfishing but was also overfished. The combination of Resolution C–12–09 and the WCPFC effort controls are positive steps towards the conservation of Pacific bluefin tuna across the range of this resource.

Tuna Conservation Measures for 2012–2013

Under authority of the Tuna Conventions Act, NMFS is implementing Resolution C–12–09, which has been approved by an authorized official acting for the Secretary of State. In accordance with the 10,000 metric ton cumulative catch limit adopted in Resolution C–12–09 for both 2012 and 2013 combined, the cumulative catch limit for all CPCs for 2013 is 3,295 metric tons, because the cumulative catch of all CPCs in the Convention Area reached 6,705 metric tons in 2012. Therefore, targeting and retention of Pacific bluefin tuna by all U.S. commercial fishing vessels in the EPO shall be prohibited for the remainder of 2013 when the cumulative catch by all CPCs reaches 3,295 metric tons of Pacific bluefin tuna, and when the commercial catch of Pacific bluefin tuna by the U.S. fleet has reached or exceeded 500 metric tons in 2013. If the U.S. commercial fishing fleet has not caught 500 metric tons of Pacific bluefin tuna in 2013 when the cumulative catch limit for all CPCs is reached, then the U.S. commercial fishing fleet may continue to target and retain Pacific bluefin tuna until the 500 metric ton limit is reached. The U.S. commercial fishing fleet may retain more than the 500 metric tons of Pacific bluefin tuna in 2013 unless and until the international fleet reaches the limit of 3,295 metric tons.

Announcement of the Limit Being Reached

To help ensure that the total catch of Pacific bluefin tuna in the EPO does not exceed the catch limit for each year, NMFS will report U.S. catch to the IATTC Director on a monthly basis. The IATTC Director will inform CPCs when the total annual catch limit is reached. If NMFS determines, based on the information provided by the IATTC Director, that the applicable limit is imminent, NMFS will publish a notice in the **Federal Register** announcing that restrictions will be effective on specific future dates until the end of the calendar year. This notice will specify a date and time for when targeting of Pacific bluefin tuna will be prohibited in the EPO, and a date and time when retention of Pacific bluefin tuna will be prohibited in the EPO. The effective date for the retention prohibition will follow the effective date for the targeting prohibition, to allow sufficient time for U.S. commercial fishing vessels retaining lawfully caught Pacific bluefin tuna to exit the EPO.

NMFS will make estimates and/or projections of U.S. catch of Pacific bluefin tuna from the EPO publicly available on a quarterly basis, on the NMFS Southwest Regional Office Web page. Additionally, NMFS will continue to investigate other means of reporting preliminary Pacific bluefin tuna catch between quarterly intervals to help participants of the commercial fishery plan for the possibility of the catch limit being reached. This commercial catch limitation will remain in effect through 2013, unless the IATTC decides to remove or modify the measure in 2013. NMFS anticipates controls on fishing for Pacific bluefin tuna in the EPO to be included in future resolutions by the IATTC.

Response to Public Comments

NMFS received four written public comments during the proposed rule public comment period. Additionally, six individuals participated in the public hearing. Two individuals who submitted written comments also attended the public hearing. In total, eight commenters submitted comments to NMFS. Four commenters suggested further restricting the Pacific bluefin fishery beyond the scope of this action based on concerns that the action did not sufficiently advance conservation of the resource. Four commenters noted that U.S. catch is insignificant relative to other sources of Pacific bluefin mortality. In addition, the Department of the Interior, Office of Environmental Policy and Compliance, Pacific Southwest Region, noted that they reviewed the subject action, but did not have comments. Summaries of the comments received and NMFS' responses appear below.

Comment 1: The proposed rule is not consistent with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) because it neither prevents overfishing by addressing the relative impacts of the U.S. fleet nor is it based on the best available information regarding the status of Pacific bluefin tuna.

Response: NMFS is promulgating this rule in accordance with IATTC Resolution C–12–09 and under the authority of the Tuna Conventions Act. This action is not subject to the Magnuson-Stevens Act. During its June 2012 meeting, the IATTC adopted

Resolution C–12–09 based on the best information on the stock status of Pacific bluefin available at that time: the IATTC scientific staff recommendations, recommendations from the IATTC's Scientific Advisory Committee, the 2008 stock assessment for Pacific bluefin tuna (finding the stock subject to overfishing) by the International Scientific Committee for Tuna and Tuna-like Species in the North Pacific (ISC), and Pacific bluefin management measures adopted in December 2010 by the Western and Central Pacific Fisheries Commission. Following the adoption of Resolution C–12–09 and the publication of the proposed rule, the ISC completed another stock assessment for Pacific bluefin tuna which served as the basis for NMFS' recent determination that the stock is experiencing overfishing and is overfished. In April 2013, NMFS informed the Pacific and the Western Pacific Fishery Management Councils of this determination and their obligations under section 304(i) of the Magnuson-Stevens Act.

Comment 2: Pacific bluefin tuna catch by U.S. vessels fishing in the EPO is an insignificant source of mortality relative to international catch levels. Despite the low numbers of landings in recent years, the United States can and has caught more than 500 metric tons of Pacific bluefin tuna in years when the fish and fishing opportunity were available.

Response: NMFS notes that the average annual Pacific bluefin tuna landings by U.S. vessels fishing in the EPO represent roughly two percent of the average annual landings from all fleets fishing in the EPO for years 2007 through 2011 (see section 1.5 of the Environmental Assessment). However, annual U.S. landings in the 1980s and 1990s often exceeded 1,000 metric tons. NMFS acknowledges that the U.S. fleet has the capacity to catch more than 500 metric tons of Pacific bluefin tuna, even though it is unlikely that the U.S. fleet would catch more than 500 metric tons. Therefore, it is in the interest of the United States to implement catch limits to both contribute to the sustainability of the stock and fulfill its obligations as a Contracting Party to the Convention.

Comment 3: The supplementary information provided in the proposed rule should have included landings by U.S. vessels fishing in the EPO for years 2010, 2011, 2012. Additionally, more clarity should be provided on how catches will be publicly reported.

Response: In the supplementary information section of this final rule, Table 1 (U.S. Commercial Catch of Pacific bluefin tuna in the EPO) has been updated to include landings for years 2010, 2011, and 2012. NMFS will make estimates or projections of Pacific bluefin tuna catch publicly available on a quarterly basis. There is a time lag between the collection of this data by state management entities and its submission to the Pacific Fisheries Information Network database. Furthermore, because so few U.S. vessels actively participate in the Pacific bluefin tuna fishery, it is unlikely that NMFS will be able to report catch on a weekly or monthly basis, due to confidentiality concerns. However, NMFS will continue to explore other means of reporting preliminary Pacific bluefin tuna catch more often than quarterly to help fishermen plan for the possibility that the catch limit will be reached.

Changes From the Proposed Rule

NMFS made a few adjustments to the language of the regulatory text from the proposed rule. Because the final rule is being published in 2013, NMFS removed references to restrictions applicable in 2012. As described above, NMFS adjusted the cumulative catch limit from 10,000 metric tons to 3,295 metric tons of Pacific bluefin tuna for all CPCs to reflect the cumulative limit for 2013. Additionally, the regulatory text now references ''dates'' rather than ''date,'' because NMFS will publish a notice in the **Federal Register** announcing that restrictions will be effective on a specific future date and time for the targeting prohibition and a later effective date and time for the retention prohibition to allow sufficient time for U.S. commercial fishing vessels retaining lawfully caught Pacific bluefin tuna to exit the EPO. Furthermore, the regulatory text now clarifies that the international limit applies to harvests by cooperating non-members of the IATTC, as well as member countries.

Classification

The NMFS Assistant Administrator has determined that this final rule is consistent with the Tuna Conventions Act and other applicable laws. This final rule has been determined to be not significant for purposes of Executive Order 12866. The following paragraphs summarize the regulatory flexibility analysis. NMFS did not receive any comments on the summary of the initial regulatory flexibility analysis that was published with the proposed rule.

The main objective of this rule is to establish catch limits to contribute to the conservation of the Pacific bluefin tuna stock. This rule applies to owners and operators of U.S. commercial fishing vessels that catch Pacific bluefin tuna in the IATTC Convention Area. It is important to note that no U.S. commercial vessels specialize in harvesting Pacific bluefin tuna in the EPO.

This rule does not mandate ''reporting'' or ''recordkeeping.'' As for compliance, in the unlikely event that the limit on Pacific bluefin tuna catch is reached for 2013, it will be the responsibility of the vessel owner to ensure that no further targeting of Pacific bluefin tuna occurs, and that no more Pacific bluefin tuna are retained on board after the specified dates published in the **Federal Register** notice announcing that the annual limit is expected to be reached. In the unlikely event of a closure under this rule, the cost of compliance would be *de minimis.* Compliance costs could consist of returning incidentally caught bluefin tuna to the ocean, forgoing associated profits, and potentially losing fishing opportunity if bluefin availability to the U.S. fleet increased in 2013. However, the U.S. fleet would have to catch more bluefin tuna in 2013 than they have caught in any given year in the past decade before they would incur any compliance costs associated with a fishery closure resulting from this action. NMFS will publish a notice in the **Federal Register** announcing that restrictions will be effective from the dates specified through the end of the calendar year. NMFS will take reasonable actions to inform vessel owners if a closure of the Pacific bluefin tuna fishery appears imminent.

Pacific bluefin tuna is commercially caught by U.S. vessels fishing in the EPO on an irregular basis. Most of the landings are made by small coastal purse seine vessels operating in the Southern California Bight with limited additional landings made by the drift gillnet fleet that targets swordfish and thresher shark. Lesser amounts of Pacific bluefin are caught by gillnet and longline gear. The Pacific bluefin tuna commercial catch limitations are not expected to result in closing the U.S. Pacific bluefin tuna fishery because annual catches have not reached 500 metric tons in over a decade. The average annual United States catch of Pacific bluefin tuna was 113 metric tons for 1999 through 2012. Table 1 (above) describes U.S. commercial catch of bluefin tuna in the EPO for the years 1999 to 2010.

The U.S. west coast catch of bluefin tuna represents a relatively minor component of the overall EPO tuna catch. The number of purse seine vessels that have landed tuna in California averaged 197 annually from 1981 through 1990 but declined to an annual average of 11 from 2001 through 2010. The decline in the number of

domestic vessels is correlated in part with the relocation of large cannery operations. Currently, there are no domestic deliveries of raw tuna to canneries in California.

NMFS compared the effects of the bluefin tuna restrictions imposed by this rule to a no action alternative. Under the no action alternative, there would be no change to current regulations, which do not limit U.S. commercial catches of Pacific bluefin tuna in the IATTC Convention Area. Based on recent Pacific bluefin tuna catch data and expected future trends, it is unlikely that any benefit to U.S. commercial fisheries would be gained from not implementing Resolution C–12–09 because the catch limit is not expected to be reached. However, failing to adopt this rule would result in the United States not satisfying its international obligations as a member of the IATTC. Furthermore, implementing Resolution C–12–09 could benefit the conservation of Pacific bluefin tuna by limiting catches.

Small Entities Compliance Guide

The Compliance Guide for this action is available via the Federal e-Rulemaking portal, at *http://www.regulations.gov,* and is also available from the Regional Administrator, Rodney R. McInnis, NMFS Southwest Regional Office, 501 W. Ocean Boulevard, Suite 4200, Long Beach, CA 90802.

List of Subjects in 50 CFR Part 300

Administrative practice and procedure, Fish, Fisheries, Fishing, Marine resources, Reporting and recordkeeping requirements, Treaties.

Dated: May 30, 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 300 is amended as follows:

PART 300—INTERNATIONAL FISHERIES REGULATIONS

■ 1. The authority citation for 50 CFR part 300 continues to read as follows:

Authority: 16 U.S.C. 951–961 et seq.

■ 2. In § 300.24, a new paragraph (u) is added to read as follows:

§ 300.24 Prohibitions.

* * * * *

(u) Target or retain Pacific bluefin tuna in the IATTC Convention Area by any United States vessel engaged in commercial fishing after the dates specified by the Regional Administrator's notification of closure issued under § 300.25 (h).

■ 3. In § 300.25, a new paragraph (h) is added to read as follows:

§ 300.25 Eastern Pacific fisheries management.

* * * * *

(h) *Bluefin tuna commercial catch limits in the eastern Pacific Ocean.* (1) After the dates specified in a notice published by Regional Administrator in the **Federal Register,** a United States vessel engaged in commercial fishing may not target or retain bluefin tuna in the Convention Area for the remainder of the calendar year. NMFS will publish such a notice prohibiting further targeting and retention of Pacific bluefin tuna on the projected dates for the remainder of 2013 when 3,295 metric tons or more have been harvested in 2013 by the commercial fishing vessels of all IATTC member countries and cooperating non-member countries. This prohibition will not be effective unless and until the annual commercial harvest of Pacific bluefin tuna by the United States fleet has reached 500 metric tons.

(2) [Reserved]

[FR Doc. 2013–13240 Filed 6–3–13; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Parts 300 and 679

[Docket No. 120223143–3489–02]

RIN 0648–BB94

Amendment 94 to the Gulf of Alaska Fishery Management Plan and Regulatory Amendments for Community Quota Entities

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

ACTION: Final rule.

SUMMARY: NMFS publishes regulations to implement Amendment 94 to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP). This final rule amends certain sablefish provisions of the Individual Fishing Quota Program for the Fixed-Gear Commercial Fisheries for Pacific Halibut and Sablefish in Waters in and off Alaska (IFQ Program). Amendment 94 and its implementing regulations revise the vessel use caps applicable to sablefish quota share (QS) held by Gulf of Alaska (GOA) Community Quota Entities (CQEs). This final rule makes the same regulatory revisions to the vessel use caps applicable to halibut QS held by GOA CQEs. In this action, NMFS also revises the IFQ Program regulations to add three eligible communities to the CQE Program; to allow CQEs in International Pacific Halibut Commission regulatory area 3A (Area 3A) to purchase vessel category D halibut QS; to revise CQE annual reporting requirements, including specifying reporting requirements for the charter halibut program; to clarify the CQE floating processor landing reporting requirements; and to consolidate CQE Program eligibility by community in a single table in the regulations.

DATES: Effective July 5, 2013.

ADDRESSES: Electronic copies of the Regulatory Impact Review (RIR) prepared for Amendment 94 and the changes to the vessel use caps applicable to halibut IFQ derived from CQE QS, the RIR prepared for the regulatory amendment to add three communities to the list of CQE eligible communities, and the RIR prepared for the regulatory amendment to allow CQEs in Area 3A to purchase vessel category D halibut QS are available from *http://www.regulations.gov* or from the NMFS Alaska Region Web site at *http://alaskafisheries.noaa.gov*.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted by mail to NMFS, Alaska Region, P.O. Box 21668, Juneau, AK 99802–1668, Attn: Ellen Sebastian, Records Officer; in person at NMFS, Alaska Region, 709 West 9th Street, Room 420A, Juneau, AK; or by email to *OIRA_Submission@omb.eop.gov* or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Peggy Murphy, (907) 586–7228.

SUPPLEMENTARY INFORMATION: This final rule implements Amendment 94 to the FMP and a suite of regulations that modify the GOA CQE Program. NMFS published the Notice of Availability for Amendment 94 in the **Federal Register** on February 22, 2013 (78 FR 12287) with a 60-day comment period that ended April 23, 2013. The Secretary approved Amendment 94 on May 20, 2013 after taking into account public comments, and determining that Amendment 94 is consistent with the FMP, the Magnuson-Stevens Fishery Conservation and Management Act

(Magnuson-Stevens Act), and other applicable law. NMFS published a proposed rule for Amendment 94 in the **Federal Register** on March 6, 2013 (78 FR 14490). The 30-day comment period on the proposed rule ended on April 5, 2013. NMFS received three comment letters on the proposed rule. A summary of these comments and NMFS' responses are provided in the ''Comments and Responses'' section of this preamble.

A detailed review of this action is provided in the notice of availability for Amendment 94 (78 FR 12287, February 22, 2013) and the proposed rule (78 FR 14490, March 6, 2013) and is not repeated here.

The preamble to this final rule provides a brief review of the regulatory changes made by this final rule to the management of the IFQ and CQE Programs and the annual recordkeeping and reporting requirements for CQEs participating in the IFQ Program, the Charter Halibut Limited Access Permit Program, and the License Limitation Program for GOA Pacific cod.

Background on the IFQ and CQE Program

The IFQ Program, a limited access privilege program for the commercial fixed-gear halibut fisheries off Alaska and sablefish (*Anoplopoma fimbria*) fisheries in the Exclusive Economic Zone (EEZ) off Alaska, was recommended by the Council in 1992 and approved by NMFS in 1993. Initial implementing rules were published November 9, 1993 (58 FR 59375), and fishing under the IFQ Program began on March 15, 1995. The IFQ Program limits access to the halibut and sablefish fisheries to those persons holding QS in specific management areas. The IFQ Program for the sablefish fishery is implemented by the FMP and Federal regulations at 50 CFR part 679 under the authority of the Magnuson-Stevens Act. The IFQ Program for the halibut fishery is implemented by Federal regulations at 50 CFR part 679 under the authority of the Northern Pacific Halibut Act (Halibut Act). A comprehensive explanation of the IFQ Program can be found in the final rule implementing the program (58 FR 59375, November 9, 1993).

Since the inception of the IFQ Program, many residents of Alaska's smaller remote coastal communities who held QS have transferred their QS to non-community residents or moved out of the smaller coastal communities. As a result, the number of resident QS holders has declined substantially in most of the GOA communities with IFQ Program participants. This transfer of halibut and sablefish QS and the associated fishing effort from the GOA's smaller remote coastal communities has limited the ability of residents to locally purchase or lease QS and has reduced the diversity of fisheries to which fishermen in remote coastal communities have access. The ability of fishermen in a remote coastal community to purchase QS or maintain existing QS may be limited by a variety of factors both shared among and unique to each community. Although the specific causes for decreasing QS holdings in a specific community may vary, the net effect is overall lower participation by residents of these communities in the halibut and sablefish IFQ fisheries. The substantial decline in the number of resident QS holders and the total amount of QS held by residents of remote coastal communities may have aggravated unemployment and related social and economic conditions in those communities.

The Council recognized that a number of remote coastal communities were struggling to remain economically viable. The Council developed the CQE Program to provide these communities with long-term opportunities to access the halibut and sablefish resources. The Council recommended the CQE Program as an amendment to the IFQ Program in 2002 (Amendment 66 to the FMP), and NMFS implemented the program in 2004 (69 FR 23681, April 30, 2004).

The CQE Program allows a distinct set of remote coastal communities in the GOA that met historic participation criteria in the halibut and sablefish fisheries to purchase and hold catcher vessel halibut QS in halibut Areas 2C, 3A, and 3B, and catcher vessel sablefish QS in the GOA. The communities are eligible to participate in the CQE Program once they are represented by a NMFS-approved non-profit entity called a CQE. The CQE is the holder of the QS and is issued the IFQ annually by NMFS. With certain exceptions, the QS must remain with the CQE. This program structure creates a permanent asset for the community to use. The structure promotes community access to QS to generate participation in, and fishery revenues from, the commercial halibut and sablefish fisheries.

Once the CQE holds QS, the CQE can lease the annual IFQ resulting from the CQE-held QS to individual community residents. The CQE Program also promotes QS ownership by individual community residents. Individuals who lease annual IFQ from the CQE could use IFQ revenue to purchase their own QS. The Council believed, and NMFS agrees, that both the CQE and non-CQE-held QS are important in terms of providing community residents fishing access that promotes the economic health of communities.

Since the CQE Program began, NMFS has implemented regulations that authorize the allocation of limited access fishing privileges for the guided sport halibut fishery and the GOA groundfish fishery for Pacific cod, to be allotted to select communities that are eligible to form a CQE. For the guided sport halibut fishery, the Council recommended and NMFS authorized certain communities in Southeast Alaska and Southcentral Alaska, Areas 2C and 3A, to request and receive a limited number of charter halibut permits, and designate a charter operator to use a community charter halibut permit to participate in the charter halibut fisheries (75 FR 554, January 5, 2010). The Council recommended, and NMFS approved and implemented, Amendment 86 to the FMP to authorize CQEs representing certain communities in the Central and Western GOA to request and receive a limited number of Pacific cod endorsed non-trawl groundfish License Limitation Program (LLP) licenses and assign those LLP licenses to specified users and vessels operating in those CQE communities (76 FR 15826, March 22, 2011). The Council and NMFS wanted to enhance access to the groundfish and halibut fisheries and generate revenues for communities. Furthermore, the Council and NMFS wanted to provide for direct participation by individuals residing in, or operating out of, CQE communities. A description of the specific rationale and criteria considered by the Council and NMFS when authorizing these additional fishery access opportunities to CQEs are provided in the final rules implementing these programs and are not repeated here (75 FR 554, January 5, 2010; 76 FR 15826, March 22, 2011). Generally, the Council chose to rely on the criteria defined under Amendment 66 to determine the subsets of coastal communities that may benefit from participation opportunities in the guided sport halibut and GOA Pacific cod fisheries.

Actions Implemented by This Rule

This final rule implements four separate actions: (1) Revises the vessel use cap applied to sablefish QS held by GOA CQEs (Amendment 94) and to halibut QS held by CQEs; (2) adds three communities to the list of CQE-eligible communities; (3) allows CQEs in Area 3A to purchase halibut vessel category D QS; and (4) adds and updates annual recordkeeping and recording

requirements for CQEs participating in limited access programs for charter halibut fisheries and the GOA Pacific cod endorsed non-trawl groundfish fisheries. Action 1, as it relates to sablefish, implements the GOA FMP. Action 1, as it relates to halibut, and actions 2 through action 4, amend the IFQ Program and CQE Program regulations.

The four actions are described below.

Action 1: Revise Vessel Use Cap for Sablefish (Amendment 94) and Halibut

Action 1 implements the GOA FMP and amends Federal regulations at § 679.42(h)(1)(ii) and (h)(2)(ii) to make the vessel use caps applicable to vessels fishing either sablefish or halibut IFQ derived from CQE-held QS similar to those applicable to vessels fishing sablefish or halibut derived from non-CQE-held QS. This regulatory revision is intended to provide community residents with additional access to vessels to fish IFQs leased from CQEs and may enable more CQEs and eligible community residents to participate in the IFQ Program.

Under this final rule, IFQ derived from non-CQE-held QS is excluded from the 50,000 pound vessel use cap. Only IFQ derived from CQE-held QS will count towards the vessel use cap. In effect, the following annual vessel use caps will apply to all vessels harvesting IFQ: No vessel can be used to harvest (1) more than 50,000 pounds (22.7 mt) of halibut or sablefish IFQ leased from a CQE, and (2) more halibut or sablefish IFQ than the IFQ Program overall vessel use caps. The IFQ Program halibut vessel use caps will remain at 1 percent of the Area 2C halibut IFQ total catch limit and 0.5 percent of the combined halibut total catch limits in all halibut regulatory areas off Alaska (Areas 2C, 3A, 3B, 4A, 4B, 4C, 4D, and 4E). The IFQ Program sablefish vessel use caps will remain at 1 percent of the Southeast sablefish IFQ total allowable catch (TAC) and 1 percent of the combined sablefish TAC in all sablefish regulatory areas off Alaska (GOA and BSAI).

Under Action 1, if, during any fishing year, a vessel is used to harvest halibut IFQ or sablefish IFQ derived from CQE-held QS and non-CQE-held QS, the harvests of IFQ derived from the non-CQE-held QS will not accrue against either the halibut 50,000-pound vessel use cap or the sablefish 50,000-pound vessel use cap for IFQ leased from a CQE. However, the harvests of halibut and sablefish IFQ derived from all sources will accrue against the overall vessel use caps. A vessel cannot use more than 50,000 pounds of halibut IFQ and 50,000 pounds of sablefish IFQ derived from QS held by a CQE during the fishing year. A vessel can be used to harvest additional IFQ from non-CQE-held QS up to the overall vessel use caps applicable in the IFQ Program, if the overall vessel use caps are greater than 50,000 pounds. If the vessel use caps in the IFQ Program are lower than 50,000 pounds in a given year, then the lowest vessel use cap will apply. For example, in the Area 2C halibut fishery in 2013, the overall vessel use cap for the IFQ Program of 1 percent of the Area 2C halibut IFQ total catch limit was 29,700 pounds. This 29,700-pound limit is more restrictive than the 50,000-pound vessel use cap for IFQ leased from a CQE, as proposed under Action 1. Alternatively, for Areas 3A and 3B, the 50,000-pound vessel use cap for halibut IFQ derived from CQE-held QS is more restrictive in 2013 because the overall vessel use cap of 0.5 percent of the combined halibut total catch limits in all halibut regulatory areas was 109,054 pounds.

The final rule is expected to provide additional opportunities for a CQE to lease IFQ to community residents, as the pool of potential resident applicants should increase if there is a larger pool of potential vessels from which residents can fish CQE-leased IFQ. CQEs and community residents leasing IFQ from CQEs may benefit from an increase in available vessels that will be able to use additional CQE-leased IFQ onboard. The revision will increase a vessel's overall IFQ use cap. The resulting increase in harvesting opportunity could benefit CQE communities through increases in revenues and CQE purchases of QS. Such resources are important for CQE communities to develop short and longer term financial and fishery business plans.

Action 2: Add Three CQE Communities

Action 2 of this final rule adds the communities of Game Creek and Naukati Bay in Area 2C, and Cold Bay in Area 3B to the list of communities that are eligible to participate in the GOA CQE Program. In establishing the CQE Program, the Council adopted a specific list of eligible communities to limit entry of new communities into the CQE Program. A community not specifically designated on the list of communities adopted by the Council may apply directly to the Council to be included. In this event, the Council may modify the list of eligible communities through a regulatory amendment approved by the Secretary.

The communities of Game Creek and Naukati Bay petitioned the Council in March 2010 to be added to the list of CQE-eligible communities. Upon receiving the petitions from Game Creek and Naukati Bay, the Council reviewed all communities that are located on the coast of Areas 2C, 3A, or 3B. The Council and NMFS found the community of Cold Bay eligible, and the city of Cold Bay agreed to represent the community in approval of a CQE. The Council evaluated each of the three communities with respect to the CQE qualification criteria and determined they would be eligible to participate as CQE communities. The Council recommended that the communities be added to the list of eligible CQE communities in Table 21 to part 679. This final rule revises Table 21 to part 679 to add the communities of Game Creek, Naukati Bay and Cold Bay as eligible to participate in the CQE Program.

Each of the three eligible communities will need to meet applicable requirements to participate in the CQE Program. Each of the three communities will need to form a new (or use an existing) qualified non-profit entity to represent the eligible community as a CQE, as required by regulations at § 679.41(l). Once the non-profit entity is formed, it must have written approval from the governing body of the community to submit an application to NMFS for review and approval to participate in the CQE Program. Upon approval by NMFS, the non-profit entity becomes a CQE and is permitted to purchase and hold halibut and sablefish QS on behalf of the community. The CQEs representing Game Creek and Naukati Bay will be eligible to purchase halibut catcher vessel QS in Area 2C and Area 3A, and sablefish catcher vessel QS in the GOA (Southeast, West Yakutat, Central Gulf and Western Gulf). The CQE representing Cold Bay will be eligible to purchase halibut catcher vessel QS in Area 3A and Area 3B, and GOA sablefish catcher vessel QS.

The Council also reviewed these three communities with respect to eligibility criteria for the other limited access programs for which the existing CQEs are eligible: the charter halibut limited access program and the LLP for GOA groundfish. The Council determined that the communities of Naukati Bay and Game Creek meet the regulatory criteria to be eligible to participate as CQE communities in the charter halibut limited access program (75 FR 554, January 5, 2010). The Council determined the community of Cold Bay is not eligible because it is located in the Alaska Peninsula regulatory area, Area 3B. Only CQEs representing certain communities in Southeast Alaska and Southcentral Alaska, Areas 2C and 3A, are allowed to request and receive a

limited number of charter halibut permits. The CQEs representing Game Creek and Naukati Bay can request up to four charter halibut permits endorsed for Area 2C. Four is the maximum number of charter halibut permits that CQE communities located in Area 2C may request.

The Council also determined the community of Cold Bay is eligible to participate as a CQE community in the GOA Pacific cod LLP. Naukati Bay and Game Creek are not eligible to participate in the GOA Pacific cod LLP because they are located in Southeast Alaska and the LLP affects the Western and Central GOA. Cold Bay can have its CQE request Pacific cod endorsed non-trawl groundfish LLP licenses as implemented by NMFS under the GOA fixed gear recency action under GOA FMP Amendment 86 (76 FR 15826, March 22, 2011). Under LLP regulations, the community of Cold Bay is eligible to receive a maximum of two Western GOA LLP licenses with endorsements for Pacific cod and pot gear.

NMFS does not know if this action will result in increased community access to the halibut and sablefish fisheries due to the limited financing options and high quota prices seen in recent years. Council analysis indicated that CQE communities are most likely to participate in the charter halibut limited access program because they will receive a limited number of community charter halibut permits at no cost. Furthermore, the charter halibut permit program does not restrict charter halibut permit use only to CQE community residents. Overall, the Council concluded that adding communities to the CQE Program will have a limited impact on existing users of the halibut and groundfish resources of the GOA, but will provide additional opportunities to the residents of Cold Bay, Game Creek, and Naukati Bay.

Action 3: Allow CQEs in Area 3A To Purchase Vessel Category D Halibut QS

Action 3 allows a CQE representing a community or communities in Area 3A to hold QS that is assigned to vessel category D. Action 3 allows some redistribution of vessel category D QS to CQEs, thereby increasing fishing opportunities for CQE communities in Area 3A and for the owners of the small category D catcher vessels they may use. Vessel category D QS is generally the least expensive category of halibut QS because non-CQE IFQ derived from category D QS can only be used on the smallest category of catcher vessel. It is often purchased and used by smaller operations or new entrants. Based on public testimony received from residents of communities located in Area 3A and its review of the CQE Program, the Council determined that additional CQEs in Area 3A could participate in the CQE Program if they were eligible to purchase vessel category D halibut QS.

Action 3 has three provisions that allow CQEs representing communities in Area 3A to hold a limited amount of vessel category D halibut QS in Area 3A as described in the preamble for the proposed rule (78 FR 14490, March 6, 2013). No change to Area 2C is made by this final rule.

The first provision implemented by this final rule requires that CQEs that purchase and hold Area 3A, vessel category D, QS, fish the annual halibut IFQ on category D vessels, which are vessels less than or equal to 35 ft. length overall (LOA). These less than 35 ft. LOA vessels are typically used by an entry-level participant and by most residents in Area 3A communities.

The second provision of this action caps the purchase of vessel category D QS by eligible Area 3A CQEs at 1,223,740 units (132,293 pounds in 2010). The new cap equals the number of vessel category D QS units initially issued to individual residents of Area 3A CQE communities. If Area 3A CQE communities purchase sufficient QS to reach the cap, then NMFS will notify Area 3A CQEs that no more vessel category D QS can be transferred, and further transfers will be prohibited by NMFS. The Council recommended this limit to provide opportunities for CQEs to hold an amount of vessel category D QS up to the amount historically held by CQE residents. However, the cap amount does not significantly expand the total holdings of vessel category D QS in CQE communities or significantly increase potential competition for vessel category D QS between non-CQE and CQE QS holders.

The third provision of this action allows a CQE to purchase any size block of vessel category D halibut QS in Area 3A. A block is a consolidation of QS units that may not be divided. The IFQ Program initially issued QS in blocks to address various problems. Most initially issued QS that resulted in less than the equivalent of 20,000 pounds (9 mt) of IFQ (in 1994 pound equivalents) was ''blocked,'' that is, issued as an inseparable unit. Subsequent amendments to the IFQ Program created a variety of block sizes that were available for transfer. One of the primary purposes of QS blocks and the amendments to the block provisions was to conserve small blocks of QS that could be purchased at a relatively low cost by crew members and new entrants to the IFQ fisheries. As the experience of these fishermen increased and the size of their fishing operations grew, larger amounts of QS were needed to accommodate this growth. The method of a ''sweep-up'' was introduced to allow very small blocks of QS to be permanently consolidated so as to be practical to fish without exceeding block use caps. Over time, the Council and NMFS made moderate increases in the sweep-up levels to allow greater amounts of QS to be swept-up into larger amounts that could be fished more economically.

Prior to this final rule, CQEs were prohibited from purchasing a halibut QS block in Area 3A that consists of less than 46,520 QS units. The majority of vessel category D halibut QS available in Area 3A is in small blocks less than or equal to the current sweep-up limit of 46,520 QS units. At the time of analysis (2010), 10 percent of the Area 3A, vessel category D, halibut QS was unblocked, 28 percent was blocked at levels greater than the sweep-up limit (large blocks), and 62 percent was blocked at levels less than or equal to the sweep-up limit (small blocks). The Council reviewed these data and determined that regulations requiring CQEs to use unblocked QS and large blocks of QS limited the opportunity for CQEs in Area 3A to purchase vessel category D QS. CQEs have few opportunities to purchase vessel category D QS from residents of CQE communities who are either retiring out of the fishery or transitioning to a different category of QS. Therefore, the Council recommended the provision implemented by this final rule to allow CQEs to purchase any size block of vessel category D halibut QS in Area 3A.

The primary effect of the three provisions implemented by this action on existing IFQ and CQE Program participants will be the potential for greater competition in the market for purchasing vessel category D halibut QS, which could result in a higher price. While this potential for competition affects all current and potential QS holders, including resident fishermen of CQE communities, the impacts of the action on all IFQ Program participants will be limited by the total amount of vessel category D halibut QS available for sale and the extent that CQEs are capable of purchasing vessel category D QS in Area 3A. Given current financing options to secure funding for a QS purchase and the trend of reduced rates of halibut QS transfers, the Council and NMFS could not determine through the analysis of this action whether allowing CQEs to access vessel category D QS in Area 3A will have an impact

on the amount of vessel category D QS transfers or the overall market price for the purchase of vessel category D QS. While CQEs will likely continue to have difficulty in funding the purchase of QS, this action will potentially provide more opportunity for communities to participate in the halibut QS market.

Action 4: Technical Revisions to Recordkeeping and Reporting

Action 4 amends CQE recordkeeping and reporting requirements, clarifies CQE Program eligibility for individual communities, and corrects minor errors in current program regulations.

Annual Reporting

When the Council developed the CQE Program, it recommended that CQEs prepare and submit an annual report to NMFS that described the prior year's business and fishing operations. The annual report requirements capture three performance standards that the Council established for CQEs. The performance standards are (1) equitable distribution of IFQ leases within a community, (2) the use of IFQ by local crew members, and (3) the percentage of IFQ resulting from community-held QS that is fished on an annual basis. A CQE's annual report is used by the Council to measure the CQE's prior year's performance against these standards. These annual reports are used to track the progress of the CQEs and assess whether the CQE issuance of the fishing privileges is meeting the overall goal of the CQE Program.

This action consolidates the CQE annual reporting requirements for all CQE participation in Federal fishery management programs in § 679.5(t), the recordkeeping and reporting regulations. Paragraph (t) describes both general reporting requirements for CQE annual reports and specific reporting requirements for any CQE participating in the IFQ, charter halibut limited access, and LLP programs. The action also revises § 679.4(k), Permits, and § 679.5(l), Recordkeeping and Reporting, to reference the single location for annual reporting regulations at § 679.5(t). Finally, the action adds a CQE annual reporting requirement to the charter halibut limited access program at § 300.67(k)(7). This final rule streamlines regulatory text and provides CQEs with a single reference to determine their annual reporting requirements.

CQE Floating Processor Landing Report Requirements

This action revises the recordkeeping and reporting regulations at § 679.5(e) for CQE floating processors. Under Amendment 83 to the GOA FMP, NMFS implemented regulations that allow vessels to receive and process catch harvested by other vessels within the municipal boundaries of CQEs located in the Central and Western GOA (76 FR 74670, December 1, 2011). This action does not modify provisions applicable to the general use of CQE floating processors that were established and described in the final rule implementing Amendment 83, but does clarify specific reporting requirements that must be met. This final rule revises regulations at § 679.5(e)(5) to require CQE floating processors that receive groundfish from catcher vessels to submit a shoreside processor landing report. In addition, the definition of a mothership at § 679.2(3), which is specific to CQE floating processors, is no longer needed and is removed with this final rule.

Modify Table 21 to Part 679

This action makes three modifications to Table 21 to part 679 by adding column headings to describe the management areas where CQE Program communities may use halibut and sablefish. The preambles to the proposed and final rules for GOA Amendment 66 describe the specific communities that may use halibut and sablefish IFQ (proposed rule: 68 FR 59564, October 16, 2003; final rule: 69 FR 23681, April 30, 2004). Under GOA Amendment 66, the Council allowed a distinct set of 42 remote coastal communities with historic participation in the halibut and sablefish fisheries to purchase and hold halibut QS in halibut regulatory Areas 2C, 3A, and 3B of the GOA and sablefish QS in the Southeast and Southcentral Alaska. The distinction between communities that may lease halibut IFQ in Area 3A as compared to Area 3B is not clear in the original table. As a result, this final rule modifies Table 21 to part 679 to clearly delineate which communities may lease halibut IFQ in Areas 3A and 3B. This modification is needed to accurately describe community eligibility to lease halibut QS by halibut IFQ regulatory area and eliminate potential confusion by the regulated public.

This final rule also modifies Table 21 by adding a column to specify the CQE communities in the GOA that are eligible to lease sablefish IFQ to community residents.

A third modification implemented by this final rule adds columns to Table 21 to list the maximum number of charter halibut limited access permits and the halibut IFQ regulatory area of the charter halibut limited access permits that may be granted to CQEs representing specific communities. The halibut charter moratorium program (75 FR 554, January 5, 2010) issued a limited number of charter halibut permits to each CQE representing a community in Area 2C and Area 3A that meets specific criteria denoting underdeveloped charter halibut ports. Under this final rule, Table 21 lists the maximum number of charter halibut limited access permits that may be issued in halibut IFQ regulatory Area 2C and Area 3A by an eligible community.

The three modifications to Table 21 implemented by this rule will assist CQEs and other stakeholders in referencing fishing program eligibility by CQE community.

Remove Table 50 to Part 679

This final rule incorporates the information previously located in Table 50 to part 679 and moves it into Table 21. Table 50 originated as part of Amendment 86 to the FMP to modify the License Limitation Program (LLP) for groundfish fisheries (76 FR 15826, March 22, 2011). Amendment 86 authorized CQEs representing certain communities in the Central and Western GOA to request and receive a limited number of Pacific cod endorsed non-trawl groundfish LLP licenses and assign those LLP licenses to specified users and vessels operating in those CQE communities. Combining Table 21 and Table 50 consolidates regulations describing each CQE community's eligibility to participate in Federal fishery management programs in the GOA. The revised Table 21 clearly defines each CQE community's opportunities and removes duplicate information currently contained in Table 50. CQEs and other stakeholders will be able to reference Table 21 and efficiently locate all the fishing programs for which a specific CQE community is eligible.

Comments and Responses

The proposed rule for this action was published in the **Federal Register** on March 6, 2013 (78 FR 14490). NMFS received three comment letters for the proposed rule. One comment letter did not directly address Amendment 94 or the proposed rule; rather, the commenter provided general comments related to the Federal government's management of marine resources. Because they do not address the amendment or proposed rule, NMFS does not respond to those comments in this final rule. A second commenter was in favor of the rule because it will promote better monitoring and reporting of harvests. The third comment letter was received from a fishing industry representative who supported actions 1

through 3 as proposed. However, the fishing industry representative suggested three modifications to the proposed regulations under action 4 for CQE annual reporting. A summary of these four unique comments and NMFS' responses follow.

Comment 1: I support this rule because it will improve NOAA's ability to monitor harvests. This will benefit fish stocks in Alaska.

Response: NMFS acknowledges the comment.

Comment 2: The proposed rule would require CQEs to report each set of ports from which a vessel using a charter halibut held by the CQE departed and to which it returned, and the total number of trips to occur to and from each set of ports. This reporting requirement is burdensome on CQEs because the information would need to be collected at the end of the fishing season when it is difficult to interface with the CQE permit holder. Moreover, this information is already compiled in the state charter operator's logbook.

Response: NMFS proposed to require CQEs to provide information in their annual reports for each set of ports from which the vessel departed and to which it returned, and the total number of trips to occur to and from each set of ports for charter halibut permits, because the information is not compiled elsewhere. Currently, charter operators record the community or port where each charter fishing trip ended in the Saltwater Charter Logbook administered by the Alaska Department of Fish and Game. The community or port of departure is not recorded in the Saltwater Charter Logbook. Therefore, NMFS will require the complete set of charter halibut permit use information. The proposed reporting requirement is consistent with the goals of the charter halibut limited access program and is necessary for NMFS and the Council to review and evaluate the use of charter halibut permits held by CQEs.

NMFS considers that it is feasible and a reasonable request that CQEs obtain charter halibut permit use information, including each set of ports from which the vessel departed and to which it returned, and the total number of trips to occur to and from each set of ports. A CQE can establish that persons using a charter halibut permit held by the CQE will provide this information as a condition of permit use. Additionally, annual reports are due January 31 for the prior calendar year, which provides sufficient time between the end of the fishing season and the report deadline for the CQE charter halibut permit user to submit required port data to the CQE.

For these reasons, this final rule requires CQEs to report each set of ports from which the vessel departed and to which it returned, and the total number of trips to occur to and from each set of ports in the CQE annual report for charter halibut permits.

Comment 3: Remove the proposed requirement for CQEs to report the business address of each person employed as a crew member on each vessel used to harvest IFQ derived from QS held by the CQE. Since the CQE Program was implemented, it has proven difficult to obtain address information for IFQ crew members after the fishing season is completed. Generally, a crew member's name and residency may be the only information a CQE can obtain. The CQE should only be required to provide the name and residency of crew members employed on each vessel used to harvest IFQ derived from QS held by the CQE.

Response: NMFS agrees. The collection of business address information from an IFQ crew member is not essential for the Council to assess whether the issuance of the fishing privileges to CQEs is meeting the overall goal of the CQE Program. This final rule requires CQEs to report crew member name, and the city and state of residence in the CQE annual report for participation in the IFQ Program. NMFS believes this reporting requirement maintains the Council's objectives for the annual report by providing information on the residency of crew members without imposing burdens on the CQE to obtain a business address for each crew member.

Comment 4: We suggest removing the annual report requirement for a description of the efforts by the CQE to ensure crew members onboard the vessels authorized to harvest LLP groundfish using one or more LLP groundfish licenses held by the CQE are residents of the eligible community. A report on these efforts is outside the scope of the Council's intent when granting a LLP groundfish license to a CQE community because no requirement exists to ensure that crew members onboard the vessel authorized to harvest LLP groundfish were community residents.

Response: NMFS agrees. The final rule implementing Amendment 86 to the GOA FMP (76 FR 15826, March 22, 2011) required that CQEs provide information in an annual report describing the number and residency of crew employed on a vessel using the LLP license held by the CQE. The commenter is correct that Amendment 86 did not implement a requirement for CQEs to ensure crew members onboard vessels authorized to harvest LLP groundfish using LLP groundfish license held by the CQE are residents of the eligible community. NMFS did not intend to add annual reporting requirements for CQE participation in the LLP program with this action. Therefore, this final rule revises the proposed rule as suggested by the commenter and does not include a requirement for the CQE to describe its efforts to ensure crew members onboard the vessel using the LLP are residents of the eligible community. This final rule retains the requirement for CQEs to report the number and city and state residency of crew employed on a vessel using an LLP held by the CQE, as required by the final rule implementing Amendment 86 and as suggested by the commenter.

This final rule also revises the proposed regulation requiring CQEs to report the business address of each crew member employed on a vessel using an LLP held by the CQE in the annual report. As described in the response to comment 3, collection of business address information for a crew member in the annual reports is not essential for the Council to evaluate CQE participation in the LLP program.

Summary of the Changes From Proposed to Final Rule

NMFS made changes from the proposed to final rule in response to public comments. NMFS made three changes to the CQE annual reporting requirements that are discussed in the responses to comments 3 and 4.

- NMFS changed the proposed regulations for the IFQ program reporting requirements at § 679.5(t)(5)(v)(I) to remove the proposed requirement for a CQE to report the business address of each person employed as a crew member on a vessel used to harvest IFQ derived from QS held by the CQE.
- NMFS changed the proposed regulations for the LLP program reporting requirements at § 679.5(t)(5)(vi)(H) to remove the proposed requirement for a CQE to describe its efforts to ensure crew members onboard a vessel authorized to harvest LLP groundfish using one or more LLP groundfish licenses held by the CQE are residents of the eligible community.
- NMFS changed the proposed regulations at § 679.5(t)(5)(vi)(I) to remove the proposed requirement for a CQE to report the business address of each person employed as a crew member on a vessel authorized to harvest LLP groundfish using one or

more LLP groundfish licenses held by the CQE.

Regulations at 15 CFR 902.1(b) are amended to display the control numbers assigned by the Director of the Office of Management and Budget (OMB) for the collections-of-information imposed by this rule. Section 3507(c)(B)(i) of the Paperwork Reduction Act requires that agencies inventory and display a current control number assigned by the Director, OMB, for each agency information collection. 15 CFR 902.1(b) identifies the location of NOAA regulations for which OMB approval numbers have been issued.

Under NOAA Administrative Order 205–11, dated December 17, 1990, the under Secretary for Oceans and Atmosphere has delegated authority to sign material for publication in the **Federal Register** to the Assistant Administrator for Fisheries, NOAA.

Classification

The Administrator, Alaska Region, NMFS, determined that FMP Amendment 94 is necessary for the conservation and management of the sablefish fishery and that it is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws.

Regulations governing the U.S. fisheries for Pacific halibut are developed by the International Pacific Halibut Commission (IPHC), the Pacific Fishery Management Council, the North Pacific Fishery Management Council (Council), and the Secretary of Commerce. Section 5 of the Northern Pacific Halibut Act of 1982 (Halibut Act, 16 U.S.C. 773c) allows the Regional Council having authority for a particular geographical area to develop regulations governing the allocation and catch of halibut in U.S. Convention waters as long as those regulations do not conflict with IPHC regulations. The proposed action is consistent with the Council's authority to allocate halibut catches among fishery participants in the waters in and off Alaska.

Executive Order 12866

This final rule has been determined to be not significant for purposes of Executive Order 12866.

Regulatory Flexibility Act

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

Recordkeeping and Reporting

The final rule would require additional reporting and recordkeeping by CQEs. Specifically, the final rule would require CQEs to add a description of the previous year's business and fishing operations for the charter halibut limited access program to its annual report submitted to NMFS. The reports are currently, and would continue to be, reviewed by NMFS. Information would be released to the Council, if requested, in a manner that is consistent with section 402(b) of the Magnuson-Stevens Act and applicable agency regulations and policies. To improve efficiency and clarity, the CQE activities are being brought together with other CQE forms under one collection.

Duplicate, Overlapping, or Conflicting Federal Rules

No Federal rules that might duplicate, overlap, or conflict with these final actions have been identified.

Collection-of-Information

This final rule contains collection-of-information requirements subject to the Paperwork Reduction Act (PRA) and which have been approved by OMB. The collections are listed below by OMB control number.

OMB Control No. 0648–0272

Two forms (Application for a Non-profit Corporation to be Designated as a Community Quota Entity (CQE) and Application for Transfer of QS/IFQ to or from a CQE) are removed from this collection and are placed in the new OMB Control No. 0648–0665 collection (see below). No changes are made to the forms.

OMB Control No. 0648–0334

Three elements (Application for a CQE to Receive a Non-trawl Groundfish LLP License; Letter of Authorization for Persons Using LLP Licenses Assigned to a CQE; and CQE Annual Report) are removed from this collection and are placed in the new OMB Control No. 0648–0665 collection (see below). No changes are made to the elements.

OMB Control No. 0648–0665

Public reporting burden per response is estimated to average 200 hours for Application to become a Community Quota Entity (CQE); two hours for Application for Transfer of QS/IFQ to or from a CQE; 20 hours for Application for a CQE to Receive a Non-trawl Groundfish LLP License; 40 hours for CQE Annual Report; and one hour for a CQE Letter of Authorization.

The estimated public reporting burden includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

Send comments regarding these burden estimates, or any other aspect of these data collections, including suggestions for reducing the burden, to NMFS (see **ADDRESSES**) and by email to *OIRA_Submission@omb.eop.gov,* or by fax to (202) 395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall 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.

List of Subjects

15 CFR Part 902

Reporting and recordkeeping requirements.

50 CFR Part 300

Fisheries, Reporting and recordkeeping requirements.

50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

Dated: May 30, 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, NMFS amends 15 CFR part 902 and 50 CFR parts 300 and 679 as follows:

TITLE 15—COMMERCE AND FOREIGN TRADE

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

■ 1. The authority citation for part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 et seq.

■ 2. In § 902.1, in the table in paragraph (b), under the entry ''50 CFR:''

■ a. Remove entry for ''300.67(h), (i), (k), and (l);''

■ b. Add an entry in alphanumeric order for ''300.67(h) and (i);''

■ c. Add an entry in alphanumeric order for ''300.67(k) and (l);''
■ d. Revise the entry for ''679.4(k);''
■ e. Remove entry for ''679.4(l);''
■ f. Add an entry in alphanumeric order for ''679.4(l)(1) through (l)(7);''
■ g. Add an entry in alphanumeric order for ''679.5(l)(8);''
■ h. Add an entry in alphanumeric order for ''679.5(t);''
■ i. Remove entry for ''679.41;''
■ j. Add an entry in alphanumeric order for ''679.41(a), (b), (c)(1) through (9), (d) through (f), (g)(1) through (4), (h) through (k), and (m);''
■ k. Add an entry in alphanumeric order for ''679.41(c)(10), (g)(5) through (8), and (l);''
■ l. Add an entry in alphanumeric order for ''679.42(a)(1)(i) through (ii), (b) through (g), (h)(1), (h)(1)(i), (h)(2), and (h)(2)(i);'' and
■ m. Add an entry in alphanumeric order for ''679.42(a)(2)(iii), (h)(1)(ii), and (h)(2)(ii).''

The additions and revisions read as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648–)
* * * * * * *	
50 CFR.	
* * * * * * *	
300.67(h) and (i)	–0592
300.67(k) and (l)	–0592 and –0665
* * * * * * *	
679.4(k)	–0334, –0545, –0565, and –0665
679.4(l)(1) through (l)(7)	–0393
679.5(l)(8)	–0665
* * * * * * *	
679.5(t)	–0665
* * * * * * *	
679.41(a), (b), (c)(1) through (9), (d) through (f), (g)(1) through (4), (h) through (k), and (m)	–0272
679.41(c)(10), (g)(5) through (8), and (l)	–0272 and –0665
679.42(a)(1)(i) through (ii), (b) through (g), (h)(1), (h)(1)(i), (h)(2), and (h)(2)(i)	–0272
679.42(a)(2)(iii), (h)(1)(ii), and (h)(2)(ii)	–0272 and –0665
* * * * * * *	

TITLE 50—WILDLIFE AND FISHERIES

PART 300—INTERNATIONAL FISHERIES REGULATIONS

■ 3. The authority citation for part 300 continues to read as follows:

Authority: 16 U.S.C. 773–773k.

■ 4. In § 300.67, revise paragraph (k)(2)(i) and add paragraph (k)(7) to read as follows:

§ 300.67 Charter halibut limited access program.

* * * * *

(k) * * *

(2) * * *

(i) For Area 2C: Angoon, Coffman Cove, Edna Bay, Game Creek, Hollis, Hoonah, Hydaburg, Kake, Kasaan, Klawock, Metlakatla, Meyers Chuck, Naukati Bay, Pelican, Point Baker, Port Alexander, Port Protection, Tenakee, Thorne Bay, Whale Pass.

* * * * *

(7) An annual report on the use of charter halibut permits must be submitted by the CQE as required at § 679.5(t) of this title.

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 5. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.;* 1801 *et seq.;* 3631 *et seq.;* Pub. L. 108–447.

§ 679.2 [Amended]

■ 6. In § 679.2, remove paragraph (3) of the definition for ''Mothership.''
■ 7. In § 679.4, revise paragraphs (k)(10)(vi)(A), (k)(10)(vi)(C) introductory text, (k)(10)(vi)(C)(*2*), (k)(10)(vi)(F)(*1*), (k)(10)(vi)(F)(*2*), and (k)(10)(vi)(G) to read as follows:

§ 679.4 Permits.

* * * * *

(k) * * *

(10) * * *

(vi) * * *

(A) Each CQE that has been approved by the Regional Administrator under the requirements of § 679.41(l)(3) to represent a community listed in Table 21 to part 679 that is eligible for Pacific cod endorsed non-trawl groundfish licenses, may apply to receive the maximum number of groundfish licenses listed in Table 21 to part 679 on behalf of the eligible communities listed in Table 21 to part 679 that CQE is designated to represent. In order to receive a groundfish license, a CQE must submit a complete application for

a groundfish license to the Regional Administer, NMFS, P.O. Box 21668, Juneau, AK 99802. A CQE may not apply for, and may not receive more than the maximum number of groundfish licenses designated in the regulatory area specified for a community as listed in Table 21 to part 679.

* * * * *

(C) A groundfish license approved for issuance to a CQE by the Regional Administrator for a community listed in Table 21 to part 679:

* * * * *

(*2*) Will have only the regional designation specified for that community as listed in Table 21 to part 679;

* * * * *

(F) * * *

(*1*) NMFS will issue only pot gear Pacific cod endorsements for groundfish licenses with a Western Gulf of Alaska designation to CQEs on behalf of a community listed in Table 21 to part 679.

(*2*) NMFS will issue either a pot gear or a hook-and-line gear Pacific cod endorsement for a groundfish license with a Central Gulf of Alaska designation to CQEs on behalf of a community listed in Table 21 to part 679 based on the application for a groundfish license as described in paragraph (k)(10)(vi)(B) of this section provided that application is received by NMFS not later than six months after April 21, 2011. If an application to receive a groundfish license with a Central Gulf of Alaska designation on behalf of a community listed in Table 21 to part 679 is received later than six months after April 21, 2011, NMFS will issue an equal number of pot gear and hook-and-line gear Pacific cod endorsements for a groundfish license issued to the CQE on behalf of a community listed in Table 21 to part 679. In cases where the total number of groundfish licenses issued on behalf of a community listed in Table 21 to part 679 is not even, NMFS will issue one more groundfish license with a pot gear Pacific cod endorsement than the number of groundfish licenses with a hook-and-line gear Pacific cod endorsement.

(G) An annual report on the use of Pacific cod endorsed non-trawl groundfish licenses shall be submitted by the CQE as required at § 679.5(t).

* * * * *

■ 8. In § 679.5,

■ a. Remove paragraph (e)(6)(i)(A)(*12*) and redesignate paragraph (e)(6)(i)(A)(*13*) as paragraph (e)(6)(i)(A)(*12*);

■ b. Revise paragraphs (e)(3)(iv)(A), (e)(3)(iv)(B), (e)(5) introductory text, (e)(5)(i) introductory text, (e)(6) introductory text, and (l)(8); and

■ c. Add paragraphs (e)(5)(i)(A)(*12*) and (t) to read as follows:

§ 679.5 Recordkeeping and reporting (R&R).

* * * * *

(e) * * *

(3) * * *

(iv) * * *

(A) *Groundfish shoreside processor, SFP, or CQE floating processor.* If a groundfish shoreside processor, SFP, or CQE floating processor, enter the FPP number.

(B) *Groundfish catcher/processor or mothership.* If a groundfish catcher/processor or mothership, enter the FFP number.

* * * * *

(5) *Shoreside processor, SFP, or CQE floating processor landing report.* The manager of a shoreside processor, SFP, or CQE floating processor that receives groundfish from a catcher vessel issued an FFP under § 679.4 and that is required to have an FPP under § 679.4(f) must use eLandings or other NMFS-approved software to submit a daily landing report during the fishing year to report processor identification information and the following information under paragraphs (e)(5)(i) through (iii) of this section:

(i) Information entered for each groundfish delivery to a shoreside processor, SFP, or CQE floating processor. The User for a shoreside processor, SFP, or CQE floating processor must enter the following information (see paragraphs (e)(5)(i)(A) through (C) of this section) for each groundfish delivery (other than IFQ sablefish) provided by the operator of a catcher vessel, the operator or manager of an associated buying station, and from processors for reprocessing or rehandling product into eLandings or other NMFS-approved software:

(A) * * *

(*12*) If receiving deliveries of groundfish in the marine municipal boundaries of a CQE community listed in Table 21 to this part.

* * * * *

(6) *Mothership landing report.* The operator of a mothership that is issued an FFP under § 679.4(b) that receives groundfish from a catcher vessel required to have an FFP under § 679.4 is required to use eLandings or other NMFS-approved software to submit a daily landing report during the fishing year to report processor identification information and the following information under paragraphs (e)(6)(i) through (iii) of this section:

* * * * *

(l) * * *

(8) An annual report on the halibut and sablefish IFQ activity must be submitted by the CQE as required at § 679.5(t).

(t) *Community Entity Quota Program Annual Report*—(1) *Applicability.* A CQE must submit an annual report on the CQE's administrative activities, business operation, and community fishing activities for each calendar year it holds any of the following: community charter halibut permits as described at § 300.67(k) of this title, halibut and sablefish individual fishing quota (IFQ) and quota shares (QS) as described at § 679.41(l)(3), and community Pacific cod endorsed non-trawl groundfish license limitation program (LLP) licenses as described at § 679.4(k)(10)(vi)(F)(*2*). The CQE may combine annual reports about its holdings of community charter halibut permits, IFQ, and LLPs in one report. A CQE must submit annual report data for the community charter halibut permit, IFQ, and LLP permits it held during the calendar year. A CQE is not required to submit an annual report for any calendar year in which it did not hold any community charter halibut permits, IFQ, or LLPs.

(2) *Time limits and submittal.* By January 31, the CQE must submit a complete annual report for the prior calendar year to the Regional Administrator, National Marine Fisheries Service, P.O. Box 21668, Juneau, AK 99802, and to the governing body of each community represented by the CQE as identified in Table 21 to this part.

(3) *Complete annual report.* A complete annual report contains all general report requirements listed in paragraphs (t)(4)(i) through (t)(4)(iii) of this section and all program specific report requirements applicable to the CQE as described in paragraphs (t)(5)(i) through (t)(5)(iii).

(4) *General report requirements.* Each CQE must report the following information:

(i) The eligible community or communities, represented by the CQE, any new communities, and any withdrawn communities;

(ii) Any changes in the bylaws of the CQE, board of directors, or other key management personnel; and

(iii) Copies of minutes and other relevant decision making documents from all CQE board meetings held during the prior calendar year.

(5) *Program specific report requirements.* Each CQE must report

business operations and fishing activity for the charter halibut permit, IFQ, and LLP programs for each eligible community represented by the CQE.

(i) If a community in Table 21 to part 679 was issued one or more charter halibut permits held on behalf of the community by a CQE, then the CQE must complete paragraphs (t)(5)(iv)(A) through (I) of this section;

(ii) If a community in Table 21 to part 679 leased halibut and sablefish IFQ derived from the QS held on behalf of the community by a CQE, then the CQE must complete paragraphs (t)(5)(v)(A) through (J) of this section; and

(iii) If a community in Table 21 to part 679 was assigned one or more Pacific cod endorsed non-trawl groundfish licenses held on behalf of the community by a CQE, then the CQE must complete paragraphs (t)(5)(vi)(A) through (I) of this section.

(iv) *Charter Halibut Limited Access Program.* For each community represented by the CQE, the program specific report for charter halibut permits held by a CQE, must include:

(A) The total number of charter halibut permits held by the CQE at the start of the calendar year, at the end of the calendar year, and projected to be held in the next calendar year;

(B) A description of the process used by the CQE to solicit applications from persons to use charter halibut permits that the CQE is holding on behalf of the eligible community;

(C) The total number of persons who applied to use one or more charter halibut permits;

(D) Name, business address, city and state, and number of charter halibut permits requested by each person who applied to use a charter halibut permit held by the CQE;

(E) A detailed description of the criteria used by the CQE to distribute charter halibut permits among persons who applied to use one or more charter halibut permits that the CQE is holding on behalf of the eligible community;

(F) For each person issued one or more charter halibut permits held by a CQE, provide their name, business address, city and state, ADF&G logbook number(s), and the number(s) of each charter halibut permits they were authorized to use with the corresponding regulatory area endorsement and angler endorsement;

(G) For each vessel authorized to participate in the charter halibut fishery using one or more charter halibut permits held by the CQE, provide the vessel name, ADF&G vessel registration number, USCG documentation number, length overall, home port and each charter halibut permits number held by the CQE and used onboard the vessel;

(H) For each vessel authorized to participate in the charter halibut fishery using one or more charter halibut permits held by the CQE, provide each set of ports from which the vessel departed and to which it returned, and the total number of trips that occurred to and from each set of ports when one or more charter halibut permits held by the CQE was used onboard the vessel; and

(I) For each community represented by the CQE, provide any payments made to the CQE for use of the charter halibut permits.

(v) *Individual Fishing Quota Program.* For each community represented by the CQE, the program specific report for halibut IFQ or sablefish IFQ that were derived from QS held by the CQE must include:

(A) The total amount of halibut QS and total amount of sablefish QS held by the CQE at the start of the calendar year, at the end of the calendar year, and projected to be held in the next calendar year;

(B) A description of the process used by the CQE to solicit applications from eligible community residents to use IFQ that is derived from QS that the CQE is holding on behalf of the eligible community;

(C) The total number of community residents who applied to use IFQ derived from QS held by the CQE;

(D) Name, business address, city and state, and amount of IFQ requested by each person who applied to use IFQ derived from QS held by the CQE;

(E) A detailed description of the criteria used by the CQE to distribute IFQ among eligible community residents who applied to use IFQ held by the CQE;

(F) For each person who leased IFQ derived from QS held by the CQE, provide their name, business address, city and state, each IFQ permit number, and the total pounds of halibut IFQ and total pounds of sablefish IFQ they were authorized to use through each IFQ permit number;

(G) For each vessel used to harvest IFQ derived from QS held by the CQE, provide the vessel name, ADF&G vessel registration number, USCG documentation number, length overall, home port, and each IFQ permit number(s) used onboard;

(H) A description of the efforts made by the CQE to ensure crew members onboard the vessels used to harvest the IFQ derived from QS held by the CQE are residents of the CQE eligible community;

(I) Name, resident city and state of each person employed as a crew member on each vessel used to harvest IFQ derived from QS held by the CQE; and

(J) For each community whose residents landed IFQ derived from QS held by the CQE, provide any payments made to the CQE for use of the IFQ.

(vi) *License Limitation Program.* For each community represented by the CQE, the program specific report for GOA Pacific cod endorsed non-trawl groundfish licenses held by a CQE must include:

(A) The total number of LLP groundfish licenses by gear type endorsement held by the CQE at the start of the calendar year, at the end of the calendar year, and projected to be held in the next calendar year;

(B) A description of the process used by the CQE to solicit applications from residents of the eligible community to use LLP groundfish license(s) that the CQE is holding on behalf of the eligible community;

(C) The total number of community residents who applied to use an LLP groundfish license held by the CQE;

(D) Name, business address, city and state, and number of LLP groundfish licenses requested by each person who applied to use a LLP groundfish license held by the CQE;

(E) A detailed description of the criteria used by the CQE to distribute LLP groundfish licenses among eligible community residents who applied to use LLP groundfish licenses held by the CQE;

(F) For each person assigned one or more LLP groundfish licenses held by the CQE, provide their name, business address, city and state, and LLP groundfish license numbers for permits of each gear endorsement type they were authorized to use;

(G) For each vessel authorized to harvest LLP groundfish using one or more LLP groundfish licenses held by the CQE, provide the vessel name, ADF&G vessel registration number, USCG documentation number, length overall, home port, and each LLP groundfish license number used onboard;

(H) Name, resident city and state of each person employed as a crew member on each vessel authorized to harvest LLP groundfish using one or more LLP groundfish licenses held by the CQE; and

(I) For each community whose residents made landings using one or more LLP groundfish licenses held by the CQE, provide any payments made to the CQE for use of the LLP groundfish licenses.

■ 9. In § 679.41, revise paragraphs (c)(10)(ii) and (g)(5) to read as follows:

§ 679.41 Transfer of quota shares and IFQ.

* * * * *

(c) * * *

(10) * * *

(ii) The CQE applying to receive or transfer QS, has submitted a complete annual report required by § 679.5 (t);

* * * * *

(g) * * *

(5) A CQE may not hold QS in halibut IFQ regulatory area 2C that is assigned to vessel category D.

(i) A CQE may not hold QS in halibut IFQ regulatory area 3A that is assigned to vessel category D on behalf of a community that is located in halibut IFQ regulatory areas 2C or 3B as listed in Table 21 to part 679.

(ii) In aggregate, CQEs may not hold an amount of QS in halibut IFQ regulatory area 3A that is assigned to vessel category D in excess of 1,233,740 QS units.

* * * * *

■ 10. In § 679.42, revise paragraphs (a)(2)(iii), (h)(1)(ii), and (h)(2)(ii) to read as follows:

§ 679.42 Limitations on use of QS and IFQ.

(a) * * *

(2) * * *

(iii) IFQ derived from QS held by a CQE may be used to harvest IFQ species from a vessel of any length, with the exception of IFQ derived from QS in IFQ regulatory area 3A that is assigned to vessel category D.

* * * * *

(h) * * *

(1) * * *

(ii) No vessel may be used, during any fishing year, to harvest more than 50,000 lb (22.7 mt) of IFQ halibut derived from QS held by a CQE, and no vessel used to harvest IFQ halibut derived from QS held by a CQE may be used to harvest more IFQ halibut than the vessel use caps specified in paragraphs (h)(1) introductory text and (h)(1)(i) of this section.

(2) * * *

(ii) No vessel may be used, during any fishing year, to harvest more than 50,000 lb (22.7 mt) of IFQ sablefish derived from QS held by a CQE, and no vessel used to harvest IFQ sablefish derived from QS and held by a CQE may be used to harvest more IFQ sablefish than the vessel use caps specified in paragraphs (h)(2) introductory text and (h)(2)(i) of this section.

* * * * *

■ 11. Revise Table 21 to part 679 to read as follows:

TABLE 21 TO PART 679—ELIGIBLE COMMUNITIES, HALIBUT IFQ REGULATORY AREA LOCATION, COMMUNITY GOVERNING BODY THAT RECOMMENDS THE CQE, AND THE FISHING PROGRAMS AND ASSOCIATED AREAS WHERE A CQE REPRESENTING AN ELIGIBLE COMMUNITY MAY BE PERMITTED TO PARTICIPATE

Eligible GOA community	Halibut IFQ regulatory area in which the community is located	Community governing body that recommends the CQE	May lease halibut QS in halibut IFQ regulatory			May lease sablefish QS in sablefish IFQ regulatory areas	Maximum number of CHPs that may be issued in halibut IFQ regulatory		Maximum number of Pacific cod endorsed non-trawl groundfish licenses that may be assigned in the GOA groundfish regulatory area	
			Area 2C	Area 3A	Area 3B	CG, SE, WG, and WY (All GOA)	Area 2C	Area 3A	Central GOA	Western GOA
Akhiok	3A	City of Akhiok	.....	X	X	X	.....	7	2	.....
Angoon	2C	City of Angoon	X	X	.....	X	4	.....	.....	.....
Chenega Bay	3A	Chenega IRA Village.	.....	X	X	X	.....	7	2	.....
Chignik	3B	City of Chignik	.....	X	X	X	.....	.....	3	.....
Chignik Lagoon.	3B	Chignik Lagoon Village Council.	.....	X	X	X	.....	.....	4	.....
Chignik Lake	3B	Chignik Lake Traditional Council.	.....	X	X	X	.....	.....	2	.....
Coffman Cove	2C	City of Coffman Cove.	X	X	.....	X	4	.....	.....	.....
Cold Bay	3B	City of Cold Bay.	.....	X	X	X	.....	.....	.....	2
Craig	2C	City of Craig	X	X	.....	X	.....	.....	.....	.....
Edna Bay	2C	Edna Bay Community Association.	X	X	.....	X	4	.....	.....	.....
Elfin Cove	2C	Community of Elfin Cove.	X	X	.....	X	.....	.....	.....	.....
Game Creek	2C	N/A	X	X	.....	X	4	.....	.....	.....
Gustavus	2C	Gustavus Community Association.	X	X	.....	X	.....	.....	.....	.....
Halibut Cove	3A	N/A	.....	X	X	X	.....	7	2	.....
Hollis	2C	Hollis Community Council.	X	X	.....	X	4	.....	.....	.....
Hoonah	2C	City of Hoonah	X	X	.....	X	4	.....	.....	.....
Hydaburg	2C	City of Hydaburg.	X	X	.....	X	4	.....	.....	.....
Ivanof Bay	3B	Ivanof Bay Village Council.	.....	X	X	X	.....	.....	.....	2
Kake	2C	City of Kake	X	X	.....	X	4	.....	.....	.....

TABLE 21 TO PART 679—ELIGIBLE COMMUNITIES, HALIBUT IFQ REGULATORY AREA LOCATION, COMMUNITY GOVERNING BODY THAT RECOMMENDS THE CQE, AND THE FISHING PROGRAMS AND ASSOCIATED AREAS WHERE A CQE REPRESENTING AN ELIGIBLE COMMUNITY MAY BE PERMITTED TO PARTICIPATE—Continued

Eligible GOA community	Halibut IFQ regulatory area in which the community is located	Community governing body that recommends the CQE	May lease halibut QS in halibut IFQ regulatory			May lease sablefish QS in sablefish IFQ regulatory areas	Maximum number of CHPs that may be issued in halibut IFQ regulatory		Maximum number of Pacific cod endorsed non-trawl groundfish licenses that may be assigned in the GOA groundfish regulatory area	
			Area 2C	Area 3A	Area 3B	CG, SE, WG, and WY (All GOA)	Area 2C	Area 3A	Central GOA	Western GOA
Karluk	3A	Native Village of Karluk.	.....	X	X	X	.....	7	2	.....
Kasaan	2C	City of Kasaan	X	X	.....	X	4	.....	.....	.....
King Cove	3B	City of King Cove.	.....	X	X	X	.....	.....	.....	9
Klawock	2C	City of Klawock.	X	X	.....	X	4	.....	.....	.....
Larsen Bay	3A	City of Larsen Bay.	.....	X	X	X	.....	7	2	.....
Metlakatla	2C	Metlakatla Indian Village.	X	X	.....	X	4	.....	.....	.....
Meyers Chuck	2C	N/A	X	X	.....	X	4	.....	.....	.....
Nanwalek	3A	Nanwalek IRA Council.	.....	X	X	X	.....	7	2	.....
Naukati Bay	2C	Naukati Bay, Inc.	X	X	.....	X	4	.....	.....	.....
Old Harbor	3A	City of Old Harbor.	.....	X	X	X	.....	7	5	.....
Ouzinkie	3A	City of Ouzinkie.	.....	X	X	X	.....	7	9	.....
Pelican	2C	City of Pelican	X	X	.....	X	4	.....	.....	.....
Perryville	3B	Native Village of Perryville.	.....	X	X	X	.....	.....	.....	2
Point Baker	2C	Point Baker Community.	X	X	.....	X	4	.....	.....	.....
Port Alexander	2C	City of Port Alexander.	X	X	.....	X	4	.....	.....	.....
Port Graham	3A	Port Graham Village Council.	.....	X	X	X	.....	7	2	.....
Port Lions	3A	City of Port Lions.	.....	X	X	X	.....	7	6	.....
Port Protection	2C	Port Protection Community Association.	X	X	.....	X	4	.....	.....	.....
Sand Point	3B	City of Sand Point.	.....	X	X	X	.....	.....	.....	14
Seldovia	3A	City of Seldovia.	.....	X	X	X	.....	7	8	.....
Tatitlek	3A	Native Village of Tatitlek.	.....	X	X	X	.....	7	2	.....
Tenakee Springs.	2C	City of Tenakee Springs.	X	X	.....	X	4	.....	.....	.....
Thorne Bay	2C	City of Thorne Bay.	X	X	.....	X	4	.....	.....	.....
Tyonek	3A	Native Village of Tyonek.	.....	X	X	X	.....	7	2	.....
Whale Pass	2C	Whale Pass Community Association.	X	X	.....	X	4	.....	.....	.....
Yakutat	3A	City of Yakutat	.....	X	X	X	.....	7	3	.....

N/A means there is not a governing body recognized in the community at this time. CHPs are Charter halibut permits.

■ 12. Remove and reserve Table 50 to part 679.

[FR Doc. 2013–13196 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 120718255–3500–02]

RIN 0648–BC38

Amendment 4 to the Corals and Reef Associated Plants and Invertebrates Fishery Management Plan of Puerto Rico and the U.S. Virgin Islands; Seagrass Management

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement Amendment 4 to the Corals and Reef Associated Plants and Invertebrates Fishery Management Plan (FMP) of Puerto Rico and the U.S. Virgin Islands (USVI) (Coral FMP), as prepared and submitted by the Caribbean Fishery Management Council (Council). This final rule removes seagrass species from the Coral FMP. The purpose of this rule and Amendment 4 to the Coral FMP is to address the future management of seagrasses in the U.S. Caribbean exclusive economic zone (EEZ) in accordance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

DATES: This rule is effective July 5, 2013.

ADDRESSES: Electronic copies of Amendment 4 to the Coral FMP, which include an Environmental Assessment, a Regulatory Flexibility Act analysis, a regulatory impact review, and a fishery impact statement, may be obtained from the Southeast Regional Office Web site at: *http://sero.nmfs.noaa.gov/index.html.*

FOR FURTHER INFORMATION CONTACT: Maria del Mar Lopez, Southeast Regional Office, NMFS, telephone: 727–824–5305, or email: *Maria.Lopez@noaa.gov.*

SUPPLEMENTARY INFORMATION: Seagrasses in the U.S. Caribbean EEZ are managed under the Coral FMP. The Coral FMP was prepared by the Council and is implemented under the authority of the Magnuson-Stevens Act by regulations at 50 CFR part 622.

On February 25, 2013, NMFS published a notice of availability for Amendment 4 and requested comments (78 FR 12703). On March 6, 2013, NMFS published a proposed rule for Amendment 4 to the Coral FMP and requested public comments (78 FR 14503). The proposed rule and Amendment 4 to the Coral FMP outline the rationale for the actions contained in this final rule. Amendment 4 to the Coral FMP was approved by the Secretary of Commerce on May 23, 2013. A summary of the actions implemented by this final rule is provided below.

This final rule removes seagrass species from the Coral FMP. The Council determined that Federal management of these seagrass species is unnecessary because there is no known harvest of seagrasses, and these species occur predominantly in Puerto Rico commonwealth and USVI territorial waters (state waters). In addition, seagrasses are designated as essential fish habitat (EFH) for stocks within the four Council FMPs (Queen Conch Resources of Puerto Rico and the USVI, Reef Fish Fishery of Puerto Rico and the USVI, Spiny Lobster Fishery of Puerto Rico and the USVI, and Coral) and as habitat areas of particular concern (HAPC) within special areas in state waters, and will continue to be protected by these designations.

Other Changes Contained in This Final Rule

In 50 CFR part 622, Appendix A, NMFS removes the text regarding aquarium trade species as being in the ''data collection'' category in the Coral FMP and the Reef Fish Fishery of Puerto Rico and the USVI FMP (Table 1 and Table 2).

NMFS has also determined that the description of waypoints B and C in the Puerto Rico Management Area (in Table 1) and waypoints B and C in the St. Thomas/St. John Management Area (in Table 3), as well as the boundary line that connects these two waypoints, were incorrectly described in the final rule for the 2010 Caribbean ACL Amendment. NMFS removes the description for points B and C in Appendix E, and maintains just the waypoints because they are sufficient descriptions of the boundary in those instances. NMFS also revises the description of the boundary line that connects waypoints B and C in Appendix E to be ''the 3-nautical mile Territorial boundary of the St. Thomas/St. John island group'' instead of ''the EEZ/Territorial boundary,'' to be consistent with the Council's intent for the specification of these Caribbean island management areas. Additionally, NMFS has determined that two boundary lines, one in the St. Croix Management Area (in Table 2) and one in the St. Thomas/St. John Management Area (in Table 3), were incorrectly described as the ''EEZ/Territorial boundary'' and are revised to ''International/EEZ boundary.'' These revisions are consistent with the Council's intent for the specification of these Caribbean island management areas.

Comments and Responses

NMFS received a total of three comments on Amendment 4 to the Coral FMP and the proposed rule. A Federal agency had no comments on the actions in Amendment 4 to the Coral FMP. One comment was unrelated to the actions in Amendment 4 to the Coral FMP. The specific comment related to the actions contained in the amendment or the proposed rule is summarized and responded to below.

Comment: Seagrasses are important fish breeding habitat and in addition to being protected from harvest, they should also be protected from physical damage (*e.g.,* sand harvesting, anchoring, mooring, traps).

Response: NMFS agrees that seagrasses are important fish habitats. However, because there is no known direct harvest of seagrasses and these species occur predominately in state waters, the Council determined that Federal management of these species would serve no useful purpose. That decision does not mean that seagrasses are unprotected. Seagrass habitat is already protected by EFH and HAPC designations in the four Caribbean Fishery Management Council FMPs (Queen Conch Resources of Puerto Rico and the USVI, Reef Fish Fishery of Puerto Rico and the USVI, Spiny Lobster Fishery of Puerto Rico and the USVI, and Coral). This rule will not affect those EFH and HAPC designations. To the extent that seagrasses are present in Federal waters, this habitat is protected by anchoring restrictions in some areas and year-round prohibitions on the use of pots, traps, bottom longlines, gillnets, or trammel nets in Federal closed areas. Other management measures, such as the prohibition on the use of chemicals, plant or plant-derived toxins, and explosives to harvest reef-associated species, as well as restricting to hand-held dip nets and slurp guns the allowable gear for collecting marine aquarium fishes, provide direct and indirect physical benefits to the seagrass

habitat by protecting it from the adverse effects of specific fishing gear.

Changes From the Proposed Rule

In 50 CFR Part 622 Appendix A Tables 1 and 2, NMFS has identified several species names that contained misspellings. These misspellings are corrected in this final rule.

Classification

The Regional Administrator, Southeast Region, NMFS, has determined that the actions contained in this final rule are consistent with Amendment 4 to the Coral FMP, the Magnuson-Stevens Act and other applicable law.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published in the proposed rule and is not repeated here. No comments were received regarding the certification and NMFS has not received any new information that would affect its determination. No changes to the final rule were made in response to public comments. As a result, a regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Seagrass, Virgin Islands.

Dated: May 30, 2013.

Alan D. Risenhoover,

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

For the reasons set out in the preamble, 50 CFR Part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In Appendix A to part 622, Tables 1 and 2 are revised to read as follows:

Appendix A to Part 622—Species Tables

Table 1 of Appendix A to Part 622—Caribbean Coral Reef Resources

I. Coelenterates—Phylum Coelenterata
A. Hydrocorals—Class Hydrozoa
1. Hydroids—Order Anthoathecata
Family Milleporidae
Millepora spp., Fire corals
Family Stylasteridae
Stylaster roseus, Rose lace corals
B. Anthozoans—Class Anthozoa
1. Soft corals—Order Alcyonacea
Family Anthothelidae
Erythropodium caribaeorum, Encrusting gorgonian
Iciligorgia schrammi, Deepwater sea fan
Family Briareidae
Briareum asbestinum, Corky sea finger
Family Clavulariidae
Carijoa riisei
Telesto spp.
2. Gorgonian corals—Order Gorgonacea
Family Ellisellidae
Ellisella spp., Sea whips
Family Gorgoniidae
Gorgonia flabellum, Venus sea fan
G. mariae, Wide-mesh sea fan
G. ventalina, Common sea fan
Pseudopterogorgia acerosa, Sea plume
P. albatrossae
P. americana, Slimy sea plume
P. bipinnata, Bipinnate plume
P. rigida
Pterogorgia anceps, Angular sea whip
P. citrina, Yellow sea whip
Family Plexauridae
Eunicea calyculata, Warty sea rod
E. clavigera
E. fusca, Doughnut sea rod
E. knighti
E. laciniata
E. laxispica
E. mammosa, Swollen-knob
E. succinea, Shelf-knob sea rod
E. touneforti
Muricea atlantica
M. elongata, Orange spiny rod
M. laxa, Delicate spiny rod
M. muricata, Spiny sea fan
M. pinnata, Long spine sea fan
Muriceopsis spp.
M. flavida, Rough sea plume
M. sulphurea
Plexaura flexuosa, Bent sea rod
P. homomalla, Black sea rod
Plexaurella dichotoma, Slit-pore sea rod
P. fusifera
P. grandiflora
P. grisea
P. nutans, Giant slit-pore
Pseudoplexaura crucis
P. flagellosa
P. porosa, Porous sea rod
P. wagenaari
3. Hard Corals—Order Scleractinia
Family Acroporidae
Acropora cervicornis, Staghorn coral
A. palmata, Elkhorn coral
A. prolifera, Fused staghorn
Family Agaricidae
Agaricia agaricites, Lettuce leaf coral
A. fragilis, Fragile saucer
A. lamarcki, Lamarck's sheet
A. tenuifolia, Thin leaf lettuce
Leptoseris cucullata, Sunray lettuce
Family Astrocoeniidae
Stephanocoenia michelinii, Blushing star
Family Caryophylliidae
Eusmilia fastigiata, Flower coral
Tubastrea aurea, Cup coral
Family Faviidae
Cladocora arbuscula, Tube coral
Colpophyllia natans, Boulder coral
Diploria clivosa, Knobby brain coral
D. labyrinthiformis, Grooved brain
D. strigosa, Symmetrical brain
Favia fragum, Golfball coral
Manicina areolata, Rose coral
M. mayori, Tortugas rose coral
Montastrea annularis, Boulder star coral
M. cavernosa, Great star coral
Solenastrea bournoni, Smooth star coral
Family Meandrinidae
Dendrogyra cylindrus, Pillar coral
Dichocoenia stellaris, Pancake star
D. stokesi, Elliptical star
Meandrina meandrites, Maze coral
Family Mussidae
Isophyllastrea rigida, Rough star coral
Isophyllia sinuosa, Sinuous cactus
Mussa angulosa, Large flower coral
Mycetophyllia aliciae, Thin fungus coral
M. danae, Fat fungus coral
M. ferox, Grooved fungus
M. lamarckiana, Fungus coral
Scolymia cubensis, Artichoke coral
S. lacera, Solitary disk
Family Oculinidae
Oculina diffusa, Ivory bush coral
Family Pocilloporidae
Madracis decactis, Ten-ray star coral
M. mirabilis, Yellow pencil
Family Poritidae
Porites astreoides, Mustard hill coral
P. branneri, Blue crust coral
P. divaricata, Small finger coral
P. porites, Finger coral
Family Rhizangiidae
Astrangia solitaria, Dwarf cup coral
Phyllangia americana, Hidden cup coral
Family Siderastreidae
Siderastrea radians, Lesser starlet
S. siderea, Massive starlet
4. Black Corals—Order Antipatharia
Antipathes spp., Bushy black coral
Stichopathes spp., Wire coral
II. [Reserved]
Aquarium Trade Species in the Caribbean Coral FMP
I. Sponges—Phylum Porifera
A. Demosponges—Class Demospongiae
Amphimedon compressa, Erect rope sponge
Chondrilla nucula, Chicken liver sponge
Cinachyrella alloclada
Geodia neptuni, Potato sponge
Haliclona spp., Finger sponge
Myriastra spp.
Niphates digitalis, Pink vase sponge
N. erecta, Lavender rope sponge
Spinosella plicifera
S. vaginalis
Tethya crypta
II. Coelenterates—Phylum Coelenterata
A. Anthozoans—Class Anthozoa
1. Anemones—Order Actiniaria
Aiptasia tagetes, Pale anemone
Bartholomea annulata, Corkscrew anemone
Condylactis gigantea, Giant pink-tipped anemone

Heteractis lucida, Knobby anemone
Lebrunia spp., Staghorn anemone
Stichodactyla helianthus, Sun anemone
2. Colonial Anemones—Order Zoanthidea
Zoanthus spp., Sea mat
3. False Corals—Order Corallimorpharia
Discosoma spp. (formerly *Rhodactis*), False coral
Ricordea florida, Florida false coral
III. Annelid Worms—Phylum Annelida
A. Polychaetes—Class Polychaeta
Family Sabellidae, Feather duster worms
Sabellastarte spp., Tube worms
S. magnifica, Magnificent duster
Family Serpulidae
Spirobranchus giganteus, Christmas tree worm
IV. Mollusks—Phylum Mollusca
A. Gastropods—Class Gastropoda
Family Elysiidae
Tridachia crispata, Lettuce sea slug
Family Olividae
Oliva reticularis, Netted olive
Family Ovulidae
Cyphoma gibbosum, Flamingo tongue
B. Bivalves—Class Bivalvia
Family Limidae
Lima spp., Fileclams
L. scabra, Rough fileclam
Family Spondylidae
Spondylus americanus, Atlantic thorny oyster
C. Cephalopods—Class Cephalopoda
1. Octopuses—Order Octopoda
Family Octopodidae
Octopus spp. (except the Common octopus, *O. vulgaris*)
V. Arthropods—Phylum Arthropoda
A. Crustaceans—Subphylum Crustacea
1. Decapods—Order Decapoda
Family Alpheidae
Alpheus armatus, Snapping shrimp
Family Diogenidae
Paguristes spp., Hermit crabs
P. cadenati, Red reef hermit
Family Grapsidae
Percnon gibbesi, Nimble spray crab
Family Hippolytidae
Lysmata spp., Peppermint shrimp
Thor amboinensis, Anemone shrimp
Family Majidae, Coral crabs
Mithrax spp., Clinging crabs
M. cinctimanus, Banded clinging
M. sculptus, Green clinging
Stenorhynchus seticornis, Yellowline arrow
Family Palaemonida
Periclimenes spp., Cleaner shrimp
Family Squillidae, Mantis crabs
Gonodactylus spp.
Lysiosquilla spp.
Family Stenopodidae, Coral shrimp
Stenopus hispidus, Banded shrimp
S. scutellatus, Golden shrimp
VI. Echinoderms—Phylum Echinodermata
A. Feather stars—Class Crinoidea
Analcidometra armata, Swimming crinoid
Davidaster spp., Crinoids
Nemaster spp., Crinoids
B. Sea stars—Class Asteroidea
Astropecten spp., Sand stars
Linckia guildingii, Common comet star
Ophidiaster guildingii, Comet star
Oreaster reticulatus, Cushion sea star
C. Brittle and basket stars—Class Ophiuroidea
Astrophyton muricatum, Giant basket star
Ophiocoma spp., Brittlestars
Ophioderma spp., Brittlestars
O. rubicundum, Ruby brittlestar
D. Sea Urchins—Class Echinoidea
Diadema antillarum, Long-spined urchin
Echinometra spp., Purple urchin
Eucidaris tribuloides, Pencil urchin
Lytechinus spp., Pin cushion urchin
Tripneustes ventricosus, Sea egg
E. Sea Cucumbers—Class Holothuroidea
Holothuria spp., Sea cucumbers
VII. Chordates—Phylum Chordata
A. Tunicates—Subphylum Urochordata

Table 2 of Appendix A to Part 622—Caribbean Reef Fish

Lutjanidae—Snappers
Unit 1
Black snapper, *Apsilus dentatus*
Blackfin snapper, *Lutjanus buccanella*
Silk snapper, *Lutjanus vivanus*
Vermilion snapper, *Rhomboplites aurorubens*
Wenchman, *Pristipomoides aquilonaris*
Unit 2
Cardinal, *Pristipomoides macrophthalmus*
Queen snapper, *Etelis oculatus*
Unit 3
Gray snapper, *Lutjanus griseus*
Lane snapper, *Lutjanus synagris*
Mutton snapper, *Lutjanus analis*
Dog snapper, *Lutjanus jocu*
Schoolmaster, *Lutjanus apodus*
Mahogany snapper, *Lutjanus mahogoni*
Unit 4
Yellowtail snapper, *Ocyurus chrysurus*
Serranidae—Sea basses and Groupers
Unit 1
Nassau Grouper, *Epinephelus striatus*
Unit 2
Goliath grouper, *Epinephelus itajara*
Unit 3
Coney, *Epinephelus fulvus*
Graysby, *Epinephelus cruentatus*
Red hind, *Epinephelus guttatus*
Rock hind, *Epinephelus adscensionis*
Unit 4
Black grouper, *Mycteroperca bonaci*
Red grouper, *Epinephelus morio*
Tiger grouper, *Mycteroperca tigris*
Yellowfin grouper, *Mycteroperca venenosa*
Unit 5
Misty grouper, *Epinephelus mystacinus*
Yellowedge grouper, *Epinephelus flavolimbatus*
Haemulidae—Grunts
White grunt, *Haemulon plumierii*
Margate, *Haemulon album*
Tomtate, *Haemulon aurolineatum*
Bluestriped grunt, *Haemulon sciurus*
French grunt, *Haemulon flavolineatum*
Porkfish, *Anisotremus virginicus*
Mullidae—Goatfishes
Spotted goatfish, *Pseudupeneus maculatus*
Yellow goatfish, *Mulloidichthys martinicus*
Sparidae—Porgies
Jolthead porgy, *Calamus bajonado*
Sea bream, *Archosargus rhomboidalis*
Sheepshead porgy, *Calamus penna*
Pluma, *Calamus pennatula*
Holocentridae—Squirrelfishes
Blackbar soldierfish, *Myripristis jacobus*
Bigeye, *Priacanthus arenatus*
Longspine squirrelfish, *Holocentrus rufus*
Squirrelfish, *Holocentrus adscensionis*
Malacanthidae—Tilefishes
Blackline tilefish, *Caulolatilus cyanops*
Sand tilefish, *Malacanthus plumieri*
Carangidae—Jacks
Blue runner, *Caranx crysos*
Horse-eye jack, *Caranx latus*
Black jack, *Caranx lugubris*
Almaco jack, *Seriola rivoliana*
Bar jack, *Caranx ruber*
Greater amberjack, *Seriola dumerili*
Yellow jack, *Caranx bartholomaei*
Scaridae—Parrotfishes
Blue parrotfish, *Scarus coeruleus*
Midnight parrotfish, *Scarus coelestinus*
Princess parrotfish, *Scarus taeniopterus*
Queen parrotfish, *Scarus vetula*
Rainbow parrotfish, *Scarus guacamaia*
Redfin parrotfish, *Sparisoma rubripinne*
Redtail parrotfish, *Sparisoma chrysopterum*
Stoplight parrotfish, *Sparisoma viride*
Redband parrotfish, *Sparisoma aurofrenatum*
Striped parrotfish, *Scarus croicensis*
Acanthuridae—Surgeonfishes
Blue tang, *Acanthurus coeruleus*
Ocean surgeonfish, *Acanthurus bahianus*
Doctorfish, *Acanthurus chirurgus*
Balistidae—Triggerfishes
Ocean triggerfish, *Canthidermis sufflamen*
Queen triggerfish, *Balistes vetula*
Sargassum triggerfish, *Xanthichthys ringens*
Monacanthidae—Filefishes
Scrawled filefish, *Aluterus scriptus*
Whitespotted filefish, *Cantherhines macrocerus*
Black durgon, *Melichthys niger*
Ostraciidae—Boxfishes
Honeycomb cowfish, *Lactophrys polygonia*
Scrawled cowfish, *Lactophrys quadricornis*
Trunkfish, *Lactophrys trigonus*
Spotted trunkfish, *Lactophrys bicaudalis*
Smooth trunkfish, *Lactophrys triqueter*
Labridae—Wrasses
Hogfish, *Lachnolaimus maximus*
Puddingwife, *Halichoeres radiatus*
Spanish hogfish, *Bodianus rufus*
Pomacanthidae—Angelfishes
Queen angelfish, *Holacanthus ciliaris*
Gray angelfish, *Pomacanthus arcuatus*
French angelfish, *Pomacanthus paru*
Aquarium Trade Species in the Caribbean Reef Fish FMP:
Frogfish, *Antennarius* spp.
Flamefish, *Apogon maculatus*
Conchfish, *Astrapogon stellatus*
Redlip blenny, *Ophioblennius atlanticus*
Peacock flounder, *Bothus lunatus*
Longsnout butterflyfish, *Chaetodon aculeatus*
Foureye butterflyfish, *Chaetodon capistratus*
Spotfin butterflyfish, *Chaetodon ocellatus*
Banded butterflyfish, *Chaetodon striatus*
Redspotted hawkfish, *Amblycirrhitus pinos*
Flying gurnard, *Dactylopterus volitans*
Atlantic spadefish, *Chaetodipterus faber*
Neon goby, *Gobiosoma oceanops*
Rusty goby, *Priolepis hipoliti*
Royal gramma, *Gramma loreto*
Creole wrasse, *Clepticus parrae*
Yellowcheek wrasse, *Halichoeres cyanocephalus*
Yellowhead wrasse, *Halichoeres garnoti*
Clown wrasse, *Halichoeres maculipinna*

Pearly razorfish, *Hemipteronotus novacula*
Green razorfish, *Hemipteronotus splendens*
Bluehead wrasse, *Thalassoma bifasciatum*
Chain moray, *Echidna catenata*
Green moray, *Gymnothorax funebris*
Goldentail moray, *Gymnothorax miliaris*
Batfish, *Ogcocephalus* spp.
Goldspotted eel, *Myrichthys ocellatus*
Yellowhead jawfish, *Opistognathus aurifrons*
Dusky jawfish, *Opistognathus whitehursti*
Cherubfish, *Centropyge argi*
Rock beauty, *Holacanthus tricolor*
Sergeant major, *Abudefduf saxatilis*
Blue chromis, *Chromis cyanea*
Sunshinefish, *Chromis insolata*
Yellowtail damselfish, *Microspathodon chrysurus*
Dusky damselfish, *Pomacentrus fuscus*
Beaugregory, *Pomacentrus leucostictus*
Bicolor damselfish, *Pomacentrus partitus*
Threespot damselfish, *Pomacentrus planifrons*
Glasseye snapper, *Priacanthus cruentatus*
High-hat, *Equetus acuminatus*
Jackknife-fish, *Equetus lanceolatus*
Spotted drum, *Equetus punctatus*
Scorpaenidae—Scorpionfishes
Butter hamlet, *Hypoplectrus unicolor*
Swissguard basslet, *Liopropoma rubre*
Greater soapfish, *Rypticus saponaceus*
Orangeback bass, *Serranus annularis*
Lantern bass, *Serranus baldwini*
Tobaccofish, *Serranus tabacarius*
Harlequin bass, *Serranus tigrinus*
Chalk bass, *Serranus tortugarum*
Caribbean tonguefish, *Symphurus arawak*
Seahorses, *Hippocampus* spp.
Pipefishes, *Syngnathus* spp.
Sand diver, *Synodus intermedius*
Sharpnose puffer, *Canthigaster rostrata*
Porcupinefish, *Diodon hystrix*

* * * * *

■ 3. Appendix E to part 622 is revised to read as follows:

Appendix E to Part 622—Caribbean Island/Island Group Management Areas

Table 1 of Appendix E to Part 622—*Coordinates of the Puerto Rico Management Area.*

The Puerto Rico management area is bounded by rhumb lines connecting, in order, the following points.

Point	North latitude	West longitude
A (intersects with the International/EEZ boundary)	19°37′29″	65°20′57″
B	18°25′46.3015″	65°06′31.866″
From Point B, proceed southerly along the 3-nautical mile Territorial boundary of the St. Thomas/St. John island group to Point C.		
C	18°13′59.0606″	65°05′33.058″
D	18°01′16.9636″	64°57′38.817″
E	17°30′00.000″	65°20′00.1716″
F	16°02′53.5812″	65°20′00.1716″
From Point F, proceed southwesterly, then northerly, then easterly, and finally southerly along the International/EEZ boundary to Point A.		
A (intersects with the International/EEZ boundary)	19°37′29″	65°20′57″

Table 2 of Appendix E to Part 622—*Coordinates of the St. Croix Management Area.*

The St. Croix management area is bounded by rhumb lines connecting, in order, the following points.

Point	North latitude	West longitude
G	18°03′03″	64°38′03″
From Point G, proceed easterly, then southerly, then southwesterly along the International/EEZ boundary to Point F.		
F	16°02′53.5812″	65°20′00.1716″
E	17°30′00.000″	65°20′00.1716″
D	18°01′16.9636″	64°57′38.817″
G	18°03′03″	64°38′03″

Table 3 of Appendix E to Part 622—*Coordinates of the St. Thomas/St. John Management Area.*

The St. Thomas/St. John management area is bounded by rhumb lines connecting, in order, the following points.

Point	North latitude	West longitude
A (intersects with the International/EEZ boundary)	19°37′29″	65°20′57″
From Point A, proceed southeasterly along the International/EEZ boundary to Point G.		
G	18°03′03″	64°38′03″
D	18°01′16.9636″	64°57′38.817″
C	18°13′59.0606″	65°05′33.058″
From Point C, proceed northerly along the 3-nautical mile Territorial boundary of the St. Thomas/St. John island group to Point B.		
B	18°25′46.3015″	65°06′31.866″
A (intersects with the International/EEZ boundary)	19°37′29″	65°20′57″

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 121004516–3498–02]

RIN 0648–BC64

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Gag Management Measures

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

ACTION: Final rule.

SUMMARY: NMFS implements management measures described in a framework action to the Fishery Management Plan for the Reef Fish Resources of the Gulf of Mexico (FMP), as prepared by the Gulf of Mexico Fishery Management Council (Council). This final rule establishes a closure date for the 2013 recreational sector for the harvest of gag based on the projected annual catch target (ACT), and reduces the geographic extent of the recreational shallow-water grouper (SWG) fixed seasonal closure. In the Gulf of Mexico (Gulf), SWG consists of gag, red grouper, black grouper, scamp, yellowfin grouper, and yellowmouth grouper.

The purpose of this rule is to help achieve optimum yield (OY) for the Gulf gag and other SWG resources and prevent overfishing from the stocks in the SWG complex.

DATES: This rule is effective July 5, 2013.

ADDRESSES: Electronic copies of the framework action, which includes an environmental assessment, regulatory impact review, and Regulatory Flexibility Act analysis, may be obtained from the Southeast Regional Office Web site at *http://sero.nmfs.noaa.gov/sf/GrouperSnapperandReefFish.htm.*

FOR FURTHER INFORMATION CONTACT: Peter Hood, Southeast Regional Office, NMFS, telephone 727–824–5305; email: *Peter.Hood@noaa.gov.*

SUPPLEMENTARY INFORMATION: The reef fish fishery of the Gulf includes SWG and is managed under the FMP. The FMP was prepared by the Council and is implemented through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On February 21, 2013, NMFS published a proposed rule for the framework action and requested public comments (78 FR 12012). The proposed rule and the framework action outline the rationale for the actions contained in this final rule. A summary of the actions implemented by this final rule are provided below.

This final rule: (1) Establishes a closure date for the recreational sector for the harvest of gag based on when the ACT is projected to be reached, rather than closing on November 1, 2013, as prescribed under current regulations; and (2) modifies the geographic extent of the recreational SWG fixed seasonal closure, which occurs from February 1 through March 31, each year, to allow recreational SWG fishing within Federal waters shoreward of the 20-fathom boundary during the closure. Both measures are intended to prevent overfishing of gag. However, while the second measure will reduce restrictions on fishermen wanting to harvest SWG in nearshore waters during the closure, the reduction in the geographic extent of the closure still provides some spawning season protection for several SWG species, but provides a better opportunity for the recreational sector to achieve OY from the stocks in the SWG complex in the Gulf.

Management Measures Contained in This Final Rule

Recreational Gag Fishing Season

The recreational gag fishing season opens on July 1, each year. Currently, the season closes on November 1, each year, and remains closed until the following July. This final rule sets the closure date of the recreational sector for gag based on when the ACT is projected to be reached. NMFS will monitor recreational gag landings in-season and if NMFS projects the recreational gag ACL will be reached before the expected ACT closure date, NMFS may publish a different closure date in the **Federal Register**.

Given a 2013 ACT of 1.287 million lb (0.584 million kg), gutted weight, and assuming compatible state regulations, NMFS projected at the time of the proposed rule that the recreational gag fishing season would remain open until sometime between November 11 and December 3, 2013. In 2013, four Gulf coast counties in Florida established recreational gag fishing seasons in state waters that are inconsistent with the 2013 Federal season. All other Gulf coast counties are consistent with the season for Federal waters. Therefore, the effect of these inconsistent seasons on gag harvest has been factored into projections of how long the Federal season may remain open based on the ACT.

Using updated landings data, NMFS now projects the ACT for the recreational sector for gag will be reached on December 3, 2013. Therefore, the recreational sector for gag will open at 12:01 a.m., local time, on July 1, 2013, and close at 12:01 a.m., local time, December 3, 2013, unless NMFS determines, using in-season landings data, that the ACL will be reached before December 3, 2013, at which time NMFS will publish a new closure date in the **Federal Register**.

During the closure, the bag and possession limit of gag in or from the Gulf exclusive economic zone (EEZ) is zero. For persons in the Gulf on board a vessel for which a valid Federal charter vessel/headboat permit for Gulf reef fish has been issued, this bag and possession limit applies without regard to where such species were harvested, *i.e.* in state or Federal waters. The recreational sector for gag will reopen on July 1, 2014, the start of the 2014 recreational fishing season.

Recreational SWG Fixed Seasonal Closure

This final rule modifies the geographic extent of the February 1 through March 31 recreational SWG fixed seasonal closure, so that it applies only to Federal waters seaward of the 20-fathom boundary as established by the coordinates in 50 CFR 622.34(d). This modification will continue to provide protection for spawning gag as well as for other SWG species that spawn in waters deeper than 20 fathoms in February and March, while allowing fishermen to harvest SWG shoreward of the 20-fathom contour. The coordinates of the boundary follow the 20-fathom reef fish bottom longline boundary from the Florida Keys north and west to Cape San Blas, as specified in Table 1 of Appendix B to 50 CFR Part 622. However, where the longline boundary moves out to 50 fathoms west of Cape San Blas, this rule establishes new 20-fathom boundary coordinates for waters off Cape San Blas to the U.S. and Mexico border.

Comments and Reponses

NMFS received a total of 23 individual comments on the framework action and the proposed rule. Seven individual comments supported all or a part of the rule. One Federal agency indicated they had no objection to the framework action or the rule. The

remaining comments opposed the rule. The comments specific to this framework action or proposed rule are grouped into 7 topics. These topics and NMFS' respective responses are summarized below.

Comment 1: Alternative gag recreational seasons, beyond the proposed season from July 1 until the ACT is projected to be reached, should be considered. A part of this consideration should be to ensure the season coincides with seasons for other important reef fish species like red snapper and greater amberjack.

Response: The Council considered several gag season alternatives in the framework action including split seasons and those based on matching the gag season with the seasons of other reef fish. However, the Council selected a single gag season beginning July 1 and ending when the ACT is projected to be reached (December 3, 2013) because this season is estimated to achieve the longest fishing season consistent with the harvest reductions outlined in the 10-year gag rebuilding plan. Other seasons considered by the Council tended to occur when gag harvest rates were higher and reduced the total season length by more than 30 to 60 days. The Council concluded the greatest benefits to the recreational sector would be achieved with a longer gag season.

Comment 2: The assumptions used to determine the 2013 gag season dates and lengths are overly optimistic and will likely result in ACLs being exceeded.

Response: NMFS disagrees that the assumptions used were overly optimistic and would likely result in ACLs being exceeded. The 2013 gag season length is projected based on landings data to best reflect current fishing conditions. The projection model, as described in Appendix D of the framework action, estimates the closure date by assessing total removals (*i.e.,* landed and discarded dead fish). This model was used to establish the October 31 closure date for the 2012 fishing season and preliminary recreational landings data for 2012 estimate only 72 percent of the ACL was caught, suggesting the model is not likely to overestimate the season length. The projections are also based on harvesting the ACT [1.287 million lb (0.584 million kg), gutted weight], which is more conservative than the ACL (1.495 million lb, or 0.678 million kg, gutted weight). In addition, landings will be monitored during the fishing year, and if these data indicate the ACL would be met prior to the season closure date, recreational gag fishing will be closed when the ACL is projected to be reached.

Comment 3: The level of harvest used to derive the season length does not match on-the-water observations of gag abundance. In addition, fishing effort is likely down with the current level of fuel prices, which would support a longer season.

Response: The Council did not consider and this rule does not address changes to the harvest limits established in Amendment 32 to the FMP (77 FR 6988, February 10, 2012). To project the gag season length, a projection model (Appendix D of the framework action) was developed by NMFS and reviewed by the Council's Science and Statistical Committee. The model uses Southeast Fisheries Science Center's ACL database and is based on current levels of fishing effort by using actual landings information to estimate 2013 fishing effort.

Comment 4: Changes to the SWG spawning closure should be rejected until NMFS and the Council evaluate the likely biological consequences for gag and other SWG stocks by removing the spawning closure.

Response: NMFS disagrees that the change to the SWG spawning closure should be rejected and that additional evaluation of the biological consequences of the change is necessary. The Council considered the stock status of gag and other SWG species, as well as the biological consequences for these species, when evaluating the impacts of modifying the SWG seasonal spawning closure. The Council determined that this modification would continue to protect spawning aggregations of gag and other grouper species such as red grouper and scamp because these species spawn primarily in waters deeper than 20 fathoms. During the offshore February and March seasonal closure, fishing effort for SWG may increase shoreward of 20 fathoms. However, the harvest of SWG species is regulated with bag limits, size limits, and the use of ACTs, ACLs, and accountability measures (AMs), which are designed to protect SWG stocks from overfishing and help achieve OY.

Comment 5: Closing waters seaward of 20 fathoms in February and March will be more difficult to enforce than the current February and March closure of all Gulf waters. There is no way to determine where a fish was caught after a vessel reaches the shore.

Response: NMFS agrees that a seasonal-area closure can be more difficult to enforce than a traditional Gulf-wide seasonal closure, which can be enforced dockside. However, the Council determined that enforcement concerns were outweighed by the benefits of opening waters shoreward of 20 fathoms to SWG harvest (with the exception of gag, which does not open until July 1 each year), which will allow for-hire businesses to book grouper fishing trips and private anglers to keep grouper they catch when fishing shoreward of 20 fathoms during February and March.

Comment 6: To protect SWG stocks, there should be no fishing during the spawning periods.

Response: NMFS disagrees that a prohibition on all fishing during spawning is required to protected SWG stocks. The proposed seasonal-area closure is expected to afford protection to all of the SWG species. The closure covers some part of peak spawning for each of these species, except yellowmouth grouper, and provides protection for all spawning during February and March in waters deeper than 20 fathoms, which is where most of the spawning occurs. The Council determined, and NMFS agrees, that limiting the seasonal closure to waters deeper than 20 fathoms will continue to provide sufficient protection for SWG spawning while reducing socio-economic impacts on the recreational sector.

Comment 7: Private anglers should have a year-round season and more restrictions should be added to the for-hire and commercial sectors.

Response: The Council did not consider and this rule does not address regulatory changes to the commercial sector or restrictions that would apply only to the for-hire component of the recreational sector. A year-round recreational season for SWG species, other than gag, is possible shoreward of 20 fathoms as long as the AMs for these SWG species do not require a closure. For gag, the harvest levels under the rebuilding plan do not allow for a year-round recreational harvest.

Changes From the Proposed Rule

On April 17, 2013, NMFS published in the **Federal Register** an interim final rule to reorganize the regulations in 50 CFR part 622 for the Gulf of Mexico, South Atlantic, and the Caribbean (78 FR 22950). That interim final rule did not create any new rights or obligations for the regulated entities. Rather, the rule merely reorganized the existing regulatory requirements in the Code of Federal Regulations into a new format. This final rule incorporates this new format into the regulatory text; it does not change the specific regulatory requirements that were contained in the proposed rule. Therefore, as a result of

this reorganization, the seasonal closure text previously located at § 622.34(u) is now at § 622.34(d) and the text previously located at § 622.34(v) is now at § 622.34(e).

The proposed rule included the term ''regulatory amendment'' to describe the document developed by the Council to implement the management measures contained in this final rule. However, NMFS has determined that it is more specific to use the term ''framework action'' to describe this document because the management measures contained in this final rule may be implemented through the Gulf reef fish framework procedures as defined in Amendment 38 to the FMP (78 FR 6218, January 30, 2013); therefore NMFS uses this term throughout this final rule.

Classification

The Regional Administrator, Southeast Region, NMFS has determined that the actions contained in this final rule and framework action are necessary for the conservation and management of the reef fish fishery and are consistent with the Magnuson-Stevens Act and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for this certification was published in the proposed rule and is not repeated here. No comments were received regarding the certification and NMFS has not received any new information that would affect its determination. No changes to the final rule were made in response to public comments. As a result, a regulatory flexibility analysis was not required and none was prepared.

List of Subjects in 50 CFR Part 622

Fisheries, Fishing, Gulf of Mexico, Recreational sector, Gag, Shallow-water grouper.

Dated: May 30, 2013.

Alan D. Risenhoover,

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

For the reasons set out in the preamble, 50 CFR part 622 is amended as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

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

■ 2. In § 622.34, paragraphs (d) and (e) are revised to read as follows:

§ 622.34 Seasonal and area closures designed to protect Gulf reef fish.

* * * * *

(d) *Seasonal closure of the recreational sector for shallow-water grouper (SWG).* The recreational sector for SWG, in or from the Gulf EEZ, is closed each year from February 1 through March 31, in the portion of the Gulf EEZ seaward of rhumb lines connecting, in order, the points in the following table. During the closure, the bag and possession limit for SWG in or from the Gulf EEZ seaward of the following rhumb lines is zero.

Point	North latitude	West longitude
1	24°48.0′	82°48.0′
2	25°07.5′	82°34.0′
3	26°26.0′	82°59.0′
4	27°30.0′	83°21.5′
5	28°10.0′	83°45.0′
6	28°11.0′	84°00.0′
7	28°11.0′	84°07.0′
8	28°26.6′	84°24.8′
9	28°42.5′	84°24.8′
10	29°05.0′	84°47.0′
11	29°02.5′	85°09.0′
12	29°21.0′	85°30.0′
13	29°27.9′	85°51.7′
14	29°45.8′	85°51.0′
15	30°05.6′	86°18.5′
16	30°07.5′	86°56.5′
17	29°43.9′	87°33.8′
18	29°43.0′	88°18.5′
19	At State/EEZ line, follow State/EEZ line to point 20	88°56.0′
20	At State/EEZ line	89°28.4′
21	29°02.0′	89°45.5′
22	28°32.7′	90°21.5′
23	28°24.8′	90°52.7′
24	28°42.3′	92°14.4′
25	28°34.2′	92°30.4′
26	28°27.6′	95°00.0′
27	28°20.0′	95°06.9′
28	28°02.2′	96°11.1′
29	27°46.5′	96°38.1′
30	27°15.0′	97°00.0′
31	26°45.5′	97°01.4′
32	At EEZ	96°51.0′

(e) *Seasonal closure of the recreational sector for gag.*

The recreational sector for gag, in or from the Gulf EEZ, is closed from January 1 through June 30 and December 3 through December 31, each year. During the closure, the bag and possession limit for gag in or from the Gulf EEZ is zero.

[FR Doc. 2013–13198 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 78, No. 107
Tuesday, June 4, 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 ENERGY

10 CFR Part 431

[Docket No. EERE–2013–BT–STD–0022]

RIN 1904–AD00

Energy Efficiency Program for Commercial and Industrial Equipment: Public Meeting and Availability of the Framework Document for Refrigerated Beverage Vending Machines

AGENCY: Office of Energy Efficiency and Renewable Energy, Department of Energy.

ACTION: Notice of public meeting and availability of the Framework document.

SUMMARY: The U.S. Department of Energy (DOE) is considering amending its energy conservation standards for refrigerated beverage vending machines. To inform interested parties and to facilitate this process, DOE has prepared a Framework document that details the analytical approach and preliminary scope of the rulemaking, and identifies several issues on which DOE is particularly interested in receiving comments. DOE will hold a public meeting to discuss and receive comments on its planned analytical approach and issues it will address in this rulemaking proceeding. DOE welcomes written comments and relevant data from the public on any subject within the scope of this rulemaking.

DATES: Meeting: DOE will hold a public meeting on Thursday, June 20, 2013 in Washington, DC.

DOE must receive requests to speak at the public meeting before 4:00 p.m., June 13, 2013. DOE must receive an electronic copy of the statement with the name and, if appropriate, the organization of the presenter to be given at the public meeting before 4:00 p.m., June 13, 2013.

Comments: DOE will accept written comments, data, and information regarding the Framework document before and after the public meeting, but no later than July 19, 2013.

ADDRESSES: DOE plans to make the public meeting available via webinar. Registration information, participant instructions, and information about the capabilities available to webinar participants will be published on DOE's Web site at: *http://www1.eere.energy.gov/buildings/appliance_standards/rulemaking.aspx/ruleid/73.* Participants are responsible for ensuring their systems are compatible with the webinar software.

The public meeting will be held at the U.S. Department of Energy, Forrestal Building, June 20, 2013, 1000 Independence Avenue SW., Washington, DC 20585–0121. Please note that foreign nationals planning to participate in the public meeting are subject to advance security screening procedures. If a foreign national wishes to participate in the public meeting, please inform DOE of this fact as soon as possible by contacting Ms. Brenda Edwards at (202) 586–2945 so that the necessary procedures can be completed. Please note that any person wishing to bring a laptop computer into the Forrestal Building will be required to obtain a property pass. Visitors should avoid bringing laptops, or allow an extra 45 minutes. As noted above, persons may also attend the public meeting via webinar.

Interested parties are encouraged to submit comments electronically by the following methods:

- *Federal eRulemaking Portal: www.regulations.gov.* Follow the instructions for submitting comments.
- *Email to the following address: BVM2013STD0022@ee.doe.gov.* Include docket number EERE–2013–BT–STD–0022 and/or RIN 1904–AD00 in the subject line of the message. All comments should clearly identify the name, address, and, if appropriate, organization of the commenter. Submit electronic comments in WordPerfect, Microsoft Word, PDF, or ASCII file format, and avoid the use of special characters or any form of encryption.
- *Postal Mail:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Mailstop EE–2J, Framework Document for Refrigerated Beverage Vending Machines, Docket No. EERE–2013–BT–STD–0022 and/or RIN 1904–AD00, 1000 Independence Avenue SW., Washington, DC 20585–0121. If possible, please submit all items on a compact disc (CD), in which case it is not necessary to include printed copies. (Please note that comments sent by mail are often delayed and may be damaged by mail screening processes.)
- *Hand Delivery/Courier:* Ms. Brenda Edwards, U.S. Department of Energy, Building Technologies Program, Sixth Floor, 950 L'Enfant Plaza SW., Washington, DC 20024. Telephone: (202) 586–2945. If possible, please submit all items on a CD, in which case it is not necessary to include printed copies.

Instructions: All submissions received must include the agency name and docket number and/or RIN for this rulemaking. No telefacsimilies (faxes) will be accepted.

Docket: The docket is available for review at *http://www.regulations.gov/#!docketDetail;D=EERE-2013-BT-STD-0022*, and will include **Federal Register** notices, the Framework document, notice of proposed rulemaking, public meeting attendee lists and transcripts, comments, and other supporting documents/materials throughout the rulemaking process. The regulations.gov Web page contains instructions on how to access all documents, including public comments, in the docket. The docket can be accessed by searching for docket number EERE–2013–BT–STD–0022 on the regulations.gov Web site. All documents in the docket are listed in the *www.regulations.gov* index. However, not all documents listed in the index may be publicly available, such as information that is exempt from public disclosure.

FOR FURTHER INFORMATION CONTACT: Mr. Charles Llenza, U.S. Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies, EE–2J, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–2192. Email: *refrigerated_beverage_vending_machines@ee.doe.gov.*

Ms. Elizabeth Kohl, U.S. Department of Energy, Office of the General Counsel, GC–71, 1000 Independence Avenue SW., Washington, DC 20585–0121. Telephone: (202) 586–7796. Email: *Elizabeth.Kohl@hq.doe.gov.*

For information on how to submit or review public comments and on how to participate in the public meeting, contact Ms. Brenda Edwards, U.S.

Department of Energy, Office of Energy Efficiency and Renewable Energy, Building Technologies Program, EE–2J, 1000 Independence Avenue SW., Washington, DC, 20585–0121. Telephone (202) 586–2945. Email: *Brenda.Edwards@ee.doe.gov.*

SUPPLEMENTARY INFORMATION:

Part B [1] of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 (42 U.S.C. 6291–6309) established the Energy Conservation Program for Consumer Products Other Than Automobiles, a program covering most major household appliances.[2] EPCA directed DOE to prescribe energy conservation standards for beverage vending machines (42 U.S.C. 6295(v)), and DOE published a final rule for beverage vending machines on August 31, 2009. (74 FR at 44914).

Within 6 years after issuance of any final rule establishing or amending a standard, EPCA also requires DOE to publish a notice determining whether to amend such standards. If DOE determines that amendment is warranted, DOE must also issue a notice of proposed rulemaking (NOPR) including new proposed energy conservation standards by that same date. (42 U.S.C. 6295(m)(1)) DOE prepared this Framework document to consider amending the energy conservation standards for refrigerated beverage vending machines. This document explains the relevant issues, analyses, and processes DOE anticipates using to determine whether to amend the standards, and, if so, for the development of such amended standards. The focus of the public meeting noted above will be to discuss the information presented and issues identified in the Framework document. At the public meeting, DOE will make presentations and invite discussion on the rulemaking process as it applies to refrigerated beverage vending machines. DOE will also solicit comments, data, and information from participants and other interested parties.

DOE is planning to conduct in-depth technical analyses in the following areas: (1) Engineering; (2) energy use; (3) life-cycle cost and payback period; (4) national impacts; (5) manufacturer impacts; (6) emissions impacts; (7) utility impacts; (8) employment impacts; and (9) regulatory impacts. Additionally, DOE will also conduct several other analyses to support these analyses, including the market and technology assessment, the screening analysis (which contributes to the engineering analysis), the markups analysis (which contributes to the life-cycle cost and payback period analysis), and the shipments analysis (which contributes to the national impacts analysis).

Public Participation

DOE encourages those who wish to participate in the public meeting to obtain the Framework document and to be prepared to discuss its contents. A copy of the Framework document is available at: *http://www1.eere.energy.gov/buildings/appliance_standards/rulemaking.aspx/ruleid/73.*

Public meeting participants need not limit their comments to the issues identified in the Framework document. DOE is also interested in comments on other relevant issues that participants believe would affect energy conservation standards for this equipment, applicable test procedures, or the preliminary determination on the scope of coverage. DOE invites all interested parties, whether or not they participate in the public meeting, to submit in writing by July 19, 2013 comments and information on matters addressed in the Framework document and on other matters relevant to DOE's consideration of coverage and standards for refrigerated beverage vending machines.

The public meeting will be conducted in an informal, facilitated, conference style. There shall be no discussion of proprietary information, costs or prices, market shares, or other commercial matters regulated by U.S. antitrust laws. A court reporter will record the proceedings of the public meeting, after which a transcript will be available at: *http://www1.eere.energy.gov/buildings/appliance_standards/rulemaking.aspx/ruleid/73* and available for purchase from the court reporter.

After the public meeting and the close of the comment period on the Framework document, DOE will collect additional data, conduct the analyses as discussed in the Framework document and at the public meeting, and review the public comments received.

DOE considers public participation to be a very important part of the process for determining whether to establish energy conservation standards and, if so, in setting those standards. DOE actively encourages the participation and interaction of the public during the comment period in each stage of the rulemaking process. Beginning with the Framework document, and during each subsequent public meeting and comment period, interactions with and among members of the public provide a balanced discussion of the issues to assist DOE in the standards rulemaking process. Accordingly, anyone who wishes to participate in the public meeting, receive meeting materials, or be added to the DOE mailing list to receive future notices and information about this rulemaking should contact Ms. Brenda Edwards at (202) 586–2945, or via email at *Brenda.Edwards@ee.doe.gov.*

Issued in Washington, DC, on May 29, 2013.

Kathleen B. Hogan,

Deputy Assistant Secretary for Energy Efficiency, Energy Efficiency and Renewable Energy.

[FR Doc. 2013–13174 Filed 6–3–13; 8:45 am]

BILLING CODE 6450–01–P

[1] For editorial reasons, upon codification in the U.S. Code, Part B was redesignated Part A.

[2] All references to EPCA in this document refer to the statute as amended through the American Energy Manufacturing Technical Corrections Act (AEMTCA), Pub. L. 112–210 (Dec. 18, 2012).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2013–0273; Airspace Docket No. 13–ASW–9]

Proposed Amendment of Class D and Class E Airspace; San Marcos, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to amend Class D and Class E airspace at San Marcos, TX. Additional controlled airspace is necessary to accommodate new Standard Instrument Approach Procedures (SIAP) at San Marcos Municipal Airport and the decommissioning of the Garys Locator Outer Marker (LOM). The FAA is taking this action to enhance the safety and management of Instrument Flight Rules (IFR) operations for SIAPs at the airport. Adjustments to the geographic coordinates also would be made.

DATES: Comments must be received on or before July 19, 2013.

ADDRESSES: Send comments on this proposal to the U.S. Department of Transportation, Docket Operations, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12–140, Washington, DC 20590–0001. You must identify the docket number FAA–2013–0273/Airspace Docket No. 13–ASW–9, at the beginning of your comments. You may also submit comments through the Internet at *http://www.regulations.gov.*

You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527), is on the ground floor of the building at the above address.

FOR FURTHER INFORMATION CONTACT: Scott Enander, Central Service Center, Operations Support Group, Federal Aviation Administration, Southwest Region, 2601 Meacham Blvd., Fort Worth, TX 76137; telephone: (817) 321–7716.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this notice must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2013–0273/Airspace Docket No. 13–ASW–9.'' The postcard will be date/time stamped and returned to the commenter.

Availability of NPRMs

An electronic copy of this document may be downloaded through the Internet at *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal holidays. An informal docket may also be examined during normal business hours at the office of the Central Service Center, 2601 Meacham Blvd., Fort Worth, TX 76137.

Persons interested in being placed on a mailing list for future NPRMs should contact the FAA's Office of Rulemaking (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

This action proposes to amend Title 14, Code of Federal Regulations (14 CFR), part 71 by amending Class D airspace and Class E airspace extending upward from 700 feet above the surface to accommodate new standard instrument approach procedures and the decommissioning of the Garys LOM at San Marcos Municipal Airport, San Marcos, TX. Accordingly, small segments of Class D airspace would extend west and north from the current 4.2-mile radius of the airport to 11.8 miles north of the airport, and small segments of Class E airspace would extend west, east, southeast and south of the 6.7-mile radius of the airport to retain the safety and management of IFR aircraft in Class D and Class E airspace to/from the en route environment. Geographic coordinates for San Marcos Municipal Airport and Lockhart Municipal Airport would also be updated to coincide with the FAA's aeronautical database.

Class D airspace areas are published in Paragraph 5000, and Class E airspace areas in Paragraph 6005 of FAA Order 7400.9W, dated August 8, 2012 and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class D and Class E airspace designations listed in this document would be published subsequently in the Order.

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

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the U.S. Code. Subtitle 1, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This rulemaking is promulgated under the authority described in Subtitle VII, Part A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This regulation is within the scope of that authority as it would amend controlled airspace at San Marcos Municipal Airport, San Marcos, TX.

Environmental Review

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

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

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

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of FAA Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, and effective September 15, 2012, is amended as follows:

Paragraph 5000 Class D Airspace

* * * * *

ASW TX D San Marcos, TX [Amended]

San Marcos Municipal Airport, TX
(Lat. 29°53′34″ N., long. 97°51′47″ W.)

That airspace extending upward from the surface to and including 3,100 feet MSL within a 4.2-mile radius of San Marcos Municipal Airport, and within 1 mile each side of the 313° bearing from the airport extending from the 4.2-mile radius to 5 miles northwest of the airport, and within 1 mile each side of the 268° bearing from the airport extending from the 4.2-mile radius to 4.4

miles west of the airport, and within 1 mile each side of the 358° bearing from the airport extending from the 4.2-mile radius to 4.4 miles north of the airport. This Class D airspace area is effective during the specific dates and times established in advance by a Notice to Airmen. The effective dates and times will thereafter be continually published in the Airport/Facility Directory.

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

* * * * *

ASW TX E5 San Marcos, TX [Amended]

San Marcos Municipal Airport, TX
(Lat. 29°53′34″ N., long. 97°51′47″ W.)
Lockhart Municipal Airport, TX
(Lat. 29°51′01″ N., long. 97°40′21″ W.)

That airspace extending upward from 700 feet above the surface within a 6.7-mile radius of San Marcos Municipal Airport, and within 2 miles each side of the 268° bearing from the airport extending from the 6.7-mile radius to 13.1 miles west of the airport, and within 2 miles each side of the 313° bearing from the airport extending from the 6.7-mile radius to 11.1 miles northwest of the airport, and within 2 miles each side of the 088° bearing from the airport extending from the 6.7-mile radius to 10.4 miles east of the airport, and within 2 miles each side of the 133° bearing from the airport extending from the 6.7-mile radius to 9.6 miles southeast of the airport, and within 2 miles each side of the 178° bearing from the airport extending from the 6.7-mile radius to 10.4 miles south of the airport, and within a 6.3-mile radius of Lockhart Municipal Airport.

Issued in Fort Worth, TX, on May 22, 2013.

David P. Medina,

Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2013–13016 Filed 6–3–13; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2013–0002; Airspace Docket No. 12–ASO–46]

Proposed Establishment of Class E Airspace; Umatilla, FL

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E Airspace at Umatilla, FL, to accommodate the Area Navigation (RNAV) Global Positioning System (GPS) Standard Instrument Approach Procedures at Umatilla Municipal Airport. This action would enhance the safety and airspace management of Instrument Flight Rules (IFR) operations at the airport.

DATES: Comments must be received on or before July 19, 2013. The Director of the Federal Register approves this incorporation by reference action under title 1, Code of Federal Regulations, part 51, subject to the annual revision of FAA, Order 7400.9 and publication of conforming amendments.

ADDRESSES: Send comments on this rule to: U. S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey, SE., Washington, DC 20590–0001; Telephone: 1–800–647–5527; Fax: 202–493–2251. You must identify the Docket Number FAA–2013–0002; Airspace Docket No. 12–ASO–46, at the beginning of your comments. You may also submit and review received comments through the Internet at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: John Fornito, Operations Support Group, Eastern Service Center, Federal Aviation Administration, P.O. Box 20636, Atlanta, Georgia 30320; telephone (404) 305–6364.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to comment on this rule by submitting such written data, views, or arguments, as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal.

Communications should identify both docket numbers (FAA Docket No. FAA–2013–0002; Airspace Docket No. 12–ASO–46) and be submitted in triplicate to the Docket Management System (see **ADDRESSES** section for address and phone number). You may also submit comments through the Internet at *http://www.regulations.gov.*

Persons wishing the FAA to acknowledge receipt of their comments on this action must submit with those comments a self-addressed stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2013–0002; Airspace Docket No. 12–ASO–46.'' The postcard will be date/time stamped and returned to the commenter.

All communications received before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this notice may be changed in light of the comments received. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRMs

An electronic copy of this document may be downloaded from and comments submitted through *http://www.regulations.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov/airports_airtraffic/air_traffic/publications/airspace_amendments/.*

You may review the public docket containing the proposal, any comments received and any final disposition in person in the Dockets Office (see the **ADDRESSES** section for address and phone number) between 9:00 a.m. and 5:00 p.m., Monday through Friday, except Federal Holidays. An informal docket may also be examined between 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal Holidays, at the office of the Eastern Service Center, Federal Aviation Administration, room 350, 1701 Columbia Avenue, College Park, Georgia 30337.

Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory circular No. 11–2A, Notice of Proposed Rulemaking distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to Title 14, Code of Federal Regulations (14 CFR) part 71 to establish Class E airspace at Umatilla, FL, providing the controlled airspace required to support the RNAV (GPS) standard instrument approach procedures for Umatilla Municipal Airport. Controlled airspace extending upward from 700 feet above the surface within a 6.7-mile radius of Umatilla Municipal Airport would be established for the safety and management of IFR operations at the airport.

Class E airspace designations are published in Paragraph 6005 of FAA Order 7400.9W, dated August 8, 2012, and effective September 15, 2012, which is incorporated by reference in 14 CFR 71.1. The Class E airspace designation listed in this document will be published subsequently in the Order.

The FAA has determined that this proposed regulation only involves an established body of technical regulations for which frequent and

routine amendments are necessary to keep them operationally current. It, therefore, (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a Regulatory Evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this proposed rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

The FAA's authority to issue rules regarding aviation safety is found in Title 49 of the United States Code. Subtitle I, Section 106 describes the authority of the FAA Administrator. Subtitle VII, Aviation Programs, describes in more detail the scope of the agency's authority. This proposed rulemaking is promulgated under the authority described in Subtitle VII, Part, A, Subpart I, Section 40103. Under that section, the FAA is charged with prescribing regulations to assign the use of airspace necessary to ensure the safety of aircraft and the efficient use of airspace. This proposed regulation is within the scope of that authority as it would establish Class E airspace at Umatilla Municipal Airport, Umatilla, FL.

This proposal will be subject to an environmental analysis in accordance with FAA Order 1050.1E, ''Environmental Impacts: Policies and Procedures'' prior to any FAA final regulatory action.

Lists of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (Air).

The Proposed Amendment:

In consideration of the foregoing, the Federal Aviation Administration proposes to amend 14 CFR Part 71 as follows:

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

■ 1. The authority citation for Part 71 continues to read as follows:

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

§ 71.1 [Amended]

■ 2. The incorporation by reference in 14 CFR 71.1 of Federal Aviation Administration Order 7400.9W, Airspace Designations and Reporting Points, dated August 8, 2012, effective September 15, 2012, is amended as follows:

Paragraph 6005 Class E Airspace Areas Extending Upward from 700 Feet or More Above the Surface of the Earth.

* * * * *

ASO FL E5 Umatilla, FL [New]

Umatilla Municipal Airport, FL
(Lat. 28°55′27″ N., long. 82°39′07″ W.)
That airspace extending upward from 700 feet above the surface within a 6.7-mile radius of Umatilla Municipal Airport.

Issued in College Park, Georgia, on: May 23, 2013.

Jackson D. Allen,

Acting Manager, Operations Support Group, Eastern Service Center, Air Traffic Organization.

[FR Doc. 2013–13020 Filed 6–3–13; 8:45 am]

BILLING CODE 4910–13–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 49

[EPA–HQ–OAR–2003–0076; FRL–9818–8]

RIN 2060–AR25

Review of New Sources and Modifications in Indian Country

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing three changes to the New Source Review (NSR) program for minor sources and minor modifications at major sources in Indian country, which we refer to as the ''Tribal minor NSR program.'' First, we propose to expand the list of emissions units and activities that are exempt from the Tribal minor NSR program by adding several types of low-emitting units and activities. Second, we propose to more clearly define the term ''commence construction'' and add the term ''begin construction'' to better reflect the regulatory requirements associated with construction activities. We believe both of these proposed changes would simplify the program, resulting in less burdensome implementation without detriment to air quality in Indian country. Lastly, we are reconsidering the advance notification period for relocation of a true minor source in response to a petition received on the final Tribal NSR rule from the American Petroleum Institute, the Independent Petroleum Association of America and America's Natural Gas Alliance.

DATES: Comments must be received on or before August 5, 2013.

Public Hearing. If anyone contacts us requesting to speak at a public hearing by June 25, 2013, we will hold a public hearing. Additional information about the hearing will be published in a subsequent **Federal Register** notice.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2003–0076, by one of the following methods:

- *http://www.regulations.gov:* Follow the online instructions for submitting comments.
- *Email: a-and-r-docket@epa.gov.* Attention Docket ID No. EPA–HQ–OAR–2003–0076.
- *Fax:* (202) 566–9744.
- *Mail:* Attention Docket ID No. EPA–HQ–OAR–2003–0076, Air and Radiation Docket, Mailcode: 28221T, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460. Please include a total of two copies.
- *Hand Delivery:* Air and Radiation Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC 20004, Attention Docket ID No. EPA–HQ–OAR–2003–0076. Such deliveries are only accepted during the Docket Center's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2003–0076. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or email. The *www.regulations.gov* Web site is an ''anonymous access'' system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other

contact information in the body of your comment and with any disk or CD–ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to section I.B of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Air and Radiation Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Avenue NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566–1744, and the telephone number for the Air and Radiation Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For technical information, contact Greg Nizich, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541–3078; fax number (919) 541–5509; email address: *nizich.greg@epa.gov.*

To request a public hearing or information pertaining to a public hearing on this document, contact Ms. Pamela Long, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–01), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541–0641; fax number (919) 541–5509; email address: *long.pam@epa.gov.*

SUPPLEMENTARY INFORMATION: The information in this Supplementary Information section of this preamble is organized as follows:

I. General Information
A. Does this action apply to me?
B. What should I consider as I prepare my comments for the EPA?
1. Submitting CBI
2. Tips for Preparing Your Comments
C. Where can I get a copy of this document and other related information?
D. How can I find information about a possible public hearing?
E. What acronyms, abbreviations and units are used in this preamble?
II. Purpose
III. Background
A. What are the general requirements of the minor NSR program?
B. What is the Tribal NSR rule?
C. What is the status of the NSR air quality program in Indian Country?
IV. Proposed Revisions to the Tribal Minor NSR rule
A. Emissions Units and Activities Exempted From the Tribal Minor NSR Rule
B. Defining Construction-Related Activities for Permitting Purposes
C. Advance Notification Time Period for Relocation of True Minor Sources
V. Statutory and Executive Order Reviews
A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review
B. Paperwork Reduction Act
C. Regulatory Flexibility Act
D. Unfunded Mandates Reform Act
E. Executive Order 13132: Federalism
F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments
G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks
H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution or Use
I. National Technology Transfer and Advancement Act
J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations
K. Determination Under Section 307(d)
VI. Statutory Authority

I. General Information

A. Does this action apply to me?

Entities potentially affected by this proposed rule include owners and operators of emission sources in all industry groups located in Indian country, the EPA and tribal governments that are delegated administrative authority to assist the EPA with the implementation of these federal regulations. Categories and entities potentially affected by this action are expected to include:

Category	NAICS [a]	Examples of regulated entities
Industry	21111	Oil and gas production/operations.
	211111	Crude Petroleum and Natural Gas Extraction.
	211112	Natural Gas Liquid Extraction.
	212321	Sand and Gravel Mining.
	22111	Electric power generation.
	221210	Natural Gas Distribution.
	22132	Sewage treatment facilities.
	23899	Sand and shot blasting operations.
	311119	Animal food manufacturing.
	3116	Beef Cattle Complex, Slaughter House and Meat Packing Plant.
	321113	Sawmills.
	321212	Softwood Veneer and Plywood Manufacturing.
	32191	Millwork (wood products manufacturing).
	323110	Printing operations (lithographic).
	324121	Asphalt hot mix.
	3251	Chemical preparation.
	32711	Clay and ceramics operations (kilns).
	32732	Concrete batching plant.
	3279	Fiber glass operations.
	331511	Casting Foundry (Iron).
	3323	Fabricated structural metal.
	332812	Surface coating operations.
	3329	Fabricated metal products.
	33311	Machinery manufacturing.
	33711	Wood kitchen cabinet manufacturing.
	42451	Grain Elevator.
	42471	Gasoline bulk plant.

Category	NAICS [a]	Examples of regulated entities
	4471	Gasoline station.
	54171	Professional, Scientific, and Technical Services.
	562212	Solid Waste Landfill.
	72112	Other (natural gas-fired boilers).[b]
	811121	Auto body refinishing.
Federal government	924110	Administration of Air and Water Resources and Solid Waste Management Programs.
State/local/tribal government	924110	Administration of Air and Water Resources and Solid Waste Management Programs.

[a] North American Industry Classification System.
[b] Used NAICS code designated for casino hotels.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be subject to the Tribal minor NSR program, and therefore potentially affected by this action. To determine whether your facility is affected by this action, you should examine the applicability criteria in 40 CFR 49.151 through 49.161 (*i.e.,* the Tribal minor NSR rule). If you have any questions regarding the applicability of this action to a particular entity, contact the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

B. What should I consider as I prepare my comments for the EPA?

1. Submitting CBI

Do not submit this information to the EPA through *www.regulations.gov* or email. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to the EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), Environmental Protection Agency, Research Triangle Park, NC 27711, Attention: Docket ID No. EPA–HQ–OAR–2003–0076.

2. Tips for Preparing Your Comments

When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

C. Where can I get a copy of this document and other related information?

In addition to being available in the docket, an electronic copy of this proposed rule will also be available on the World Wide Web. Following signature by the EPA Administrator, a copy of this proposed rule will be posted in the regulations and standards section of our NSR Web site, under Regulations & Standards, at *http://www.epa.gov/nsr.*

D. How can I find information about a possible public hearing?

To request a public hearing or information pertaining to a public hearing on this document, contact Ms. Pamela Long, Air Quality Policy Division, Office of Air Quality Planning and Standards (C504–03), Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone number (919) 541–0641; fax number (919) 541–5509; email address: *long.pam@epa.gov.*

E. What acronyms, abbreviations and units are used in this preamble?

The following acronyms, abbreviations and units are used in this preamble:

BACT Best Available Control Technology
CAA or Act Clean Air Act
EPA U.S. Environmental Protection Agency
FARR Federal Air Rule for Indian Reservations
FIP Federal Implementation Plan
FR Federal Register
GHG Greenhouse Gas
GP General Permit
HAPs Hazardous Air Pollutants
ICR Information Collection Request
LAER Lowest Achievable Emission Rate
MACT Maximum Achievable Control Technology
MMBTU/hr Million British thermal units per hour
NAAQS National Ambient Air Quality Standard
NESHAP National Emission Standards for Hazardous Air Pollutants
NSPS New Source Performance Standards
NSR New Source Review
NO_X Nitrogen Oxide
NTTAA National Technology Transfer and Advancement Act
OMB Office of Management and Budget
PSD Prevention of Significant Deterioration
PTE Potential to Emit
RFA Regulatory Flexibility Act
SBA Small Business Administration
SIP State Implementation Plan
TIP Tribal Implementation Plan
TSD Technical Support Document
tpy Tons Per Year
UMRA Unfunded Mandates Reform Act

II. Purpose

The purpose of this rule is to propose and seek comment on three revisions to the Tribal minor NSR rule [1] that will streamline implementation by adding more exempted units/activities, clarifying language related to construction and relocation of true minor sources. Specifically, we are proposing to add seven categories of units/activities that will be listed as exempt from the Tribal minor NSR rule because their emissions are deemed insignificant. Listing these categories explicitly will mean that many applicants and reviewing authorities will not need to calculate potential emissions for activities that can be deemed insignificant. In the preamble to the Tribal minor NSR rule, we committed to considering the addition

[1] The Tribal minor NSR rule is a component of ''Review of New Sources and Modifications in Indian Country, Final Rule'' 76 FR 38747 (July 1, 2011) (the Tribal minor NSR rule).

of exempt units/activities to the list in that final rule, as requested by commenters. This proposed rule fulfills that commitment.

In the Tribal minor NSR rule, the term ''commence construction'' is used in two different contexts, *i.e.,* the provisions governing construction prohibition, and also the provisions specifying that construction must occur within 18 months of the permit effective date. In this proposal, we are clarifying this distinction by proposing two different terms for those situations—''begin construction'' and ''commence construction.'' Accordingly, we are also proposing to replace ''commence construction'' with ''begin construction,'' in certain sections of the regulatory text for consistency. The third proposed revision is reconsideration of the 30-day advance notice requirement for a true minor source prior to relocation. This is in response to a request on the final rule from the American Petroleum Institute, the Independent Petroleum Association of America and America's Natural Gas Alliance.

III. Background

A. What are the general requirements of the minor NSR program?

Section 110(a)(2)(C) of the Clean Air Act (Act) requires that every state implementation plan (SIP) include a program to regulate the construction and modification of stationary sources, including a permit program as required in parts C and D of title I of the Act, to ensure attainment and maintenance of the National Ambient Air Quality Standards (NAAQS). The permitting program for minor sources is addressed by section 110(a)(2)(C) of the Act, which we commonly refer to as the minor NSR program. A minor source means a source that has a potential to emit (PTE) lower than the major NSR applicability threshold for a particular pollutant as defined in the applicable nonattainment major NSR program or Prevention of Significant Deterioration (PSD) program.

States must develop minor NSR programs to attain and maintain the NAAQS and the federal requirements for state minor NSR programs are outlined in 40 CFR 51.160 through 51.164. These federal requirements for minor NSR programs are considerably less prescriptive than those for major sources and, as a result, there is a larger variation of requirements across the state minor NSR programs.

Furthermore, sections 301(a) and 301(d)(4) of the Act, as implemented through the Tribal Authority Rule,[2] provide the EPA with a broad degree of discretion in developing a program to regulate new and modified minor sources in Indian country.

B. What is the Tribal NSR rule?

The ''Review of New Sources and Modifications in Indian country'' (*i.e.,* Tribal NSR rule) final rule was published in the **Federal Register** on July 1, 2011 (76 FR 38748), pursuant to sections 301(a) and (d) of the Act. This rule established a federal implementation plan (FIP) for Indian country that includes two NSR regulations for the protection of air resources in Indian country. These two new NSR regulations work together with the pre-existing PSD program at 40 CFR 52.21 [3] and the title V operating permits program at 40 CFR part 71 [4] to provide a comprehensive permitting program for Indian country to ensure that air quality in Indian country will be protected in the manner intended by the Act.

One regulation created by the Tribal NSR rule, which we call the ''Tribal minor NSR rule,'' applies to new and modified minor stationary sources (minor sources) and to minor modifications at existing major stationary sources (major sources) throughout Indian country where there is no EPA-approved plan in place. The second regulation, which we refer to as the ''tribal nonattainment major NSR rule,'' applies to new and modified major sources in areas of Indian country that are designated as not attaining the NAAQS (nonattainment areas). Through these two regulations, the Tribal NSR rule ensures that Indian country will be protected in the manner intended by the Act by establishing a preconstruction permitting program for new or modified minor sources, minor modifications at major sources, and new major sources and major modifications in nonattainment areas.

The Tribal minor NSR rule applies to new and modified minor sources and to minor modifications at major sources. New minor sources with a PTE equal to or greater than the minor NSR thresholds, or modifications at existing minor sources with allowable emissions increases equal to or greater than the minor NSR thresholds, must apply for and obtain a minor NSR permit prior to beginning construction of the new source or modification.

Under the nonattainment major NSR rule, affected sources are required to comply with the provisions of 40 CFR part 51, Appendix S. In recent years, Appendix S has primarily been used as a transitional rule for nonattainment major NSR permitting in nonattainment areas for which state agencies do not have an approved nonattainment major NSR program for a particular pollutant in their SIPs. Sources subject to the nonattainment major NSR rule must meet requirements for Lowest Achievable Emissions Rate (LAER) control technology, emissions offsets and compliance certification.

The effective date of the minor Tribal NSR rule was August 30, 2001. To facilitate the effective implementation of the Tribal minor NSR program, some components of the rule were phased in. Generally, the applicability of the preconstruction permitting rules to new synthetic minor sources [5] began on the rule's effective date, August 30, 2011; for new or modified true minor sources,[6] the rules apply beginning the earlier of September 2, 2014, or 6 months after the publication of a final general permit for that source category in the **Federal Register** (40 CFR 49.151(c)(1)(iii)(B)). In addition, existing true minor sources in Indian country were required to register with their reviewing authority by March 1, 2013.

C. What is the status of the NSR air quality program in Indian Country?

No tribe is currently administering an EPA-approved PSD program. Therefore, the EPA has been implementing a FIP to issue PSD permits for major sources in

[2] The Tribal Authority Rule is comprised of Subpart A of 40 CFR part 49, which is titled ''Indian Country: Air Quality Planning and Management''.

[3] The PSD program is a preconstruction permitting program that applies to new major stationary sources (major sources) and major modifications in areas attaining the NAAQS, including attainment areas in Indian country.

[4] Title V of the Act requires all new and existing major sources in the United States to obtain and comply with an operating permit that brings together all of the source's applicable requirements under the Act. All states, numerous local areas and one tribe have approved title V permitting programs under the regulations at 40 CFR part 70. The EPA implements the part 71 federal program in Indian country and other areas that are not covered by an approved part 70 program. Currently, one tribe has been delegated authority to assist the EPA with administration of the federal part 71 program.

[5] 40 CFR 49.152 defines ''synthetic minor source'' as a source that otherwise has the potential to emit regulated NSR pollutants in amounts that are at or above those for major sources in section 49.167, section 52.21 or section 71.2 of chapter 40, as applicable, but that has taken a restriction so that its PTE is less than such amounts for major sources. Such restrictions must be enforceable as a practical matter.

[6] 40 CFR 49.152 defines ''true minor source'' as a source, not including the exempt emissions units and activities listed in section 49.153(c), that emits or has the potential to emit regulated NSR pollutants in amounts that are less than the major source thresholds in section 49.167 or section 52.21 of Chapter 40, as applicable, but equal to or greater than the minor NSR thresholds in section 49.153, without the need to take an enforceable restriction to reduce its PTE to such levels.

attainment areas of Indian country (40 CFR 52.21). There are also no tribes currently administering an EPA-approved nonattainment major NSR program, so EPA is the reviewing authority under a FIP (40 CFR 49.166 through 49.175). Only a few tribes are administering EPA-approved minor NSR programs. Accordingly, EPA administers minor NSR programs in most areas of Indian country under a FIP (40 CFR 49.151 through 49.165).

Sections 301(d) and 110(o) of the Act provide eligible tribes the opportunity to develop their own tribal programs and we encourage eligible tribes to develop their own minor and nonattainment major NSR programs, as well as a PSD major source program, for incorporation into tribal implementation plans (TIPs). Tribes may use the tribal NSR FIP program as a model if they choose to develop their own TIPs and seek our approval.

IV. Proposed Revisions to the Tribal Minor NSR Rule

This section discusses the proposed revisions to the Tribal minor NSR rule and our rationale for proposing those changes. We solicit public comment on the changes being proposed and will consider those comments in developing the final rule.

A. Emissions Units and Activities Exempted From the Tribal Minor NSR Rule

In the Tribal minor NSR rule promulgated on July 1, 2011 (76 FR 38792), we exempted seven emissions units/activities from the Tribal minor NSR permitting program pursuant to 40 CFR 49.153(c) because their potential emissions are insignificant. Listing units/activities with trivial emissions as exempt saves permitting resources because it eliminates the need for applicants or permitting agencies to calculate the potential emissions to verify they do not exceed minor source permitting thresholds. In the preamble to that rule, we referred to comments received regarding our originally proposed list of exempt units/activities (*i.e.,* the August 21, 2006, proposed rule) and we committed to consider additional units/activities for exemption from minor NSR permitting, and to propose and seek comment on such revisions through a separate rulemaking (76 FR 38759). This proposal fulfills that commitment.

In the Tribal minor NSR rule proposed on August 21, 2006, we listed ten categories of units/activities for exemption from minor NSR permitting. We received eleven comment letters concerning the list of exempted units/activities. Many commenters said the list should be more extensive, similar to state source exemption lists from minor NSR permitting. The majority of those commenters stated that a longer list of exemptions would ''level the playing field'' between sources located in Indian country, and those on adjacent lands subject to EPA-approved state NSR programs, by treating them more equitably regarding the types of minor sources that would be exempt from minor NSR permitting. We considered this information in determining whether to modify the exemptions list in the existing Tribal minor NSR rule and also reviewed unit/activity-exemption lists from many states that also contain Indian country.[7]

We noted several things from our review of state minor source rules that apply outside Indian country. One observation is that some state regulations do not provide any minimum NSR pollutant emission thresholds below which sources are exempt from state minor NSR permitting requirements. In those cases, any new source or activity not specifically exempted by its state rule is potentially subject to its minor NSR permitting program. By contrast, the existing Tribal minor NSR rule already contains minor NSR thresholds, thereby providing a mechanism for sources to avoid being subject to minor source permitting without being specifically listed for exemption. A second observation is that many state minor NSR permitting regulations contain language specifying that a permitting exemption for a specific source-type does not apply if that source is subject to either the requirements of 40 CFR part 60 NSPS, Part 61 National Emission Standards for Hazardous Air Pollutants (NESHAP), or Part 63 MACT (New Source Performance Standards (NSPS), NESHAP and MACT programs). By including such language in their minor source regulations, the states have attempted to address any sources that may have significant emissions and the potential to negatively impact ambient air quality. This approach ensures that sources that might otherwise be exempt from permitting are subject to minor NSR permitting. Since the Tribal minor NSR rule does not contain similar language, we have chosen fewer categories than some states, but more than others, in the number of source-types exempted. We have taken this approach to limit exemptions to fewer source types since, without the ''backstop'' of the permitting obligation tied to sources subject to NSPS, NESHAP or MACT programs, we might inadvertently exempt non-trivial sources, potentially degrading air quality in Indian country.

As a result, we considered a variety of source types and are proposing to add units/activities to the exemptions list that are expected: (1) to have inherent emissions significantly less than the minor NSR thresholds in 40 CFR 49.153, and (2) are expected to be very common and sited at many sources such that an exemption from needing to calculate PTE to determine applicability would reduce the burden on these sources. In essence, we are seeking to strike a balance between ensuring that the permitting of minor emission sources is consistent with the requirements of the Act, and exempting source categories where the permitting process adds administrative burden but offers no significant environmental benefit. We believe the sources we propose to add to the exempted list have emissions below the relevant applicability thresholds due to their operational nature. *See* additional discussion below in the section titled, ''Information Obtained from Source Registration under Federal Air Rule for Indian Reservations (FARR).''

We note that for determining applicability, a source's emissions are based on PTE and are determined on a source-wide basis and not an individual unit basis. For this reason, when considering potential units/activities for addition to the exemptions list, which are excluded from a source's PTE calculation, we were mindful of the possibility that multiple individual units/activities, while perhaps individually below the Tribal minor NSR permitting thresholds, could collectively exceed those thresholds (*e.g.,* two non-emergency, stationary engines at the same facility). For that reason we limited the number exempt units/activities to minimize inadvertently exempting units/activities that would exceed minor source permitting thresholds based on combined potential emissions with other exempted units/activities at the source.

Several of the units/activities we are proposing to add to the exemptions list are currently exempted under the FARR's air pollution source registration program under 40 CFR 49.138.[8] We

[7] This review included minor NSR permitting regulations from the State of Colorado and the South Coast Air Management District since these states/agencies were specifically cited by commenters. *See* Docket ID No. EPA–HQ–OAR–2003–0076 for the listing of state regulations reviewed.

[8] The FARR is a FIP that applies to air pollution sources on Indian reservations in Idaho, Oregon and

believe that adding these same units/activities to the Tribal minor NSR rule's exemption list would provide consistency in implementing rules affecting similar sources in Indian country. We also believe it is appropriate to include exemptions contained in the FARR because that list was developed with the intent of exempting both (1) the units/activities with *de minimis* levels of emissions, and (2) those for which a registration requirement would create an unreasonable burden. We are proposing to include most units/activities from the FARR that we believe have *de minimis* emissions.

Additional Units/Activities for Exemption

Based on our review of state lists, and anticipation of lower source emissions, we are proposing to add the following units/activities to the exempt units/activities list:

- Emergency generators, designed solely for the purpose of providing electrical power during power outages: in nonattainment areas, the total maximum manufacturer's site-rated horsepower of all units shall be below 500; in attainment areas, the total maximum manufacturer's site-rated horsepower of all units shall be below 1,000. The horsepower thresholds were established to ensure that minor NSR nitrogen oxide (NO_X) thresholds are not exceeded using the maximum annual run-time of 500 hours per year, based on EPA's PTE guidance.
- Stationary internal combustion engines with a manufacturer's site-rated horsepower of less than 50.
- Furnaces or boilers used for space heating exclusively using gaseous fuel with a total maximum heat input (*i.e.,* from all units combined) of 10 million British thermal units per hour (MMBtu/hr) (5 MMBtu/hr in nonattainment areas) or less. Based on our review of state regulations, and a determination that the NO_X emissions threshold of 5 tons/year would not be exceeded, we are proposing a maximum fuel usage rate of 10 MMBtu/hr (5 MMBtu/hr in nonattainment areas) for these units.

We are proposing to add the following units/activities to the list of sources that are exempt from minor NSR permitting:

- Single family residences and residential buildings with four or fewer dwelling units. This would typically include units such as furnaces and hot water heaters.
- Air conditioning units used for human comfort that do not exhaust air pollutants to the atmosphere from any manufacturing or other industrial processes.
- Forestry and silvicultural activities. The FARR defines these as activities associated with regeneration, growing, and harvesting of trees and timber including, but not limited to, preparing sites for new stands of trees to be either planted or allowed to regenerate through natural means, road construction and road maintenance, fertilization, logging operations, and forest management techniques employed to enhance the growth of stands of trees or timber. They do not include milling operations.

Exemptions for air conditioning units and heating units for comfort were originally proposed in the August 21, 2006, Tribal minor NSR proposed rule. We did not finalize those exemptions, however, because we were uncertain at that time how the upcoming greenhouse gas (GHG) regulations, then under development, would affect GHG permitting thresholds and thus how the outcome of that process might impact those activities. We have now completed the GHG Tailoring Rule Step 3 rulemaking and not lowered GHG permitting applicability thresholds. Therefore, we believe these units will not trigger GHG permitting requirements and we are proposing to add the exemption for air conditioning units (the non-manufacturing/industrial process type) and certain units used for space heating to the list of exempted units and activities in the Tribal minor NSR rule. If the EPA lowers GHG permitting thresholds in the future, we will reevaluate whether these exemptions continue to be appropriate.

Revision to the Existing Exempted Units/Activities List

Lastly, in addition to the proposed additions to the exempted units/activities listed above, we are proposing to revise the existing exemption criteria for food preparation activities currently specified in 40 CFR 49.153(c)(3) such that the current exemption, limited to noncommercial cooking of food, will be expanded to include certain types of commercial operations. We are proposing the same definition that is used in the FARR, *i.e.,* an exemption for the cooking of food other than wholesale businesses that both cook and sell cooked food. This proposed revision will broaden the current exemption to fast food vendors and stand alone restaurants and is being added because we believe these sources have *de minimis* emissions.

Information Obtained From Source Registration Under FARR

The FARR, under 40 CFR 49.138, requires sources on the covered Indian reservations, unless otherwise exempt, to register their facility with EPA Region 10 (*i.e.,* the reviewing authority) each year. As part of that registration process, the source must submit an estimate of its actual emissions (for criteria and other specified pollutants). There are 39 Indian reservations located in Idaho, Oregon and Washington covered under the FARR. While these 39 reservations represent only a portion of Indian country nationwide, we believe the source-registration information collected by EPA Region 10 is useful to help inform us regarding the source-types potentially subject to minor source permitting (note: the FARR requires both minor and major sources of NSR pollutants to register).

For 2011, the most recent registration year completed under the FARR, a total of 153 sources located within applicable Indian reservations have registered. Nearly all of the registered sources perform activities that are potentially covered under one or more EPA air rules (*i.e.,* a MACT or NSPS rule) when relevant emissions, or other thresholds, are met (*i.e.,* they are industrial sources). This information suggests that the list of exemptions in the FARR is effective at screening out and reducing unnecessary administrative burden on the types of small emission sources we intend to exempt from permitting through the proposed revisions to the list in the Tribal minor NSR rule and indicates that a relatively short list of exempt units/activities can fulfill our objective. Similarly, under the Tribal minor NSR rule, units/activities that are not exempt from minor NSR permitting based on the exemptions list can still qualify for an exemption if their estimated potential emissions are below the thresholds contained in 40 CFR 49.153.

B. Defining Construction-Related Activities for Permitting Purposes

Under the Tribal minor NSR permitting program, the point at which construction begins is critical in two instances: 1) For new or modified sources that have not obtained a minor NSR permit, construction is prohibited until a permit is issued; and 2) For new or modified sources that have received a minor NSR permit, construction must begin within 18 months of permit issuance for the permit to remain valid.

In the existing Tribal minor NSR rule, the term ''commence construction'' is used for both situations described

Washington. The permitting for Indian country in these states is under the oversight of EPA Region 10.

above, *i.e.,* where construction is prohibited and also where construction must occur within 18 months. In this proposal, we are intend to clarify two different terms that are relevant for these two different situations as follows:

1. Construction Prohibited Prior to Permit Issuance—Definition of ''Begin Construction.''

The term ''commence construction'' is used in certain sections of the existing Tribal minor NSR rule to indicate that construction is prohibited prior to obtaining a permit. To make this provision of the rule consistent with a similar provision of the major NSR rule, we are proposing to replace the term ''commence construction'' with ''begin construction'' in those cases where the rule specifies that a permit is required before constructing or modifying a source.

One section of the rule where we are proposing to change ''commence construction'' to ''begin construction'' is 40 CFR 49.151(c)(1)(iii)(B). In addition to this proposed change, we believe the regulatory text in this section could be clearer in stating our intent to delay the implementation date of the minor NSR permitting program for true minor sources, due to resource constraints, until September 2, 2014 [9]. Therefore, we are proposing to revise this section. We believe that by moving the date at which applicability is triggered to the beginning of this section it is clearer that true minor sources are not required to obtain a permit unless they begin construction on or after the date that is the earlier of: six months after a final general permit for that specific source category is published in the **Federal Register**, or September 2, 2014.

We are also proposing to provide a specific definition for ''begin construction.'' The proposed definition for ''begin construction'' is based on the definition of ''begin actual construction'' in 40 CFR 52.21 with some modifications. One proposed modification is a provision clarifying that certain preparatory activities are not considered to be construction activities, and therefore can be performed prior to receiving a permit. The following proposed list of activities is generally consistent with what we have historically allowed in our site-specific determinations, related to construction activities, under the major NSR program: engineering and design planning, geotechnical investigation (surface and subsurface explorations), clearing, surveying, ordering of equipment and materials, storing of equipment or setting up temporary trailers to house construction management or staff and contractor personnel. We believe this listing of activities will reduce the uncertainty of whether an activity constitutes ''begin construction'' under the Tribal minor NSR program.

2. Construction Necessary after Permit Issuance—Definition of ''Commence Construction.''

The existing Tribal minor NSR rule does not define the term ''commence construction.'' Currently, because that term is not defined in the Tribal minor NSR rule, the definition(s) under 40 CFR 52.21 (*i.e.,* the PSD program) applies. However, while 40 CFR 52.21(b) defines ''construction [10]'' and ''commence'' it does not expressly define the term ''commence construction.'' Therefore, we are proposing a distinct definition under the Tribal minor NSR rule for ''commence construction'' that will assist in implementing the minor NSR provisions.

The definition being proposed for ''commence construction'' for purposes of Tribal minor NSR primarily uses terminology from the definition of ''commence'' under 40 CFR 52.21 that applies to major source NSR. However, similar to the proposed definition of ''begin construction,'' this proposed definition also includes the following language to clarify the preparatory activities that are not considered to be within the scope of commencing construction: engineering and design planning, geotechnical investigation (surface and subsurface explorations), clearing, surveying, ordering of equipment and materials, storing of equipment or setting up temporary trailers to house construction management or staff and contractor personnel. The list of activities considered to be preparatory, and therefore not considered to be commencing construction, is included to clarify that these activities do not count when determining whether the source has commenced construction by a specified date. In contrast, the activities that are substantial, and therefore do count toward determining that a source has commenced construction, are activities such as: installation of building supports and foundations, paving, laying of underground pipe work, construction of permanent storage structures, and activities of a similar nature.

C. Advance Notification Time Period for Relocation of True Minor Sources

The Tribal minor NSR rule includes a registration program for true minor sources. This program was developed to improve our understanding of the types, and number, of minor sources located in Indian country. This program requires, under 40 CFR 49.160(c), the owner/operator of true minor sources to register their source with their reviewing authority. The information submitted as part of that registration includes the source's location. If an owner/operator plans to move the source to another location, that owner/operator is required under 40 CFR 49.160(d)(1) to submit a notice of relocation no later than 30 days prior to relocating. Among other reasons, this requirement allows us to maintain the accuracy of our minor source inventory in Indian country.

We received a letter on November 4, 2011, from the American Petroleum Institute, the Independent Petroleum Association of America and America's Natural Gas Alliance (collectively, the Petitioners) requesting that we reconsider the 30-day advance notice provision for registered sources prior to relocation. The EPA responded to that request in a letter dated December 19, 2012, from then EPA Administrator Lisa Jackson to the Petitioners, where we agreed to reconsider the 30-day notice requirement. We stated in that December 19, 2012, letter that we would publish a **Federal Register** notice to address the specific issues for which we granted reconsideration and we are addressing the 30-day notice issue in this proposed rule.

The Petitioners claim that the 30-day period is too long a timeframe for those sources where facility operations may necessitate a need to relocate unexpectedly. The Petitioners also stated their understanding that the requirement to provide the notice of relocation is for informational purposes and does not require any approval from the reviewing authority. Both of these issues are discussed below.

In response to the 30 day notification issue, we looked at both State and Federal rules pertaining to source relocation. Our review of state rules showed a range between 10 and 30 days advance notice specified for sources prior to relocation. In our major source PSD provisions at 52.21(i)(1)(viii)(*d*), addressing portable sources that relocate, we require that notice be

[9] July 1, 2011 **Federal Register**, 76 FR 38783.

[10] The definition of ''construction'' under 40 CFR 52.21(b) for major sources carries with it a lengthy history of implementing that term under the major source program. The types of sources regulated under the major source program are predominantly much more complex in nature than those regulated under the Tribal minor NSR rule. Therefore, it would be inconsistent with our intent to simplify implementation for minor sources or minor modifications, to refer to the term used in the major source program.

provided to the Administrator no later than 10 days prior to the relocation. Based on this information we are seeking comment on what advance notification period between 10 and 30 days is appropriate under the provisions of 40 CFR 49.160(d)(1).

While we agree with the Petitioners statement that there is no requirement for advance approval or a permit for relocation of a registered source prior to September 2, 2014, we are further clarifying and requesting comment on the permit requirements discussed below for sources relocating on or after September 2, 2014.

Source Obligation/Permit Requirements for Relocation

We believe that the types of true minor sources that typically relocate are ''portable sources'' such as: hot-mix asphalt plants, rock crushing operations and concrete batch plants. These source-types are designed to move the entire source from location to location, and, as a result, they are normally issued permits containing conditions that specify the owner/operator obligations prior to relocating. These portable sources can be permitted with either a site-specific permit or, if appropriate, through coverage under a general permit. In either case, multiple locations can be, and often are, pre-authorized in the permit. We also note that any general permits we may develop for such portable sources may contain provisions that would address source relocation. If the existing permit for a portable source does not contain authorization to relocate to a particular location, then the source must apply to the appropriate reviewing authority for a permit revision or new permits, as appropriate, to provide coverage for that additional location(s) and receive that permit before relocating.

For the relatively infrequent situation where a non-portable source is relocated, the owner must apply to the appropriate reviewing authority for a permit that covers the new location.

It's important to note that the above discussion pertains to relocation of the entire minor source. If an owner/operator chooses to relocate one or more pieces of equipment or emission units associated with a source from one source to another, the owner/operator would need to work with its reviewing authority (at the new location) to determine if such a relocation constitutes a modification under the Tribal minor NSR rule and requires a permit.

Timing of Relocation

A relocating source can be subject to permit requirements depending on the date of relocation.[11] The three main scenarios are as follows:

- A registered true minor source constructed before September 2, 2014, that relocates before September 2, 2014, is not required to obtain any approval or permit prior to the relocation. Such a source is, however, required to provide advance notification of any planned relocation to the reviewing authority in accordance with 40 CR 49.160(d)(1).
- A true minor source constructed before September 2, 2014, that relocates on or after September 2, 2014, must obtain a permit from the appropriate reviewing authority prior to relocation if the source is subject to the Tribal minor NSR rule.
- A true minor source constructed on or after September 2, 2014, must obtain a permit for the original location and also for any subsequent relocation not specifically pre-authorized in the original permit.

To clarify the notification of relocation requirements further, we are proposing revisions to 40 CFR 49.160(d)(1) . We propose to replace the last two sentences of the existing regulatory text, addressing NSR permitting obligations, with more specific language concerning relocation situations. The proposed changes specify that a source moving from the jurisdiction of one reviewing authority to another on or after September 2, 2014, is required to notify the reviewing authority at the existing location and submit a permit application to the reviewing authority at the new location. In the case where the existing and new locations both fall within the jurisdiction of the same reviewing authority, the permit application for the new location will fulfill the relocation notification requirement.

As discussed above, we believe certain sources will hold permits that will contain specific conditions addressing requirements for relocation. In those cases, the provisions of the existing permit shall indicate the necessary notification of relocation requirements instead of those contained in 40 CFR 49.160(d)(1).

[11] The discussion below applies to true minor sources only. Synthetic minor sources are less likely to relocate, but if they do, we expect their permit conditions will address relocation.

V. Statutory and Executive Order Reviews

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

This action is not a ''significant regulatory action'' under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011) because it does not result in an impact greater than $100 million in any one year or raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive order.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. The proposed rule would not create any new requirements under the Tribal minor NSR program, but rather would simplify minor source registrations and permit applications for some sources, potentially reducing burden. The Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations for the Tribal minor NSR program (40 CFR 49.151 through 49.161) under the provisions of the *Paperwork Reduction Act,* 44 U.S.C. 3501 *et seq.,* and has assigned OMB control number 2060–0003. The OMB control numbers for the EPA's regulations in 40 CFR are listed in 40 CFR Part 9.

C. Regulatory Flexibility Act

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

For purposes of assessing the impacts of this proposed action on small entities, small entity is defined as: (1) A small business as defined in the U.S. Small Business Administration size standards at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise that is independently

owned and operated and is not dominant in its field.

After considering the economic impacts of this proposed action on small entities, I certify that this proposed action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant *adverse* economic impact on small entities, since the primary purpose of the regulatory flexibility analysis is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect, on all of the small entities subject to the rule.

The proposed rule would not create any new requirements under the Tribal minor NSR program, and therefore would not impose any additional burden on any sources (including small entities). The proposed rule would simplify minor source registrations and reduce the number of permit applications for some sources required under the existing rule, potentially reducing burden for all entities, including small entities. We have therefore concluded that this proposed rule will be neutral or relieve the regulatory burden for all affected small entities. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

D. Unfunded Mandates Reform Act

This rule does not contain a federal mandate that may result in expenditures of $100 million or more for state, local and tribal governments, in the aggregate, or the private sector in any 1 year. The proposed rule would not create any new requirements under the Tribal minor NSR program, but rather would simplify minor source registrations and reduce the number of permit applications for some sources, potentially reducing burden. Thus, this rule is not subject to the requirements of sections 202 or 205 of UMRA.

This rule is also not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. As noted previously, the effect of the proposed rule would be neutral or relieve regulatory burden.

E. Executive Order 13132: Federalism

This proposed rule does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This proposed rule would revise the Tribal minor NSR program, which applies only in Indian country, and would not, therefore, affect the relationship between the national government and the states or the distribution of power and responsibilities among the various levels of government.

In the spirit of Executive Order 13132 and consistent with EPA policy to promote communications between the EPA and state and local governments, the EPA specifically solicits comment on this proposed rule from state and local officials.

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

The EPA has concluded that this proposed rule will have tribal implications. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt tribal law. The proposed rule will have tribal implications since it would revise the Tribal minor NSR program, which applies to both tribally-owned and privately-owned sources in Indian country. As with the existing rule, the revised rule would be implemented by the EPA, or a delegate tribal agency assisting the EPA with administration of the rules, until replaced by an EPA-approved tribal implementation plan. The effect of the proposed rule would be to simplify compliance with, and administration of, the Tribal minor NSR program, so any impact on tribes would be in the form of reduced burden and cost.

The EPA conducted substantial outreach and consultation with tribal officials and other tribal representatives during the development of the Tribal minor NSR program, and incorporated tribal views throughout the course of developing the program. These outreach efforts were summarized in section III.D of the preamble to the final rule (76 FR 38753). Regarding this proposal, we have presented highlights of the proposed changes to tribal environmental staff during a conference call with the National Tribal Air Association on February 28, 2013, and asked for comments. Regarding the list of exempted units/activities, we received a comment letter from one tribe during the comment period following proposal of the initial Tribal minor NSR rule and we considered those comments again in developing this proposed rule. We plan to offer consultation to the tribal governments during the proposed rule comment period.

The EPA specifically solicits additional comment on this proposed action from tribal officials.

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

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

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

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

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

This proposed rulemaking does not involve technical standards. Therefore, the EPA did not consider the use of any voluntary consensus standards.

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

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

The EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The proposed rule would simplify minor source registrations and permit applications for some sources under the Tribal minor NSR program, but would not relax control requirements or result in greater emissions under the program. In fact, to the extent that the proposed rule might result in improved compliance with the program, it could result in emissions reductions in Indian country, which are often home to both minority and low-income populations.

K. Determination Under Section 307(d)

Pursuant to section 307(d)(1)(V) of the CAA, the Administrator determines that this action is subject to the provisions of section 307(d). Section 307(d)(1)(V) provides that the provisions of section 307(d) apply to ''such other actions as the Administrator may determine.''

VI. Statutory Authority

The statutory authority for this action is provided by sections 101, 110, 112, 114, 116 and 301 of the CAA as amended (42 U.S.C. 7401, 7410, 7412, 7414, 7416 and 7601).

List of Subjects in 40 CFR Part 49

Administrative practices and procedures, Air pollution control, Environmental protection, Indians, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: May 23, 2013.

Bob Perciasepe,

Acting Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as set forth below.

PART 49—INDIAN COUNTRY: AIR QUALITY PLANNING AND MANAGEMENT

■ 1. The authority citation for part 49 continues to read as follows:

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

Subpart C—[Amended]

■ 2. Section 49.151 is amended by:
■ a. Revising paragraph (c)(1)(i)(A);
■ b. Revising paragraphs (c)(1)(ii)(A) and (B);
■ c. Revising paragraph (c)(1)(iii)(B); and
■ d. Revising paragraph (d)(1).

The revisions read as follows:

§ 49.151 Program Overview.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(A) If you wish to begin construction of a minor modification at an existing major source on or after August 30, 2011, you must obtain a permit pursuant to §§ 49.154 and 49.155 (or a general permit pursuant to § 49.156, if applicable) prior to beginning construction.

* * * * *

(ii) * * *

(A) If you wish to begin construction of a new synthetic minor source and/or a new synthetic minor HAP source or a modification at an existing synthetic minor source and/or synthetic minor HAP source on or after August 30, 2011, you must obtain a permit pursuant to § 49.158 prior to beginning construction.

(B) If your existing synthetic minor source and/or synthetic minor HAP source was established pursuant to the FIPs applicable to the Indian reservations in Idaho, Oregon and Washington or was established under an EPA-approved rule or permit program limiting potential to emit, you do not need to take any action under this program unless you propose a modification for this existing synthetic minor source and/or synthetic minor HAP source, on or after August 30, 2011. For these modifications, you need to obtain a permit pursuant to § 49.158 prior to beginning construction.

* * * * *

(iii) * * *

(B) If you wish to begin construction of a new true minor source or a modification at an existing true minor source on or after 6 months from the date of publication in the **Federal Register** of a final general permit for that source category, or September 2, 2014, whichever is earlier, you must first obtain a permit pursuant to §§ 49.154 and 49.155 (or a general permit pursuant to § 49.156, if applicable). The proposed new source or modification will also be subject to the registration requirements of § 49.160, except for sources that are subject to § 49.138.

* * * * *

(d) * * *

(1) If you begin construction of a new source or modification that is subject to this program after the applicable date specified in paragraph (c) of this section without applying for and receiving a permit pursuant to this program, you will be subject to appropriate enforcement action.

* * * * *

■ 3. Amend § 49.152 in paragraph (d) by adding in alphabetical order the definitions for the terms ''Begin construction,'' ''Commence construction,'' and ''Forestry or silvicultural activities'' to read as follows:

§ 49.152 Definitions.

* * * * *

(d) * * *

Begin construction means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change. The following preparatory activities are excluded: engineering and design planning, geotechnical investigation (surface and subsurface explorations), clearing, surveying, ordering of equipment and materials, storing of equipment or setting up temporary trailers to house construction management or staff and contractor personnel.

Commence construction means, as applied to a new minor stationary source or minor modification at an existing stationary source subject to this subpart, that the owner or operator has all necessary preconstruction approvals or permits and either has:

(i) Begun on-site activities including, but not limited to, installing building supports and foundations, laying underground piping or erecting/installing permanent storage structures. The following preparatory activities are excluded: engineering and design planning, geotechnical investigation (surface and subsurface explorations), clearing, surveying, ordering of

equipment and materials, storing of equipment or setting up temporary trailers to house construction management or staff and contractor personnel.; or

(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

* * * * *

Forestry or silvicultural activities means those activities associated with regeneration, growing, and harvesting of trees and timber including, but not limited to, preparing sites for new stands of trees to be either planted or allowed to regenerate through natural means, road construction and road maintenance, fertilization, logging operations, and forest management techniques employed to enhance the growth of stands of trees or timber.

* * * * *

■ 4. Section 49.153 is amended by:

■ a. Revising paragraphs (a)(3)(ii) and (iii);

■ b. Revising paragraphs (c) introductory text and (c)(3); and

■ c. Adding paragraphs (c)(8) through (13).

The revisions and additions read as follows:

§ 49.153 Applicability.

(a) * * *

(3) * * *

(ii) If you wish to begin construction of a new synthetic minor source and/or a new synthetic minor HAP source or a modification at an existing synthetic minor source and/or synthetic minor HAP source, on or after August 30, 2011, you must obtain a permit pursuant to § 49.158 prior to beginning construction.

(iii) If you own or operate a synthetic minor source or synthetic minor HAP source that was established prior to the effective date of this rule (that is, prior to August 30, 2011) pursuant to the FIPs applicable to the Indian reservations in Idaho, Oregon and Washington or under an EPA-approved rule or permit program limiting potential to emit, you do not need to take any action under this program unless you propose a modification for this existing synthetic minor source and/or synthetic minor HAP source on or after August 30, 2011. For these modifications, you need to obtain a permit pursuant to § 49.158 prior to beginning construction.

* * * * *

(c) *What emissions units and activities are exempt from this program?* At a source that is otherwise subject to this program, this program does not apply to the following emissions units and activities that are listed in paragraphs (c)(1) through (13) of this section:

* * * * *

(3) Cooking of food, except for wholesale businesses that both cook and sell cooked food.

* * * * *

(8) Single family residences and residential buildings with four or fewer dwelling units.

(9) Emergency generators, designed solely for the purpose of providing electrical power during power outages:

(i) In nonattainment areas, the total maximum manufacturer's site-rated horsepower of all units shall be below 500;

(ii) In attainment areas, the total maximum manufacturer's site-rated horsepower of all units shall be below 1,000.

(10) Stationary internal combustion engines with a manufacturer's site-rated horsepower of less than 50.

(11) Furnaces or boilers used for space heating that exclusively use gaseous fuel, with a total maximum heat input (*i.e.,* from all units combined) of:

(i) In nonattainment areas, 5 million British thermal units per hour (MMBtu/hr) or less;

(ii) In attainment areas, 10 MMBtu/hr or less.

(12) Air conditioning units used for human comfort that do not exhaust air pollutants in the atmosphere from any manufacturing or other industrial processes.

(13) Forestry and silvicultural activities.

* * * * *

■ 5. Section 49.158 is amended by revising paragraph (c)(1) to read as follows:

§ 49.158 Synthetic minor source permits.

* * * * *

(c) * * *

(1) If your existing synthetic minor source and/or synthetic minor HAP source was established pursuant to the FIPs applicable to the Indian reservations in Idaho, Oregon and Washington or was established under an EPA-approved rule or permit program limiting potential to emit, you do not need to take any action under this program unless you propose a modification for this existing synthetic minor source and/or synthetic minor HAP source on or after August 30, 2011. For these modifications, you need to obtain a permit pursuant to § 49.158 before you begin construction.

* * * * *

■ 6. Section 49.160 is amended by revising paragraph (d)(1) to read as follows:

§ 49.160 Registration program for minor sources in Indian country.

* * * * *

(d) * * *

(1) *Report of relocation.* After your source has been registered, you must report any relocation of your source to the reviewing authority in writing no later than 30 days prior to the relocation of the source. Unless otherwise specified in an existing permit, a report of relocation shall be provided as specified in paragraph (d)(1)(i) or (ii) of this section, as applicable. In either case, the permit application for the new location satisfies the report of relocation requirement.

(i) Where the relocation results in a change in the reviewing authority for your source, you must submit a report of relocation to the current reviewing authority and a permit application to the new reviewing authority.

(ii) Where the reviewing authority remains the same, a report of relocation is fulfilled through the permit application for the new location.

* * * * *

[FR Doc. 2013–13057 Filed 6–3–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[EPA–HQ–SFUND–2003–0010; FRL–9818–6]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List: Partial Deletion of the Omaha Lead Superfund Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notice of intent.

SUMMARY: The Environmental Protection Agency (EPA) Region 7 is issuing a Notice of Intent to Delete the 1,154 parcels (of the Omaha Lead Superfund Site (Site) located in the eastern part of the city of Omaha, Nebraska, from the National Priorities List (NPL) and requests public comments on this proposed action. The NPL, promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980, as amended, is an appendix of the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The EPA and the State of Nebraska, through the

Nebraska Department of Environmental Quality (NDEQ), have determined that all appropriate response actions under CERCLA and other lead abatement activities at these identified parcels have been completed. However, this deletion does not preclude future actions under Superfund.

This partial deletion pertains to soils, dust and deteriorating lead-based paint, where applicable, of the 1,154 residential parcels. These types of properties include single and multi-family dwellings, apartment complexes, child-care facilities, vacant lots in residential areas, schools, churches, community centers, parks, greenways, and any other areas where children may be exposed to site-related contaminated media. A listing of the parcels by address can be found in Table 1 in the deletion docket. Figure 1 also shows a map of the Omaha Lead site and identifies the parcels proposed for deletion. Approximately 12,800 residential parcels and associated soil, dust and deteriorating lead-based paint will remain on the NPL and is/are not being considered for deletion as part of this action.

DATES: Comments must be received by July 5, 2013.

ADDRESSES: Submit your comments, identified by Docket ID no. EPA–HQ–SFUND–2003–0010, by one of the following methods:

- *http://www.regulations.gov.* Follow on-line instructions for submitting comments.
- *Email: france-isetts.pauletta@epa.gov* Fax: 913–551–7066
- *Mail:* Environmental Protection Agency, 8600 NE Underground Dr., Pillar 253,, Kansas City, Missouri 64161 Attention: Pauletta France-Isetts, Superfund Division Hand delivery: 11201 Renner Boulevard, Lenexa, Kansas 66219. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID no. EPA–HQ–SFUND–2003–0010. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or email. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means 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 *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket:

All documents in the docket are listed in the *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 the hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at:

EPA Region 7, 11201 Renner Boulevard., Lenexa, Kansas 66219 open from 8 a.m. to 4 p.m.

EPA Public Information Center (north), 3040 Lake Street, Omaha, NE 68111 open from 8 a.m. to 4 p.m. call (402) 991–9583 to ensure staff are available; EPA Public Information Center (south) 4909 S. 25th Street, Omaha, NE 68107, open from 8 a.m. to 4 p.m. call (402) 731–3045 to ensure staff are available; W. Dale Clark Library, 215 S. 15th Street; Omaha, NE 68102

FOR FURTHER INFORMATION CONTACT: Pauletta France-Isetts, Remedial Project Manager, U.S. Environmental Protection Agency, Region 7, Superfund Division, 8600 NE Underground Drive, Pillar 253, Kansas City, Missouri 64161, (913)–339–8105, email: france-isetts.pauletta@epa.gov

SUPPLEMENTARY INFORMATION:

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I. Introduction

EPA Region 7 announces its intent to delete the 1,154 residential parcel(s) (identified in Table 1 and Figure 1 of the deletion docket) of the Omaha Lead Superfund Site (Site), from the National Priorities List (NPL) and request public comment on this proposed action. The NPL constitutes Appendix B of 40 CFR part 300, which is the Oil and Hazardous Substances Pollution Contingency Plan (NCP), which EPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980, as amended. EPA maintains the NPL as those sites that appear to present a significant risk to public health, welfare, or the environment. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substance Superfund (Fund). This partial deletion of the Omaha Lead Superfund Site is proposed in accordance with 40 CFR 300.425(e) and is consistent with the Notice of Policy Change: Partial Deletion of Sites Listed on the National Priorities List. 60 FR 55466 (Nov. 1, 1995). As described in 300.425(e)(3) of the NCP, a portion of a site deleted from the NPL remains eligible for Fund-financed remedial action if future conditions warrant such actions.

EPA will accept comments on the proposal to partially delete portions of this site for thirty (30) days after publication of this document in the **Federal Register**.

Section II of this document explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section IV discusses the 1,154 residential parcel(s) of the Omaha Lead Superfund Site and demonstrates how each activity completed at the parcels meet the deletion criteria.

II. NPL Deletion Criteria

The NCP establishes the criteria that EPA uses to delete sites from the NPL. In accordance with 40 CFR 300.425(e), sites may be deleted from the NPL where no further response is appropriate. In making such a determination pursuant to 40 CFR 300.425(e), EPA will consider, in consultation with the State, whether any of the following criteria have been met:

i. responsible parties or other persons have implemented all appropriate response actions required;

ii. all appropriate Fund-financed response under CERCLA has been implemented, and no further response

action by responsible parties is appropriate; or

iii. the remedial investigation has shown that the release poses no significant threat to public health or the environment and, therefore, the taking of remedial measures is not appropriate.

III. Deletion Procedures

The following procedures apply to deletion of [Enter description of parcel(s)] of the Site:

(1) EPA consulted with the State before developing this Notice of Intent for Partial Deletion.

(2) EPA has provided the state 30 working days for review of this notice prior to publication of it today.

(3) In accordance with the criteria discussed above, EPA has determined that no further response is appropriate.

(4) The State of Nebraska, through the Nebraska Department of Environmental Quality, has concurred with the deletion of the 1,154 parcel(s) identified in Table 1 and Figure 1of the Omaha Lead Superfund Site, from the NPL.

(5) Concurrently, with the publication of this Notice of Intent for Partial Deletion in the **Federal Register**, a notice is being published in a major local newspaper, Omaha World Herald and Nuestro Mundo. The newspapers announce the 30-day public comment period concerning the Notice of Intent for Partial Deletion of the Site from the NPL.

(6) The EPA placed copies of documents supporting the proposed partial deletion in the deletion docket and made these items available for public inspection and copying at the Site information repositories identified above.

If comments are received within the 30-day comment period on this document, EPA will evaluate and respond accordingly to the comments before making a final decision to delete the 1,154 parcel(s) indentified in Table 1 and Figure 1. If necessary, EPA will prepare a Responsiveness Summary to address any significant public comments received. After the public comment period, if EPA determines it is still appropriate to delete the 1,154 parcel(s) identified in Table 1 and Figure 1 of the Omaha Lead Superfund Site, the Regional Administrator will publish a final Notice of Partial Deletion in the **Federal Register**. Public notices, public submissions and copies of the Responsiveness Summary, if prepared, will be made available to interested parties and included in the site information repositories listed above.

Deletion of a portion of a site from the NPL does not itself create, alter, or revoke any individual's rights or obligations. Deletion of a portion of a site from the NPL does not in any way alter EPA's right to take enforcement actions, as appropriate. The NPL is designed primarily for informational purposes and to assist EPA management. Section 300.425(e)(3) of the NCP states that the deletion of a site from the NPL does not preclude eligibility for future response actions, should future conditions warrant such actions.

IV. Basis for Partial Site Deletion

The following information provides EPA's rationale for deleting the 1,154 residential property parcel(s) identified in Table 1 and Figure 1 of the Omaha Lead Superfund Site from the NPL:

Site Background and History

The Omaha Lead Site (OLS or Site [CERCLIS ID #NESFN0703481]) includes surface soils present at residential properties, child-care centers, and other residential-type properties in the city of Omaha, Douglas County, Nebraska, that have been contaminated as a result of air emissions deposition from historic lead smelting and refining operations. The OLS encompasses the eastern portion of the greater metropolitan area in Omaha, Nebraska. The site extends from the Douglas-Sarpy County line on the south, north to Read Street and from the Missouri River on the east to 56th Street on the west. The Site is centered around downtown Omaha, Nebraska, where two former lead-processing facilities operated. American Smelting and Refining Company, Inc. (ASARCO) operated a lead refinery at 500 Douglas Street in Omaha, Nebraska, for over 125 years. Aaron Ferer & Sons Company (Aaron Ferer), and later the Gould Electronics, Inc., (Gould) operated lead battery recycling plant were located at 555 Farnam Street.

Both ASARCO and Aaron Ferer/Gould facilities released lead-containing particulates into the atmosphere from their smokestacks which were deposited on surrounding residential properties. Douglas County Health Department (DCHD) monitored ambient air quality around the ASARCO facility beginning in 1984. This air monitoring routinely measured ambient air lead concentrations in excess of the ambient air standard.

The DCHD has compiled statistics on the results of blood lead screening of children less than seven years of age for more than 25 years. Blood lead screening of children living in zip codes located east of 45th Street have consistently exceeded the 10 microgram per deciliter (µg/dl) health-based threshold more frequently than children living elsewhere in the county.

In 1998, the Omaha City Council requested assistance from the EPA to address the high frequency of children found with elevated blood lead levels by the DCHD. At that time, the EPA began investigating the lead contamination in the Omaha area under the authority of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

The OLS includes those residential properties where the U.S. Environmental Protection Agency (EPA) determines through soil sampling that soil lead levels represent an unacceptable risk to human health. Residential properties where soil sampling indicates that soil lead concentrations are below a level that represent an unacceptable risk, they are not considered part of the Site. Residential properties include those with high accessibility to sensitive populations (children seven years of age and younger [0 to 84 months] and pregnant or nursing women). These types of properties include single and multi-family dwellings, apartment complexes, child-care facilities, vacant lots in residential areas, schools, churches, community centers, parks, greenways, and any other areas where children may be exposed to site-related contaminated media. Commercial and industrial properties are also excluded from the defined Site. The EPA established a 27 square-mile Final Focus Area to evaluate potentially impacted properties.

The OLS was proposed to be included on the National Priorities List (NPL) on February 26, 2002 (67 FR 8836). The Site was listed on the NPL on April 30, 2003 (68 FR 23094).

The residential properties proposed for partial deletion were addressed under both removal and remedial authority. Regardless of the authority used for the remediation of yards, the cleanup levels for soils (developed using the IEUBK model) for all the properties proposed for deletion are the same. The response decision documents and activities will be discussed in the following sections.

Removal Activities

The EPA began sampling residential properties that were used to provide licensed child-care services in March 1999. Due to the high concentrations of lead detected in yard soils, the EPA initiated a removal action to address lead-contaminated soils that exceed criteria for a time-critical removal action in 1999. The removal response involves the excavation and replacement of lead-

contaminated soil where action levels identified in the Action Memorandum are exceeded. These response actions levels were:

- A child seven years of age or younger (0 to 84 months) residing at the property is identified with an elevated blood level exceeding 10 µg/dl and any non-foundation sample collected from the property exceeds 400 ppm;
- A property is a child-care facility, and any non-foundation sample collected from the property exceeds 400 ppm; or
- Any non-foundation sampled exceeds 1,200 ppm at any residential or residential-type property.

A second removal action was initiated in August 2002 with the signing of a second Action Memorandum. This second removal action included all other residential type properties where the maximum non-foundation soil lead concentration exceeded an action level of 2,500 ppm. The 2002 Action Memorandum explicitly identifies the possibility of lead-based paint as a potential contributor to lead contamination of soils within 30 inches of the foundation of a painted structure. Because of the potential contribution of deteriorating lead-based paint near the foundations of structures, the soil lead level in the drip zone (areas near structure foundations) alone would not trigger soil removal. However, if any mid-yard soil sample exceeded the action level, soil from all areas of the property exceeding the 400 ppm cleanup level would be removed and replaced, including drip zone soils if they exceeded 400 ppm.

Properties determined to be eligible for response under either of the Action Memoranda had soils with lead concentrations greater than the cleanup level excavated and replaced with clean soil and disturbed areas were revegetated. The action level, which triggered response for typical residential properties under the second removal action, was reduced to 1,200 ppm in November 2003. In 2005, the two removal actions were combined into a single response. Throughout the implementation of both removal actions, the lead cleanup level remained at 400 ppm.

Remedial Investigation/Feasibility Study

Thoughout the implementation of the removal action, lead levels in residential soils were evaluated and actions were taken where action levels were exceeded, per the removal Action memoranda. A Human Health Risk Assessment was developed for the site using site-specific information collected during the OLS Remedial Investigation. Lead was identified in the risk assessment as the primary contaminant of concern. Arsenic was also identified as a potential contaminant of concern, but was eliminated after considering its relatively low overall risk to residents and lack of connection to the release from the industrial sources being addressed by this Superfund action.

The risk assessment for lead focused on young children under the age of seven (0 to 84 months) who are site residents. Young children are most susceptible to lead exposure because they have higher contact rates with soil or dust, absorb lead more readily than adults, and are more sensitive to the adverse effects of lead than are older children and adults. The effect of greatest concern in children is impairment of the nervous system, including learning deficits, lowered intelligence, and adverse effects on behavior. The Integrated Exposure Uptake Biokinetic (IEUBK) model for lead in children was used to evaluate the risks posed to young children (0 to 84 months) as a result of the lead contamination at the site. Because lead does not have a nationally-approved reference dose (RfD), cancer slope factor, or other accepted toxicological factor which can be used to assess risk, standard risk assessment methods cannot be used to evaluate the health risks associated with lead contamination. The modeling results determined that there was an unacceptable risk to young children from exposure to soils above 400 ppm.

In October 2008, EPA released a draft Final Remedial Investigation, which presented results of all site investigations including soil sampling performed at more than 35,000 residential properties. Based on the 2008 data set, EPA established the Final Focus Area for the Site, which defined the area of residential properties that are targeted for sampling. This area is generally bounded by Read Street to the north, 56th Street to the west, Harrison Street (Sarpy County line) to the south, and the Missouri River to the east, and encompasses 17,290 acres (27.0 square miles).

Through completion of the OLS Final Remedial Investigation, soil sampling had been completed at 37,076 residential properties, including 34,565 within the Final Focus Area's boundary. In total, 34.2 percent of properties sampled through completion of the 2008 RI had at least one mid-yard sample with a soil lead level exceeding 400 ppm. Based on the data trends, the OLS Final Feasibility Study (FS) estimates that soil lead levels will exceed 400 ppm at a total of 14,577 properties when soil sampling is completed at all properties within the Final Focus Area.

In addition to soil sampling, 159 residences were sampled during the OLS Remedial Investigation for interior dust to support the OLS Human Health Risk Assessment conducted by the EPA and the Nebraska Health and Human Services System. The EPA recognizes that there may be additional sources of lead exposure to residents at the site. These other sources, which could include interior and exterior lead-based paint and drinking water, are generally outside the scope of CERCLA response authority. The focus of the EPA sampling efforts focused on lead-contaminated surface soils related to historic industrial emissions at the site, in accordance with procedures established in the EPA Residential Sites Handbook. The handbook does allow for characterization of potential sources of lead exposure in addition to soil and interior dust. In accordance with the EPA Residential Sites Handbook, the selected remedy in this ROD includes an expanded sampling program to characterize other potential lead exposure sources in addition to soil and interior dust.

Selected Remedy

As the soil cleanup under CERCLA removal authority was ongoing, planning for continued response under CERCLA remedial authority was proceeding. EPA organized the work remaining following completion of CERCLA removal response into these two operable units:

- Operable Unit 1: Response at high child impact properties and the most highly contaminated OLS properties exceeding 800 ppm soil lead.
- Operable Unit 2: Response at remaining properties that exceed risk-based soil lead levels established during final remedy selection process.

For OU1, EPA selected an interim remedy on December 15, 2004. The Remedial Action Objective was to reduce the risk of exposure of young children to lead such that an individual child, or group of similarly exposed children, have no greater than a 5 percent chance of having a blood-lead concentration exceeding 10 µg/dl. The selected remedy included:

- Excavation and replacement of soils at properties with greatest human health risk
  - Excavation of soils exceeding 800 ppm at any residential-type property
  - Excavation of soils exceeding 400 ppm in high child-impact areas
  - Excavation of soils exceeding 400 ppm at properties with a child exhibiting an elevated blood-lead level

- Final management of excavated materials
- Stabilization of loose and flaking exterior lead-based paint
- High efficiency interior cleaning
- Participation in comprehensive program addressing all potential lead sources
- Health Education

The pre-established soil remediation level of 400 ppm was determined to be the cleanup level for this interim remedial action. In order to prevent the re-contamination of the clean soil placed in yards after excavation, loose and flaking exterior lead-based paint that threatens the continued protectiveness of the remedy at these properties will be stabilized on affected structures prior to soil excavation. Only those homes and other structures where lead-based paint is visibly flaking and deteriorating will be addressed. At residences where soil cleanup actions are conducted, sampling will be performed to assess lead concentrations and loadings in interior dust. Homes that exceed the EPA and HUD standards for lead in interior dust will be eligible for a thorough interior cleaning using high-efficiency equipment. Interior cleaning of affected residences will be provided, in accordance with HUD procedures, on a voluntary basis for willing residents, after the soil cleanup is completed in the yard.

For OU2, EPA selected a final site remedy on May 13. 2009. The Remedial Action Objective is to reduce the risk of exposure of young children to lead such that an individual child, or group of similarly exposed children, have no greater than a 5 percent chance of having a blood-lead concentration exceeding 10 µg/dl.

The selected final remedy continues the ongoing remedial response being implemented under the December 15, 2004, Interim ROD for the OLS with the following modifications:

- The final OLS soil lead action level was lowered to 400 ppm for all residential and residential-type properties. High child impact properties continue to be prioritized for response.
- Soil sampling will continue to determine eligibility for remedial action at properties inside the Final Focus Area where sampling has not been performed. Soil sampling, outside the focus area, will be discontinued unless requested. Requests for soil sampling outside the focus area will be considered by EPA and decisions made on a case-by-case basis.
- An institutional control involving the operation of a local lead hazard registry containing information about the status of EPA investigation and response and other lead hazards identified at individual Omaha properties.
- Participating residents at eligible properties will be offered high-efficiency household vacuum equipment, training on the maintenance and importance of proper usage, and education on mitigation of household lead hazards. In addition, samples of interior dust are collected and the results provided to the residents. Residents at properties qualifying for soil remediation will be offered interior dust response. The interior dust response is not mandatory and the resident may choose to decline. Dust and interior floor wipe sampling are performed when access is granted. The analytical data is provided to the resident/tenant and informs them if HUD criteria are exceeded. Follow-up efforts are conducted by the Douglas County Health Department at any residence that has interior dust levels exceeding HUD criteria.

Response Actions

The initial EPA response was conducted under CERCLA removal authority. In 2005, following issuance of the Interim Record of Decision, the action level for removal response during the transitional period was lowered to 800 ppm for consistency with the upcoming remedial response.

Beginning with the construction season of 2005, the scope of the EPA response was expanded under the 2004 Interim ROD to include: (1) Stabilization of deteriorating exterior lead-based paint at properties where the continued effectiveness of the soil remediation was threatened, (2) response to interior dust at properties where interior dust lead levels exceeded appropriate criteria, (3) public health education, and (4) participation in a comprehensive remedy with other agencies and organizations that addresses all identified lead hazards in the Omaha community.

Excavation and Replacement of Soils

Excavation of soils was accomplished using lightweight excavation equipment and hand tools the portions of the yard where the surface soil exceeded 400 ppm lead. Excavation continued in all quadrants, play zones, and drip zone areas exceeding 400 ppm lead until the residual lead concentration measured at the exposed surface of the excavation was less than 400 ppm in the initial foot, or less than 1,200 ppm at depths greater than one foot. Typically, soil excavation depths were between 6 and 10 inches in depth. Soils in garden areas were excavated until reaching a residual concentration of less than 400 ppm in the initial two feet from the original surface, or less than 1,200 ppm at depths greater than two feet.

After confirmation sampling verified that cleanup goals were met, the excavated areas were backfilled with clean soil to original grade and sod was placed over the remediated areas.

EPA did not utilize soil from any protected Loess Hills area as backfill for the OLS.

The contaminated soils removed from the remediated yards was stockpiled at staging areas, sampled and then transported to an off-site Subtitle D solid waste landfill for use as daily cover and/or disposal.

Stabilization of Loose and Flaking Exterior Lead-Based Paints

The lead-based paint assessment protocol, presented in the Final Lead-Based Paint Recontamination Study Report prepared for the OLS, was used to determine eligibility for exterior lead-based paint stabilization at those properties where soil lead concentrations exceed 400 ppm. At those properties where the exterior lead-based paint assessment identified a threat from deteriorating paint to the continued protectiveness of the soil remediation, the owner of the property was offered stabilization of painted surfaces on structures located on the property. Exterior lead-based paint stabilization is not mandatory and was provided to those qualifying property owners who choose to have their exterior paint stabilized. Lead –safe practices identified in the EPA's Renovate, Repair and Painting Rule were followed. Removal of loose and flaking lead-based paint was performed using lead-safe practices, which includes wet scraping and collection of paint chips using plastic sheeting. Scraped areas were primed and all previously painted surfaces had two coats of paint applied.

Interior Dust Response

As part of the final remedy, residents at eligible properties are given the opportunity to have interior dust sampled. Upon agreement, the residents are given a high-efficiency household vacuum cleaner, training on the maintenance and the importance of proper usage of the vacuum, and education on mitigation of household lead hazards. In addition, samples of interior dust are collected and analyzed for lead. The resident/tenant is provided the analytical results. The letter transmitting the data also indicates whether the interior dust collected has lead above the HUD criteria.

The Douglas County Health Department provides the training and education regarding the need to mitigate interior dust. Interior dust response is offered to all residents with a qualifying property (soil lead concentrations greater than 400 parts per million). The resident does not have to agree and participation in the dust response is voluntary by the residents. At properties where soil remediation has been conducted, interior floor wipe sampling indicates that, typically, HUD criteria are not exceeded.

Exterior lead-based paint stabilization and interior dust response were provided retroactively to properties where soil cleanups have been performed under CERCLA removal authority, as well as to properties addressed under CERCLA remedial authority.

Participation in Comprehensive Program to Address Potential Lead Sources

There are a number of identified lead hazards within the OLS, not all of which are connected to the contaminant source of OLS. In order to better address all potential lead sources within the OLS, a health education program was developed and continues to be implemented to raise awareness and mitigate exposure. An active educational program continues in cooperation with agencies and organizations that includes ATSDR, NDHHS, DCHD, local non-governmental organizations, and other interested parties throughout the duration of the EPA remedial action.

Health Education

The following, although not an exhaustive list, indicate the types of educational activities provided at the Site:

- Support for in-home assessments for children identified with elevated blood lead levels.
- Development and implementation of lead poisoning prevention curriculum in schools.
- Support for efforts to increase community-wide blood lead monitoring.
- Physicians' education for diagnosis, treatment, and surveillance of lead exposure.
- Operation of EPA Public Information Centers to distribute information and respond to questions about the EPA response activities and lead hazards in the community.
- Use of mass media (television, radio, internet, print media, etc.) to distribute health education messages.

Development and distribution of informational tools such as fact sheets, brochures, refrigerator magnets, etc., to inform the public about lead hazards and measures that can be taken to avoid or eliminate exposure.

Institutional Controls

The lead hazard registry, identified as the Omaha Lead Education and Discussion (Omaha LEAD), provides interested parties with on-line access to lead hazard information at individual properties, including the status of EPA investigations and response actions and other lead hazard information including HUD-funded lead hazard control and abatement activities. Information available through the lead hazard registry includes initial soil lead sampling results from individual quadrants and residual soil lead levels remaining at properties following soil remediation. EPA notifies residents and property owners about the information that is available through the lead hazard registry as part of the transmittal sent at the completion of soil remediation at individual properties. Residents and property owners will receive a second notification when the lead hazard registry is complete and operational at the conclusion of the OLS remedial action. The final notification will describe information available through the lead hazard registry and again advise property owners that records of potential lead hazards received from EPA should be retained for compliance with state and Federal disclosure requirements.

After the issuance of the 2009 Final ROD, response efforts identified as Operable Unit 2 began. Operable Unit 2 work efforts began with the 2009 construction season and included all remaining remedial response work at the OLS. All work remaining under Operable Unit 1 not completed was performed under Operable Unit 2. Properties identified with time-critical conditions, including residences with elevated blood-lead levels in children and high child-impact areas, continue to receive prioritized response during the final remedy implemented under Operable Unit 2.

The precise scope of work remaining to be completed at the OLS site (under OU1 and OU2) is not known with certainty since sampling has not been completed to determine eligibility for soil remediation, exterior lead-based paint stabilization, and interior dust response. However, those properties not addressed to date are not part of this partial deletion.

Information on activities completed at each property can be found in the deletion docket and at the Omaha Lead Education and Discussion (''OmahaLEAD'') Web site. Omaha LEAD is a Geographic Information Systems (''GIS'')-based Web site (*www.omahalead.org*) that increases the public's awareness of lead hazards and acts of a as a *virtual library* of lead hazard mitigation activities, including activities conducted by private property owners, the City of Omaha, and the US EPA. The Web site is operational.

Cleanup Goals

Final cleanup levels for lead in residential soil at Superfund sites generally are based on a consideration of the PRG derived by the IEUBK model results, taking the uncertainty in the value into account, and also considering the nine criteria in accordance with the CERCLA regulations contained in the National Contingency Plan (NCP). Under most circumstances, EPA selects a residential soil lead cleanup level that is within the range of 400 ppm to 1,200 ppm. EPA selected a soil action level for lead in residential soils at the site of 400 ppm.

For lead contamination that may be addressed under CERCLA, these cleanup levels allow for unrestricted use. Therefore, operation and maintenance, institutional controls and five-year reviews are not required for these parcels.

Community Involvement

EPA has worked extensively with the Omaha community through a variety of communication vehicles, including but not limited to local speaking engagements, participation in citizens' groups and city council meetings, local public access television, public service announcements on local cable television, coverage on radio and television and in local and national newspapers, mass mailings of informational materials, public outreach by telephone, by conducting public meetings, and through the EPA Web site.

EPA has been performing outreach to Omaha citizens, elected officials, school officials, health officials, the media, nonprofit groups, and others since becoming involved in the project in 1998 in an effort to convey information about the hazards of lead poisoning, particularly how lead affects the health of children. The EPA has participated in numerous formal and informal meetings to explain EPA's role and commitment in Omaha, convey information about the Superfund process, and provide general information about the site and lead contamination. EPA responds to inquiries on a daily basis regarding the site and individual property owner's sampling results.

In January 2004, a Community Advisory Group (CAG) was formed for the site. A CAG is a committee, task force, or board made up of residents affected by a Superfund site. They provided a public forum where representatives of diverse community interests can present and discuss their needs and concerns related to the site and the cleanup process. The last CAG meeting was held in October 2011. A new group, Child Lead Poisoning Prevention Group, formed. The first meeting of the Child Lead Poisoning Group was held at City Hall in May 2012. The purpose of the new group remains the same.

Determination That the Criteria for Deletion Have Been Met

In accordance with 40 CFR 300.425(e), Region 7 of the EPA finds that the 1,154 residential parcels of the Omaha Lead site (the subject of this deletion) meet the substantive criteria for partial NPL deletions. EPA has consulted with and has the concurrence of the State of Nebraska. All responsible parties or other persons have implemented all appropriate response actions required. All appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate.

List of Subjects in 40 CFR Part 300

Environmental protection, Hazardous substances, Intergovernmental relations, Superfund.

Authority: 33 U.S.C. 1321(c)(2); 42 U.S.C. 9601–9657; E.O. 12777, 56 FR 54757,3 CFR, 1991 Comp., p.351; E.O. 12580, 52 FR 2923, 3 CFR, 1987 Comp., p.193.

Dated: May 16, 2013.

Karl Brooks,

Regional Administrator, Region 7.

[FR Doc. 2013–12969 Filed 6–3–13; 8:45 am]

BILLING CODE 6560–50–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

[FWS–R6–ES–2013–0068]

RIN 1018–AY56

Endangered and Threatened Wildlife and Plants; Revision of Critical Habitat for Salt Creek Tiger Beetle

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to revise critical habitat for the Salt Creek tiger beetle (*Cicindela nevadica lincolniana*) under the Endangered Species Act. If we finalize this rule as proposed, it would extend the Act's protections to lands designated as revised critical habitat for this subspecies. This designation fulfills our obligations under a settlement agreement. The effect of this regulation is to conserve the habitat of Salt Creek tiger beetles in eastern Nebraska under the Endangered Species Act.

DATES: We will accept comments received or postmarked on or before August 5, 2013. Comments submitted electronically using the Federal eRulemaking Portal (see **ADDRESSES** section, below) must be received by 11:59 p.m. Eastern Time of the closing date. We must receive requests for public hearings, in writing, at the address shown in **ADDRESSES** by July 19, 2013.

ADDRESSES: You may submit comments by one of the following methods:

(1) *Electronically:* Go to the Federal eRulemaking Portal: *http://www.regulations.gov.* In the Search box, enter Docket No. FWS–R6–ES–2013–0068, which is the docket number for this rulemaking. You may submit a comment by clicking on ''Comment Now!''

(2) *By hard copy:* Submit by U.S. mail or hand-delivery to: Public Comments Processing, Attn: FWS–R6–ES–2013–0068; Division of Policy and Directives Management; U.S. Fish and Wildlife Service; 4401 N. Fairfax Drive, MS 2042–PDM; Arlington, VA 22203.

We request that you send comments only by the methods described above. We will post all comments on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see the Public Comments section below for more information).

The coordinates or plot points or both from which the maps are generated are included in the administrative record for this critical habitat designation and are available at *http://www.fws.gov/nebraskaes,* or *http://www.regulations.gov* at Docket No. FWS–R6–ES–2013–0068, and at the Nebraska Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**). Any additional tools or supporting information that we may develop for this critical habitat designation will also be available at the Fish and Wildlife Service Web site and Field Office set out above, and may also be included in the preamble and/or at *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Michael D. George, Field Supervisor, U.S. Fish and Wildlife Service, Nebraska Ecological Services Field Office, 203 W 2nd St., Grand Island, NE 68801; telephone 308–382–6468. If you use a telecommunications device for the deaf (TDD), call the Federal Information Relay Service (FIRS) at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Executive Summary

Why We Need To Publish a Rule

This is a proposed rule to revise the designation of critical habitat for the endangered Salt Creek tiger beetle. This revision will fulfill the terms of a settlement agreement reached on June 7, 2011 (see Previous Federal Actions). Under the Endangered Species Act of 1973, as amended (Act; 16 U.S.C. 1531 *et seq.*), any species that is determined to be threatened or endangered requires critical habitat to be designated, to the maximum extent prudent and determinable. Designations and revisions of critical habitat can only be completed by issuing a rule.

This Rule Will Propose Revised Critical Habitat for the Endangered Salt Creek Tiger Beetle

In total, we are proposing 1,110 acres (ac) (449 hectares (ha)) for designation as critical habitat for the Salt Creek tiger beetle in Lancaster and Saunders Counties in Nebraska. This proposed revised critical habitat includes saline wetlands and streams associated with Little Salt Creek and encompasses all three habitat areas occupied by the subspecies at the time of listing. It also includes saline wetlands and streams associated with Rock Creek and Oak Creek (Capitol Beach) that are currently unoccupied, but supported the subspecies less than 20 years ago. Our designation also includes segments of Haines Branch Creek because this area has the potential to provide suitable habitat for the Salt Creek tiger beetle and its inclusion will reduce the risk of species extinction by providing redundancy in available habitat throughout multiple creeks. Due to the presence of suitable habitat, we believe that the Salt Creek tiger beetle occurred in this area historically; however, they have not been documented in this location due to minimal survey effort relative to the annual surveys done at Little Salt, Rock, and Oak Creeks.

The Basis for Our Action

Under the Act, any species that is determined to be a threatened or

endangered species shall, to the maximum extent prudent and determinable, have habitat designated that is considered to be critical habitat. Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species.

We Will Seek Peer Review

We are seeking comments from independent specialists to ensure that our proposed revision of critical habitat is based on scientifically sound data and analyses. We will invite these peer reviewers to comment on our specific assumptions and conclusions in this proposed rule. Because we will consider all comments and information received during the comment period, our final determinations may differ from this proposal (see subsequent section on Peer Review).

Information Requested

We intend that any final action resulting from this proposed rule will be based on the best scientific and commercial data available and be as accurate and as effective as possible. Therefore, we request comments or information from other concerned government agencies, the scientific community, industry, or any other interested party concerning this proposed rule. We particularly seek comments concerning:

(1) The reasons why we should or should not designate habitat as ''critical habitat'' under section 4 of the Act (16 U.S.C. 1531 *et seq.*) including whether there are threats to the species from human activity, the degree of which can be expected to increase due to the designation, and whether that increase in threat outweighs the benefit of designation such that the designation of critical habitat may not be prudent.

(2) Specific information on:

(a) The amount and distribution of Salt Creek tiger beetle habitat;

(b) What areas that were occupied at the time of listing (or are currently occupied) and that contain features essential to the conservation of the species should be included in the designation and why;

(c) Special management considerations or protection that may be needed in critical habitat areas we are proposing, including managing for the potential effects of climate change;

(d) What areas not occupied at the time of listing are essential for the conservation of the species and why; and

(e) The amount of habitat needed to be occupied by Salt Creek tiger beetles in order to recover the species.

(3) Land use designations and current or planned activities in the subject areas and their possible impacts on proposed critical habitat.

(4) Information on the projected and reasonably likely impacts of climate change on the Salt Creek tiger beetle and proposed critical habitat.

(5) Any probable economic, national security, or other relevant impacts of designating any area that may be included in the final designation; in particular, any impacts on small entities or families, and the benefits of including or excluding areas that exhibit these impacts.

(6) Whether any specific areas we are proposing for revised critical habitat designation should be considered for exclusion under section 4(b)(2) of the Act, and whether the benefits of potentially excluding any specific area outweigh the benefits of including that area under section 4(b)(2) of the Act.

(7) Whether we could improve or modify our approach to designating critical habitat in any way to provide for greater public participation and understanding, or to better accommodate public concerns and comments.

You may submit your comments and materials concerning this proposed rule by one of the methods listed in **ADDRESSES**. We request that you send comments only by the methods described in **ADDRESSES**.

We will post your entire comment—including your personal identifying information—on *http://www.regulations.gov.* If you submit your comment by hard copy, you may request at the top of your document that we withhold personal information such as your street address, phone number, or email address from public review; however, we cannot guarantee that we will be able to do so. All comments submitted via *http://www.regulations.gov* will be posted in their entirety.

Comments and materials we receive, as well as supporting documentation we used in preparing this proposed rule, will be available for public inspection on *http://www.regulations.gov,* or by appointment, during normal business hours, at the U.S. Fish and Wildlife Service, Nebraska Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Previous Federal Actions

The final rule to list the Salt Creek tiger beetle as endangered was published on October 6, 2005 (70 FR 58335). At that time, we stated that critical habitat was prudent and determinable; however, we did not designate critical habitat because we were in the process of identifying the physical and biological features essential to conservation of the species. We published a proposed rule to designate critical habitat on December 12, 2007 (72 FR 70716). On June 3, 2008, we published a notice in the **Federal Register** to reopen the comment period and announce a public hearing (73 FR 31665). On April 28, 2009, we published a revised proposed rule to designate critical habitat (74 FR 19167). A final rule designating approximately 1,933 ac (782 ha) of critical habitat was published on April 6, 2010 (75 FR 17466). The Center for Native Ecosystems, the Center for Biological Diversity, and the Xerces Society (plaintiffs) filed a complaint on February 23, 2011, regarding designation of critical habitat for the species. The plaintiffs asserted that we failed to designate sufficient critical habitat to conserve and recover the species. A settlement agreement between the plaintiffs and the U.S. Fish and Wildlife Service (Service) was reached on June 7, 2011, and we agreed to reevaluate our designation of critical habitat. This proposed rule addresses our proposed revisions to the critical habitat designation for the Salt Creek tiger beetle.

Background

It is our intent to discuss below only those topics directly relevant to the proposed revisions to the critical habitat designation for the Salt Creek tiger beetle. For more detailed information regarding the species, refer to the final rule to list the species as endangered published on October 6, 2005 (70 FR 58335).

Taxonomy and Species Description

The Salt Creek tiger beetle (*Cicindela nevadica lincolniana*) is a subspecies in the class Insecta, order Coleoptera, and family Carabidae (Integrated Taxonomic Information System 2012, p. 1). At least 85 species of tiger beetles and more than 200 subspecies exist in the United States; 26 species and 6 subspecies are

known from Nebraska (Carter 1989, p. 8). Tiger beetles are fast-moving, predaceous insects (Carter 1989, p. 9). The Salt Creek tiger beetle's average length is 0.4 inches (in) (10 millimeters (mm)), and its color is dark brown shading to green (Carter 1989, pp. 12 and 17).

Distribution, Abundance, and Trends

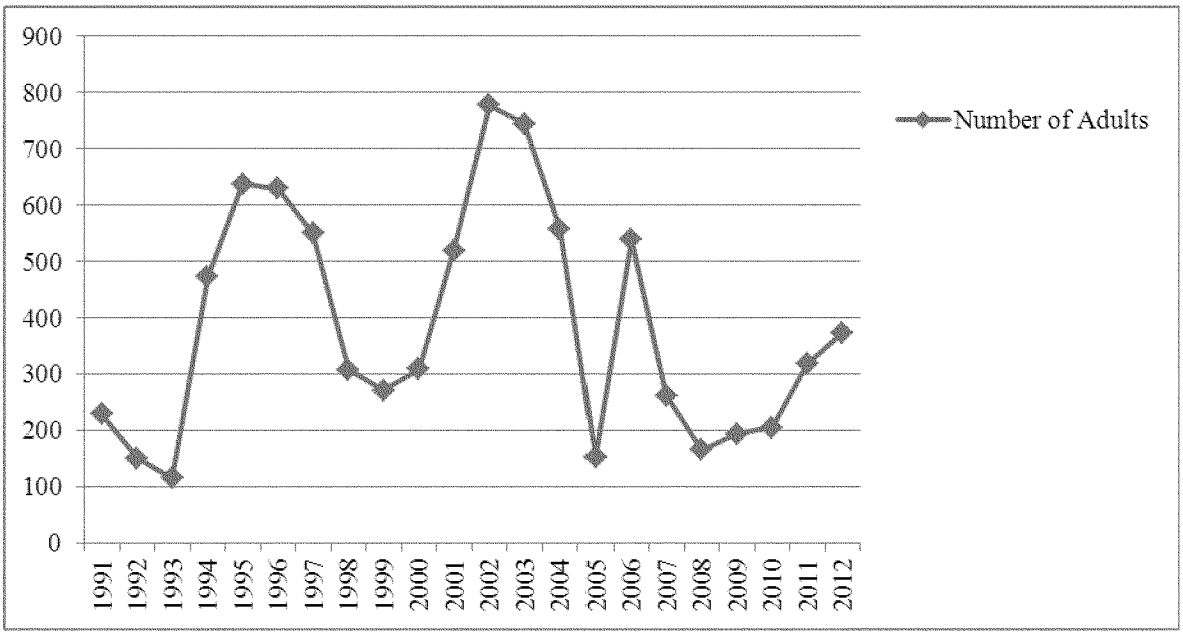
The Salt Creek tiger beetle is endemic to saline wetlands associated with the Salt Creek watershed and some of its tributaries in Lancaster and southern Saunders Counties in eastern Nebraska (Allgeier 2005, p. 18). Historical estimates of the extent of these saline wetlands vary. Fowler (2012, p. 41) estimates that approximately 65,000 ac (26,000 ha) of saline wetlands occurred historically within the Salt Creek watershed. LaGrange et al. (2003, p. 3) estimated that more than 20,000 ac (8,100 ha) occurred historically. Farrar and Gersib (1991, p. 20) cite a report from 1862 that estimated 16,000 ac (6,480 ha) of saline wetlands in four basins near the present-day town of Lincoln. It is not clear which four basins they are describing, but these basins were likely only a portion of the entire eastern Nebraska saline wetland complex. Historically, the Salt Creek tiger beetle was probably widely distributed throughout the eastern saline wetlands of Nebraska, especially at the type locality of Capitol Beach (Allgeier 2005, p. 41) along Oak Creek. However, in the past 150 years, approximately 90 percent of these wetlands have been degraded or lost due to urbanization, agriculture, and drainage (LaGrange et al. 2003, p. 1; Allgeier 2005, p. 41).

The most complete recent inventory, conducted in 1992 and 1993, identified 3,244 ac (1,314 ha) of ''Category 1'' wetlands remaining in Lancaster and Saunders Counties (Gilbert and Stutheit 1994, p. 10). The authors define Category 1 wetlands as high-value saline wetlands or saline wetlands with the potential to be restored to high value (Gilbert and Stutheit 1994, p. 6). High-value wetlands were defined as meeting one or more of the following criteria: (1) The presence of Salt Creek tiger beetles; (2) the presence of one or more rare or restricted halophytes (salt-tolerant plants); (3) historical significance as identified by the Nebraska State Historical Society; (4) the presence of plants characteristic of saline wetlands and not highly degraded, or the potential for saline wetland characteristics after enhancement or restoration; and (5) high potential for restoration of the historical salt source. Other categories of wetlands described in the inventory, including Categories 2, 3, and 4, were thought to provide limited or no saline wetland functions. At that time, it was thought that these wetland types had little or no potential for reestablishing the salt source and hydrology needed to restore and maintain saline conditions (Gilbert and Stutheit 1994, p. 7). Since 1994, however, techniques involving removal of excess sediment and restoration of saline water through installation of wells has made restoration of Categories 1, 2 and 3 feasible. Removal of sediment has exposed saline seeps and restored Salt Creek tiger beetle habitat along Little Salt Creek to the extent that the species now uses some of the restored areas (Harms 2013, pers. comm.). Category 2, 3, and 4 wetlands can also protect Category 1 saline wetlands from negative impacts associated with sediment transport and freshwater dilution of salinity. Without adjacent Category 2–4 wetlands, Category 1 saline wetlands can degrade and cease providing saline wetland functions (USFWS 2005, p. 11; LaGrange 2005, pers comm.; Stutheit 2005, pers comm.). The Service completed a detailed assessment of wetlands prior to listing the Salt Creek tiger beetle in 2005 and concluded that, following years of degradation in the Salt Creek watershed, approximately 35 ac (14 ha) of barren salt flats and saline stream edges contain the entire habitat currently occupied by the Salt Creek tiger beetle, which is not sufficient to sustain the species.

Visual surveys of Salt Creek tiger beetles, using consistent methods, timing, and intensity, have been conducted by University of Nebraska at Lincoln since 1991 (Spomer 2012a, pers comm.). Over the past 22 years, the total number of Salt Creek tiger beetle adults counted during visual surveys has ranged from 115 (in 1993) to 777 (in 2002) individuals (Figure 1). The most recent count was 374 adults in 2012. A 2-year mark-recapture study indicated that visual surveys may underestimate the species' population by approximately 40–50 percent, and recommended that a 2X correction factor be applied (Allgeier et al. 2003, p. 6; Allgeier et al. 2004, p. 3; Allgeier 2005, p. 40). However, these mark-recapture efforts were conducted on a small population that may have experienced immigration or emigration during the sampling period; therefore, all assumptions may not have been met (Spomer 2012b, pers. comm.) and use of these results to make a population estimate may not be appropriate. Additionally, mark-recapture requires handling beetles and may interfere with egg-laying (Allgeier 2004, p. 3). Therefore, visual studies are preferred since they are more economical and less intrusive (Allgeier et al. 2003, p. 6; Allgeier et al. 2004, p. 3; Allgeier 2005, p. 53); however, visual studies do not provide the same precision as do mark-recapture studies.

Insects typically show greater population variability than many other animal species (Thomas 1990, p. 326), and their annual population numbers are generally cyclic. A very small population size indicates a vulnerability to extinction (Thomas 1990, pp. 325–326; Shaffer 1981, p. 131; Lande 1993, pp. 911–912; Primack 1998, p. 179) because when numbers decline, the population can become locally extirpated. The long-term data shows a fluctuating, but very small population size for Salt Creek tiger beetles.

Figure 1. Adult Salt Creek tiger beetles counted during visual surveys 1991-2012 (Brosius 2010, p. 12; Spomer 2012b, entire).



In addition to the number of individuals, the number of populations is critical when considering distribution, abundance, and trends. Salt Creek tiger beetles have been located at 14 sites since surveys began in 1991 (Brosius 2010, p. 12). We consider these 14 sites to represent 6 different populations based upon documented dispersal distances and presence of discrete suitable habitat for the species (70 FR 58336, October 6, 2005). Three of these populations have been extirpated since surveys began in 1991: The Capitol Beach population along Oak Creek, the Upper Little Salt Creek–South population on Little Salt Creek, and the Jack Sinn Wildlife Management Area (WMA) population on Rock Creek. For these populations, surveys showed that the number of individuals declined and then completely disappeared, leaving us to conclude that the population had become locally extirpated. The three remaining populations, Upper Little Salt Creek–North, Arbor Lake, and Little Salt Creek–Roper, all occur in the Little Salt Creek watershed, along a stream reach of approximately 7 miles (mi) (11 kilometers (km)) (Fowler 2012, p. 41).

Habitat

The Salt Creek tiger beetle has very specific habitat requirements. It occurs in remnant saline wetlands on exposed mudflats and along the banks of streams and seeps that contain salt deposits (Carter 1989, p. 17; Spomer and Higley 1993, p. 394; LaGrange et al. 2003, p. 4). Soil moisture and soil salinity are critically important in habitat selection (Allgeier et al. 2004, p. 6) for foraging, where the female lays eggs, and for larval habitat. The species uses soil moisture and soil salinity to partition habitat between other collocated species of tiger beetles (Allgeier 2005, p. 64). Moist, saline, open flats are needed for thermoregulation, reproduction, and foraging.

Nebraska's eastern saline wetlands are maintained through groundwater discharge from the Dakota Aquifer System occurring in the flood plains of Salt Creek as it flows in a general pattern from southwest to northeast of Lincoln, Nebraska, in Lancaster and southern Saunders Counties (Harvey et al. 2007, p. 738). From the perspective of the larger Nebraska Eastern Saline Wetlands ecosystem, little is known about the connections between the surface water and the underlying groundwater and dissolved salts, or about the extent of the flow systems that feed the wetlands. From a local perspective, especially when making decisions about land management actions, it can be difficult to make informed management decisions about wetland protection or the impact of future development (Harvey et al. 2007, p. 738). However, the eastern saline wetlands are dependent upon a regional-scale groundwater flow system and may not be replenished indefinitely (Harvey et al. 2007, p. 750). Subsurface geology, geomorphic features (including manmade features), and topographic characteristics all affect the hydrology of the wetlands, resulting in variability between each wetland (Kelly 2011, pp. 97–99).

Life History

The Salt Creek tiger beetle typically has a 2-year life cycle of egg, larval, and adult stages (Ratcliffe and Spomer 2002, unpaginated; Allgeier 2005, pp. 3–4). Adult females lay eggs in moist, saline mudflats along the banks of seeps and in saline wetland habitats when soil moisture and saline levels are appropriate. Upon hatching, each larva excavates a burrow where it lives for the next 2 years; the burrow is enlarged by the larva as it grows. Larvae are sedentary predators, catching prey that passes nearby. Larvae are more directly affected by a limited food supply than adults because they are not as mobile as adults and almost never leave their burrows. Following pupation, adults emerge from the burrows in the late spring to early summer of their second year and mate. Adults are typically active in May, June, and July before dying (Allgeier 2005, p. 63).

Adult Salt Creek tiger beetles have a mean dispersal distance of 137 feet (ft) (42 meters (m)), a maximum dispersal of 1,506 ft (459 m), and most are recovered within 82 ft (25 m) of the marking location, based upon a study of 60 individuals (Allgeier 2005, p. 50) in which 24 individuals were relocated following capture and 36 were not. The

Salt Creek tiger beetle appears to have narrower habitat requirements for egg-laying, foraging, and thermoregulation than other tiger beetles found in Nebraska's eastern saline wetlands (Brosius 2010, p. 5).

Critical Habitat

Background

Critical habitat is defined in section 3 of the Act as:

(1) The specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the Act, on which are found those physical or biological features

(a) Essential to the conservation of the species, and

(b) Which may require special management considerations or protection; and

(2) Specific areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Conservation, as defined under section 3 of the Act, means to use and the use of all methods and procedures that are necessary to bring an endangered or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Critical habitat receives protection under section 7 of the Act through the requirement that Federal agencies ensure, in consultation with the Service, that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The designation of critical habitat does not affect land ownership or establish a refuge, wilderness, reserve, preserve, or other conservation area. Such designation does not allow the government or public to access private lands. Such designation does not require implementation of restoration, recovery, or enhancement measures by non-Federal landowners. Where a landowner requests Federal agency funding or authorization for an action that may affect a listed species or critical habitat, the consultation requirements of section 7(a)(2) of the Act would apply, but even in the event of a destruction or adverse modification finding, the obligation of the Federal action agency and the landowner is not to restore or recover the species, but to implement reasonable and prudent alternatives to avoid destruction or adverse modification of critical habitat.

Under the first prong of the Act's definition of critical habitat, areas within the geographical area occupied by the species at the time it was listed are included in a critical habitat designation if they contain physical or biological features (1) which are essential to the conservation of the species and (2) which may require special management considerations or protection. For these areas, critical habitat designations identify, to the extent known using the best scientific and commercial data available, those physical or biological features that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, we focus on the principal biological or physical constituent elements (primary constituent elements such as roost sites, nesting grounds, seasonal wetlands, water quality, tide, soil type) that are essential to the conservation of the species. Primary constituent elements are those specific elements of the physical or biological features that provide for a species' life-history processes and are essential to the conservation of the species.

Under the second prong of the Act's definition of critical habitat, we can designate critical habitat in areas outside the geographical area occupied by the species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. For example, an area currently occupied by the species, but that was not occupied at the time of listing, may be essential to the conservation of the species and may be included in the critical habitat designation. We designate critical habitat in areas outside the geographical area occupied by a species only when a designation limited to its range would be inadequate to ensure the conservation of the species.

Section 4 of the Act requires that we designate critical habitat on the basis of the best scientific data available. Further, our Policy on Information Standards Under the Endangered Species Act (published in the **Federal Register** on July 1, 1994 (59 FR 34271), the Information Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001 (Pub. L. 106–554; H.R. 5658)), and our associated Information Quality Guidelines, provide criteria, establish procedures, and provide guidance to ensure that our decisions are based on the best scientific data available. They require our biologists, to the extent consistent with the Act and with the use of the best scientific data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat.

When we are determining which areas should be designated as critical habitat, our primary source of information is generally the information developed during the listing process for the species. Additional information sources may include the recovery plan for the species, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, other unpublished materials, experts' opinions, or personal knowledge.

Habitat is dynamic, and species may move from one area to another over time. We recognize that critical habitat designated at a particular point in time may not include all of the habitat areas that we may later determine are necessary for the recovery of the species. For these reasons, a critical habitat designation does not signal that habitat outside the designated area is unimportant or may not be needed for recovery of the species. Areas that are important to the conservation of the species, both inside and outside the critical habitat designation, will continue to be subject to: (1) Conservation actions implemented under section 7(a)(1) of the Act, (2) regulatory protections afforded by the requirement in section 7(a)(2) of the Act for Federal agencies to ensure their actions are not likely to jeopardize the continued existence of any endangered or threatened species, and (3) section 9 of the Act's prohibitions on taking any individual of the species, including taking caused by actions that affect habitat. Federally funded or permitted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. These protections and conservation tools will continue to contribute to recovery of this species. Similarly, critical habitat designations made on the basis of the best available information at the time of designation will not control the direction and substance of future recovery plans, habitat conservation plans (HCPs), or other species conservation planning

efforts if new information available at the time of these planning efforts calls for a different outcome.

Prudency Determination

Section 4(a)(3) of the Act, as amended, and implementing regulations (50 CFR 424.12) require that, to the maximum extent prudent and determinable, the Secretary shall designate critical habitat at the time the species is determined to be an endangered or threatened species. Our regulations (50 CFR 424.12(a)(1)) state that the designation of critical habitat is not prudent when one or both of the following situations exist:

(1) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of threat to the species, or

(2) Such designation of critical habitat would not be beneficial to the species.

There is currently no imminent threat of take attributed to collection or vandalism under Factor B for the Salt Creek tiger beetle, and identification and mapping of critical habitat is not expected to initiate any such threat. In the absence of finding that the designation of critical habitat would increase threats to a species, if there are any benefits to a critical habitat designation, then a prudent finding is warranted. Here, the potential benefits of designation include:

(1) Triggering consultation under section 7 of the Act, in new areas for actions in which there may be a Federal nexus where it would not otherwise occur because, for example, it is or has become unoccupied or the occupancy is in question;

(2) Focusing conservation activities on the most essential features and areas;

(3) Providing educational benefits to State or county governments or private entities; and

(4) Preventing people from causing inadvertent harm to the species. Therefore, because we have determined that the designation of critical habitat will not likely increase the degree of threat to the species and may provide some measure of benefit, we find that designation of critical habitat is prudent for the Salt Creek tiger beetle.

Critical Habitat Determinability

Having determined that designation is prudent, under section 4(a)(3) of the Act we must find whether critical habitat for the Salt Creek tiger beetle is determinable. Our regulations at 50 CFR 424.12(a)(2) state that critical habitat is not determinable when one or both of the following situations exist:

(1) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(2) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

When critical habitat is not determinable, the Act allows the Service an additional year to publish a critical habitat designation (16 U.S.C. 1533(b)(6)(C)(ii)).

We reviewed the available information pertaining to the biological needs of the species and habitat characteristics where it is located. This and other information represent the best scientific data available and led us to conclude that the designation of critical habitat is determinable for the Salt Creek tiger beetle.

Physical or Biological Features

In accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, in determining which areas within the geographical area occupied by the species at the time of listing to designate as critical habitat, we consider the physical or biological features that are essential to the conservation of the species and which may require special management considerations or protection. These include, but are not limited to:

(1) Space for individual and population growth and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, or rearing (or development) of offspring; and

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

We derive the specific physical or biological features essential for the Salt Creek tiger beetle from studies of this species' habitat, ecology, and life history as described below. Additional information can be found in the final listing rule published in the **Federal Register** on October 6, 2005 (70 FR 58335). We have determined that the following physical or biological features are essential for the Salt Creek tiger beetle.

Space for Individual and Population Growth and for Normal Behavior

Individual Spatial Needs—The Salt Creek tiger beetle requires areas associated with saline seeps along stream banks and salt flats with the appropriate soil moisture and salinity levels and that are largely barren and nonvegetated. During the species' nearly 2-year larval stage, its spatial requirements are small, but very specific in terms of soil texture, moisture, and chemical composition (Allgeier et al. 2004, pp. 5–6; Allgeier 2005, p. 64; Brosius 2010, p. 20; Harms 2012a, pers comm.). At this stage, the species is a sedentary predator that positions itself at the top of its burrow to catch prey that passes nearby. Tiger beetle larvae do not move more than an inch or so from where eggs are originally deposited by the female (Brosius 2010, p. 64).

The adult stage of the Salt Creek tiger beetle lasts a few weeks in May, June, and July (Carter 1989, pp. 8 and 17). Adults have greater spatial requirements in order to accommodate foraging needs and egg-laying. We do not have information regarding historical dispersal distances for the species. However, adults are strong fliers (Carter 1989, p. 9); therefore, it is likely they could disperse some distance if sufficient suitable habitat was available. A recent study documented adults dispersing up to 1,506 ft (459 m), with a mean dispersal distance of 137 ft (42 m), and most individuals dispersed less than 82 ft (25 m) (Allgeier 2005, p. 50). Longer dispersal movements almost certainly occur (Allgeier 2005, p. 51).

A female will lay up to 50 eggs during her brief adult season, each in a separate burrow (Rabadinanth 2010, p. 14). We do not have species-specific information regarding the typical distance between burrows in the wild. However, tiger beetles using burrows in close proximity to one another may succumb to intraspecific and interspecific competition (Brosius 2010, p. 27). Efforts to breed the species in captivity attempted to keep burrows in terrariums at least 1 in (25 mm) apart; at this distance, incidences of burrow collapse due to proximity to another burrow were documented (Allgeier 2005, pp. 121–122).

Population Spatial Needs—We do not have species-specific information regarding a minimum viable population size for the Salt Creek tiger beetle or the amount of habitat needed to sustain a viable population. However, we have preliminarily determined that 500–1,000 adults is a reasonable estimate of a minimum viable population for the species based on recovery plans for two other species of tiger beetles in the same genus (*Cicindela*). These plans consider a minimum viable population size to be at least 500–1,000 adults (Hill and Knisley 1993, p. 23; Hill and Knisley 1994, p. 31). The authors base this estimate on available literature and on

preliminary observations of population stability at several sites, but acknowledge that there is little information available regarding the amount of habitat necessary to support a population of this size.

The Salt Creek tiger beetle is historically known from six populations (70 FR 58336, October 6, 2005); four from Little Salt Creek, one from Rock Creek, and one from Oak Creek (i.e., Capitol Beach). We consider this the minimum number of populations needed to maintain species viability. Half of these populations are now extirpated. Little Salt Creek contains saline wetland and stream habitats currently occupied by the remaining populations of the species. Rock and Oak Creeks also contain saline wetland and stream habitats although the species has disappeared from those areas. One of the populations at Little Salt Creek (Upper Little Salt Creek South population) was extirpated leaving the remaining three populations. The two additional populations on Rock and Oak Creeks existed prior to the mid-1990s (70 FR 58336, October 6, 2005). Visual surveys of adults at the three remaining populations on Little Salt Creek over the past 10 years have ranged from 153 to 745 individuals (Harms 2009, p. 3). The Service determined that 38 ac (15 ha) of scattered barren salt flats and saline stream edges remain in the Little Salt Creek watershed, with approximately 35 ac (14 ha) currently occupied by the Salt Creek tiger beetle (70 FR 58342, October 6, 2005; George and Harms 2013, pers. comm.).

In the absence of specific data on how much space is required to maintain viable populations of Salt Creek tiger beetles, we derived an estimate of the amount of habitat needed to support six viable populations as follows. The minimum population of Salt Creek tiger beetles counted over the past 10 years was 153 adult beetles in 2005, from 3 populations. We consider a minimum of 500 adult beetles necessary to maintain a single viable population. The small population of 153 beetles occupied approximately 35 ac (14 ha) of habitat. We estimate that 3.3 times as much habitat would be required to support a minimum of 500 beetles; therefore approximately 116 ac (47 ha) are required to support a single viable population, and approximately 696 ac (282 ha) would be required to support 6 viable populations. This estimate is very conservative from the standpoint that 500 individuals was used as a minimum viable population size. If the upper number in the range of 500–1,000 adults to support a single viable population is used, similar calculations would conclude that approximately 1,368 ac (554 ha) are required to support 6 viable populations of the species. Therefore, based upon the best available information, it is reasonable to assume that 696–1,368 ac (282–554 ha) are needed to maintain species viability. Therefore, we designed our proposed revised critical habitat units to provide sufficient habitat to ensure the species' recovery.

Summary—Based upon the best available information, we conclude that recovery of the Salt Creek tiger beetle would require at least 6 populations, with each population containing at least 500–1,000 adults of the species. We estimate that at least 696–1,368 ac (282–554 ha) would be required to maintain these populations. Given the nature of insect populations, which are cyclic and subject to local extirpations, the species must be sufficiently abundant and in a geographic configuration that allows them to repopulate areas following local extirpations when suitable habitat conditions return. Salt Creek tiger beetles require nonvegetated areas associated with stream banks, mid-channel islands, and salt flats to meet life-history requirements as core habitat, as well as adjacent habitat to facilitate dispersal and protect core habitat. We identify these spatial characteristics as a necessary physical feature for this species.

Food, Water, Air, Light, Minerals, or Other Nutritional or Physiological Requirements

Food—The Salt Creek tiger beetle is a predatory insect. Larvae are sedentary predators that capture small prey passing over or near their burrows on the soil surface. Adults are very quick and agile, and use this ability to actively hunt a wide variety of flying and terrestrial invertebrates (Allgeier 2005, pp. 1–2, 5). Insect prey may be supported by the limited open habitat in close proximity to the burrows or by the adjacent vegetated habitat. Typical prey items include insects belonging to the orders Coleoptera (beetles), Orthoptera (grasshoppers and crickets), Hemiptera (true bugs), Hymenoptera (ants, bees, and wasps), Odonata (dragonflies), Diptera (flies), and Lepidoptera (moths and butterflies) (Allgeier 2005, p. 5). Ants appear to be the most commonly observed prey of adult tiger beetles (Allgeier 2005, p. 5). Larvae are more easily affected by a limited food supply than adults because they almost never leave their burrows and must wait for prey (Ratcliffe and Spomer 2002, unpaginated).

Surface Water—The Salt Creek tiger beetle prefers very moist soils for egg-laying and during its larval stage, with mean soil moisture of 47.6 percent (Allgeier 2005, p. 72). This high moisture percentage likely aids in the species' ability to tolerate heat (Allgeier 2005, p. 75) and keeps the soil malleable during burrow construction and maintenance (Harms 2012b, pers comm.). Adults of the species spend significantly more time on damp surfaces and in shallow water than other tiger beetles (Ratcliffe and Spomer 2002, unpaginated; Brosius 2010, p. 70). This close association with seeps and adjacent shallow pools may allow adults to forage at times when high temperatures limit foraging by other saline-adapted tiger beetles. However, this association may also explain some of the species' vulnerability to extinction—beyond the loss of saline wetlands in general, the limited seeps and pools in the remaining habitat may represent a further limitation regarding habitat (Brosius 2010, p. 74). Channelization along Salt Creek has increased its velocity, which in turn has resulted in deep cuts in the lower reaches of its tributaries. This change has caused these tributary streams to function like drainage ditches, lowering adjacent water table levels and drying many of the wetlands that once provided suitable habitat for the species (Farrar and Gersib 1991, p. 29; Murphy 1992, p. 12). Additionally, saline seeps located along Little Salt Creek have become over-covered following bank sloughing that was facilitated by channel entrenchment. Seeps are currently the only locations that provide suitable larval habitat.

Groundwater—Nebraska's eastern saline wetlands are fed by groundwater discharge from the Dakota Aquifer, which is part of the Great Plains Aquifer (Harvey et al. 2007, p. 741). Urban expansion associated with the City of Lincoln is placing increasing demands on the aquifer (Gosselin et al. 2001, p. 99). The official soil series description for the ''Salmo'' soil series notes that the water table is near the surface in the spring and at depths of 2–4 ft (0.6–1.2 m) in the fall (USDA 2009). Harvey et al. (2007, p. 740) monitored groundwater levels and groundwater salinity at Rock Creek and Little Salt Creek from 2000 through 2002. They found that groundwater did not reach the soil surface and was present in the upper few yards (meters) of the soil column only during the spring when groundwater levels were at their highest due to winter snowmelt and spring rainstorms. They also noted that the depth of groundwater was related to the proximity of the stream, such that

groundwater was at a lower depth near a stream than far away from it. They also noted that the area was under slight drought conditions during the study period. The increased depth to groundwater in this region is likely due to a combination of factors including drought, channelization along Salt Creek, and water depletions for urban and agricultural uses. If groundwater levels continue to decline, saline features of the wetlands could gradually change to freshwater, or wetlands could dry. Either of these scenarios could result in extirpation of the Salt Creek tiger beetle from affected wetlands and could ultimately lead to extinction of the species.

Saline Soils—Soils in the eastern saline wetlands of Nebraska typically contain chloride or sulfate salts and have a pH from 7–8.5 (Allgeier 2005, p. 17). Salt Creek tiger beetles prefer soils that are slightly saline, with an optimal electroconductivity of 2,504 milliSiemens per meter (mS/m) (Allgeier 2005, p. 75). However, salinities as low as 1,656 mS/m have been measured at survey sites (Rabadinanth 2010, p. 19). Soil salinity may serve as a means of partitioning habitat between the 12 species of tiger beetles in the genus *Cicindela* that use the saline wetlands of Nebraska (Allgeier et al. 2004, pp. 5–6; Allgeier 2005, p. 65; Brosius 2010, p. 13).

The ''Salmo'' soil series is found at all known occurrences for the species (Allgeier 2005, p. 42). This soil type is formed on saline flood plains, and its characteristics typically include: (1) A texture of silt loam or silty-clay loam, (2) 0–2 percent slope, (3) somewhat poorly drained or poorly drained soils, and (4) 0–3 feet to the water table (Gersib and Steinauer 1991, p. 41; Gilbert and Stutheit 1994, p. 4; USDA 2009, pp. 1–3). The ''Saltillo'' soil series is found in adjacent Saunders County and has soil characteristics very similar to the ''Salmo'' soil series (USDA 2006, pp. 1–4). Consequently we believe that this soil type may also be able to provide suitable salinity levels and capacity to hold sufficient soil moisture for the species.

Light—Salt Creek tiger beetles have only been observed laying eggs at night (Allgeier et al. 2004, p. 5). Light pollution from urban areas likely disrupts nocturnal behavior by attracting beetles towards the light and out of their normal habitats (Allgeier et al. 2003, p. 8). In both field and laboratory studies, attraction to light from different types of lamps varied, in decreasing order, from blacklight, mercury vapor, fluorescent, incandescent, and sodium vapor, with blacklight being the most favored by the species (Allgeier 2005, pp. 89–95). The disruption in behavior caused by lights could affect egg-laying activity of females, if it attracts females into unsuitable habitat.

Summary—Based upon the best available information, we conclude that the Salt Creek tiger beetle requires abundant available insect prey (supported by both the immediate core habitat and adjacent habitat), moist saline soils, and minimal light pollution. We identify these characteristics as necessary physical or biological features for the species.

Cover or Shelter

Burrows—Salt Creek tiger beetle larvae are closely associated with their burrows, which provide cover and shelter for approximately 2 years. Larvae are sedentary predators and position themselves at the top of their burrows. When prey passes nearby, a larva lunges out of its burrow, clutches the prey in its mandibles, and pulls the prey down into the burrow to feed. Once a larva obtains enough food, it plugs its burrow and digs a pupation chamber, emerging as an adult in early summer of its second year (Ratcliffe and Spomer 2002, unpaginated; Allgeier 2005, p. 2). The species is a visual predator, requiring open habitat to locate prey (Ratcliffe and Spomer 2002, unpaginated). Consequently, a clear line of sight is important. Habitat that becomes covered with vegetation no longer provides suitable larval habitat (Allgeier 2005, p. 78). Burrow habitat can also be impacted from disturbances such as trampling (Spomer and Higley 1993, p. 397), which causes soil compaction and damages the fragile crust of salt that is evident on the soil surface. After the adult emerges from the pupa, it remains in the burrow chamber while its outer skeleton hardens (Ratcliffe and Spomer 2002, unpaginated). For the remainder of its brief adult stage, burrows are no longer used.

Summary—Based upon the best available information, we conclude that the Salt Creek tiger beetle requires a suitable burrow in moist, saline, sparsely vegetated soils for its larval stage. We identify this characteristic as a necessary physical feature for the species.

Sites for Breeding, Reproduction, or Development of Offspring

Annual visual surveys have been conducted since 1991, when six populations were known. Each of the three populations of Salt Creek tiger beetle currently known is associated with Category 1 wetlands along Little Salt Creek including moist saline soils and seeps which can be located at saline wetlands and streams. Three additional populations occurred in the mid-1990s on Little Salt Creek, Oak Creek, and Rock Creek, but these have been extirpated since 1998. No records of the species are known for other tributaries of Salt Creek. However, the species may have been abundant historically, based on numerous museum specimens collected from Capitol Beach (Carter 1989, p. 17; Allgeier et al. 2003, p. 1). The Capitol Beach population was severely impacted following construction of the Interstate-80 corridor and other urban development (Farrar and Gersib 1991, pp. 24–25), and finally disappeared in 1998. Little or no suitable habitat remains along Oak Creek because it has been channelized and has become somewhat entrenched. However, numerous saline seeps and a large salt flat are located southwest of Oak Creek in its former floodplain. Little Salt Creek and Rock Creek still contain numerous saline wetlands and are the focus of efforts to protect remaining saline wetlands (Farrar and Gersib 1991, p. 40). Saline seeps are known to occur at the Haines Branch Creek. Few regular surveys for the Salt Creek tiger beetle have been done in these areas; however, suitable habitat occurs there, and more habitat could be potentially restored to aid in the recovery of the Salt Creek tiger beetle (USFWS 2005, p. 18). Given the presence of suitable habitat for a species with very narrow habitat preferences with historical records nearby, we can infer that the species was likely present there in the past.

The Salt Creek tiger beetle has very specific habitat requirements for foraging, egg-laying, and larval development. Requirements regarding water, soil salinity, and exposed habitat are described in the previous sections.

Summary—Based upon the best available information, we conclude that the Salt Creek tiger beetle requires a core habitat of moist saline soils with minimal vegetative cover for foraging, egg-laying, and larval development. Adjacent, more vegetative habitat is used for shade to cool adults (Harms 2013, pers comm.), protecting core habitat, and supporting a diverse source of prey for adults and larval Salt Creek tiger beetles. Approximately 90 percent of all remaining wetlands suitable for Salt Creek tiger beetles occur in the Little Salt Creek, Rock Creek watersheds, but saline seeps and wetlands also occur at Oak and Haines Branch Creeks. We identify barren salt flats and saline seeps along streams and

within suitable wetlands as a necessary physical feature for the species.

Primary Constituent Elements for Salt Creek Tiger Beetle

Under the Act and its implementing regulations, we are required to identify the physical or biological features essential to the conservation of the Salt Creek tiger beetle in areas occupied at the time of listing, focusing on the features' primary constituent elements. We consider primary constituent elements to be those specific elements of the physical or biological features that provide for a species' life-history processes and are essential to conservation of the species.

Based on our current knowledge of the physical or biological features and habitat characteristics required to sustain the species' life-history processes, we determine that the primary constituent elements specific to the Salt Creek tiger beetle are:

- Saline barrens and seeps found within saline wetland habitat in Little Salt, Rock, Oak and Haines Branch Creeks. For our evaluation, we determined that two habitat types within suitable wetlands are required by the Salt Creek tiger beetle:
- Exposed mudflats associated with saline wetlands or the exposed banks and islands of streams and seeps that contain adequate soil moisture and soil salinity are essential core habitats. These habitats support egg-laying and foraging requirements. The ''Salmo'' soil series is the only soil type that currently supports occupied habitat; however, ''Saltillo'' is the other soil series that has adequate soil moisture and salinity and can also provide suitable habitat.
- Vegetated wetlands adjacent to core habitats that provide shade for species thermoregulation, support a source of prey for adults and larval forms of Salt Creek tiger beetles, and protect core habitats.

With this proposed designation of critical habitat, we intend to identify the physical or biological features essential to the conservation of the species, through the identification of the features' primary constituent elements sufficient to support the life-history processes of the species.

Special Management Considerations or Protection

When designating critical habitat, we assess whether the specific areas within the geographical area occupied by the species at the time of listing contain features which are essential to the conservation of the species and which may require special management considerations or protection. A detailed discussion of threats to the Salt Creek tiger beetle and its habitat can be found in the October 6, 2005, final rule to list the species (70 FR 58335).

The primary threats impacting the physical and biological features essential to the conservation of the Salt Creek tiger beetle are described in detail in the final rule to list the species published on October 6, 2005 (70 FR 58335). These threats may require special management considerations or protection within the proposed critical habitat and include, but are not limited to, urban development (e.g., commercial and residential development, road construction, associated light pollution, and stream channelization) and agricultural development (e.g., over-grazing and cultivation). These threats are exacerbated by having only three populations on one stream (Little Salt Creek) with extremely low numbers and a highly restricted range making this species particularly susceptible to extinction in the foreseeable future.

The features essential to the conservation of the Salt Creek tiger beetle (exposed, moist, saline areas associated with stream banks, mid-channel islands, and mudflats) may require special management considerations or protection to reduce threats. For example, a loss of moist, open habitat necessary for larval foraging, thermoregulation, and other life-history activities resulted in the extinction of another endemic tiger beetle—the Sacramento Valley tiger beetle (*Cicindela hirticollis abrupta*) (Knisley and Fenster 2005, p. 457). This was the first tiger beetle known to be extirpated. Actions that could ameliorate threats include, but are not limited to:

(1) Increased protection of existing habitat through actions such as land acquisition and limiting access;

(2) Restoration of potential habitat within saline wetlands and streams through exposure of saline seeps, removal of sediment layers to expose saline soils and seeps, and use of wells to pump saline water over saline soils by Federal, State, and local interested parties;

(3) Establishment of multiple populations in the Rock, Oak, and Haines Branch Creeks through captive rearing and translocation of laboratory-reared larvae originating from wild populations;

(4) Protection of habitat adjacent to existing and new populations to provide dispersal corridors, support prey populations, and protect wetland functions; and

(5) Avoidance of activities such as groundwater depletions, new channelization projects, increased surface water runoff, and residential or road development that could alter soil moisture levels, salinity, open habitat, or low light levels required by the species.

Criteria Used To Identify Critical Habitat

As required by section 4(b)(2) of the Act, we use the best scientific data available to designate critical habitat. We review available information pertaining to the habitat requirements of the Salt Creek tiger beetle. In accordance with the Act and its implementing regulation at 50 CFR 424.12(e), we consider whether designating additional areas—outside those currently occupied as well as those occupied at the time of listing—are necessary to ensure the conservation of the species. We are proposing to designate critical habitat within the geographical area occupied by the species at the time of listing in 2005 (Little Salt Creek) under the first prong of the Act's definition of critical habitat. We also are proposing to designate specific areas outside the geographical area occupied by the species at the time of listing that were documented to be occupied as recently as the mid-1990s or are presumed to have been occupied in the past given the availability of suitable saline habitat, but which are presently unoccupied (Rock, Oak, and Haines Branch Creeks), under the second prong of the Act's definition of critical habitat because such areas are essential for the conservation of the species as they will spread the risk of species extinction over multiple stream systems. Important sources of supporting data include the final rule for listing the species (70 FR 58335, October 6, 2005), the recovery outline (USFWS 2009), available literature, and information provided by the University of Nebraska at Lincoln and the Nebraska Game and Parks Commission (citations noted herein).

We are proposing to include all currently occupied habitat in our designation of critical habitat because any further loss of occupied habitat would increase the Salt Creek tiger beetle's susceptibility to extinction. As previously noted, the species currently occupies approximately 35 ac (14 ha) of saline wetland and streams in three small populations along approximately 7 mi (11 km) of Little Salt Creek. The three existing populations are referred to as Upper Little Salt Creek–North, Little Salt Creek–Arbor Lake, and Little Salt Creek–Roper.

We are also proposing to include unoccupied saline wetlands, specifically saline salt flats along Little

Salt Creek that are interspersed among these three populations. These barren salt flats are essential to the conservation of the species because they provide larval habitat, protect existing populations, provide dispersal corridors between populations, support prey populations, and provide potential habitat for new populations.

Lastly, we are proposing to include unoccupied barren salt flats and saline streams along Rock, Oak, and Haines Branch Creeks that were either occupied by the species until 1998 (i.e., Rock and Oak Creeks) or have suitable habitat for the Salt Creek tiger beetle, but were surveyed infrequently (Haines Branch). We have determined that these areas (Little Salt, Rock, Oak, and Haines Branch Creeks) are essential to the conservation of the species because they provide necessary redundancy in the event of an environmental catastrophe associated with Little Salt Creek—the only watershed that currently supports the species. All of these areas are tributaries to Salt Creek.

We recommend that at least one viable population of Salt Creek tiger beetles be established in each of the three unoccupied units of critical habitat, recognizing the uncertainty as to which areas will successfully support reintroduced populations. Although so little appropriate habitat remains in one of these units (Haines Branch) that it is below the number of acres that we estimated would be necessary to support a population of 500 adults, this area may be able to support a smaller population, which collectively would reduce the risk of extinction.

These populations, in addition to the 3 existing populations at Little Salt Creek, would result in 6 populations, with at least 500 adults in each population, but with 3 populations in Little Salt Creek. This is the number of populations documented in the mid-1990s, and the minimum number needed for species recovery; however, at that time, none of these populations were large enough to maintain species viability, and three of the populations were later extirpated. As the populations expand to viable numbers, we anticipate that they will be within the maximum documented dispersal range of the species and may eventually constitute one metapopulation that has spatially separated populations with some interaction between those populations.

We delineated the critical habitat unit boundaries for the Salt Creek tiger beetle using the following steps:

(1) We used Geographic Information System (GIS) coverages initially generated by Gilbert and Stutheit (1994, entire) to categorize saline wetlands in the Salt Creek watershed of Lancaster and Saunders Counties, Nebraska.

(2) We delineated critical habitat within the areas of Little Salt, Rock, Oak, and Haines Branch Creeks that (a) are documented to support the species currently or to have supported it in the recent past (until 1998), or (b) that provide potential suitable habitat for the species that could sustain a viable population.

(3) We delineated all of the barren salt flats in the four creeks with adjacent suitable saline wetlands.

(4) In order to include surrounding vegetative areas that provide essential resources and support functions to the species, we delineated areas on segments of the four creeks that extended 137 feet (the average known dispersal distance for the species) on either side of the stream course. We used 137 feet because it is the average distance that the Salt Creek tiger beetle can move to meet life history requisites which can be satisfied within the stream segment and adjacent saline barrens and seeps in the floodplain area. We concluded that this distance would provide the species with sufficient prey resources.

Some other areas within the likely historical range of the Salt Creek tiger beetle were considered in this revised designation, but ultimately were not included. We do not propose to designate suitable saline wetlands along Middle Creek as critical habitat because the habitat there has been eliminated due to commercial and residential developments, road construction, and stream channelization, and is probably not restorable. Similarly, we do not propose to designate areas on tributaries to Salt Creek near the Cities of Roca and Hickman, Nebraska, because agricultural development has somewhat limited the ability of these areas to be restored for the benefit of the Salt Creek tiger beetle. We also do not propose to designate areas of Salt Creek downstream of Lincoln, Nebraska, because channel entrenchment has resulted in the loss of saline seep and saline wetland habitats there. We also did not include remaining areas of suitable saline wetlands in Upper Salt Creek because they are of insufficient size to support a viable population of Salt Creek tiger beetles.

This proposed revision to the critical habitat designation for Salt Creek tiger beetle would decrease the current designation of 1,933 acres by 823 acres, but it would increase the number of unoccupied units from one to three. This change would extend critical habitat to two additional stream corridors not previously included in critical habitat that could support populations of the species in the future, thereby reducing the risk of extinction. We have also revised the primary constituent elements on which this proposed revision was based to make them clearer and easier for the public to understand. However, these revised proposed primary constituent elements are based on the same biological concepts about the needs of the Salt Creek tiger beetle that were used in the current critical habitat designation.

Since the time of our previous critical habitat designation, we have begun the process of recovery planning, and have preliminarily determined that at least 6 populations of 500–1,000 beetles within suitable habitat across multiple stream corridors would be necessary to recover the species. Therefore, we have proposed to designate an amount of critical habitat that would allow for that recovery to occur. We considered other possible critical habitat configurations for this proposal, including larger and smaller designations and different numbers of units. However, we concluded that this proposed designation of 1,110 acres in four units was the most biologically appropriate as it is based on habitat features that are used by Salt Creek tiger beetles, consistent with the statutory definition of critical habitat, and would best provide for the recovery of the species.

When determining proposed critical habitat boundaries, we made every effort to avoid including developed areas such as lands covered by buildings, pavement, and other structures because such lands lack the physical and biological features necessary for the Salt Creek tiger beetle. The scale of the maps we prepared under the parameters for publication within the Code of Federal Regulations may not reflect the exclusion of such developed lands. Any such lands inadvertently left inside critical habitat boundaries shown on the maps of this proposed rule have been excluded by text in the proposed rule and are not proposed for designation as critical habitat. Therefore, if the critical habitat is finalized as proposed, a Federal action involving these developed lands would not trigger section 7 consultation with respect to critical habitat and the requirement of no adverse modification unless the specific action would affect the physical or biological features in the adjacent critical habitat.

We are proposing designation of critical habitat lands that: (a) were determined to be occupied at the time of listing and contain sufficient elements of physical or biological

features to support life-history processes essential for the conservation of the species and (b) are outside of the geographical area occupied at the time of listing that we have determined are essential for conservation of the Salt Creek tiger beetle.

Four units are proposed for designation based on sufficient elements of physical or biological features being present to support Salt Creek tiger beetle life-history processes. Designating units of critical habitat on Little Salt, Rock, Oak, and Haines Branch Creeks provides redundancy in the event that adverse effects on one of these watersheds impact Salt Creek tiger beetles or their habitat.

The critical habitat designation is defined by the map, as modified by any accompanying regulatory text, presented at the end of this document in the rule portion. We include more detailed information on the boundaries of the critical habitat designation in the preamble of this document. We will make the coordinates or plot points or both on which the map is based available to the public on *http://www.regulations.gov* at Docket No. FWS–R6–ES–2013–0068, on our Internet site at *http://www.fws.gov/nebraskaes/*, and at the Nebraska Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT** above).

Proposed Critical Habitat Designation

We are proposing four units as critical habitat for the Salt Creek tiger beetle. The critical habitat units we describe below constitute our current best assessment of areas that meet the definition of critical habitat for the species. The four units we propose as critical habitat are: (1) Little Salt Creek—under the first prong of the Act's definition of critical habitat and (2) Rock Creek, Oak Creek, and Haines Branch—under the second prong of the Act's definition of critical habitat. Table 1 shows the occupancy status of these units.

TABLE 1—OCCUPANCY OF SALT CREEK TIGER BEETLE BY PROPOSED CRITICAL HABITAT UNITS

Unit	Occupied at time of listing?	Currently occupied?
Little Salt Creek Unit	Yes	Yes.
Rock Creek Unit	No	No.
Oak Creek Unit	No	No.
Haines Branch Unit	No	No.

The approximate area and ownership of each proposed critical habitat unit is shown in Table 2.

TABLE 2—PROPOSED CRITICAL HABITAT UNITS FOR SALT CREEK TIGER BEETLE

[Area estimates reflect all land within critical habitat unit boundaries]

Critical habitat unit	Land ownership by type	Estimated quantity of critical habitat	Percent of critical habitat unit
Little Salt Creek Unit	City of Lincoln	40 ac (16 ha)	14.1
	Lower Platte South Natural Resources District	19 ac (8 ha)	6.7
	Nebraska Game & Parks Commission	41 ac (17 ha)	14.4
	The Nature Conservancy	29 ac (12 ha)	10.2
	Pheasants Forever	11 ac (4 ha)	3.9
	Private*	144 ac (58 ha)	50.7
Subtotal		284 ac (115 ha)	
Rock Creek Unit	Nebraska Game & Parks Commission	152 ac (62 ha)	28.9
	Private*	374 ac (152 ha)	71.1
Subtotal		526 ac (213 ha)	
Oak Creek Unit	Nebraska Department Roads	178 ac (72 ha)	85.6
	City of Lincoln	30 ac (12 ha)	10.67
Subtotal		208 ac (84 ha)	
Haines Branch Unit	Private	92 ac (37 ha)	100
Total	City of Lincoln	70 ac (28 ha)	6.3
	Lower Platte South Natural Resources District	19 ac (8 ha)	1.7
	Nebraska Game & Parks Commission	193 ac (78 ha)	17.4
	Nebraska Department Roads	178 ac (72 ha)	16.0
	The Nature Conservancy	29 ac (12 ha)	2.6
	Pheasants Forever	11 ac (4 ha)	1.0
	Private*	610 ac (247 ha)	55.0
Total		1,110 ac (449 ha)	

* Several private tracts are protected by easements.

We present a brief description of each unit and reasons why it meets the definition of critical habitat for Salt Creek tiger beetle below.

Unit 1: Little Salt Creek Unit

This unit consists of 284 ac (115 ha) of barren salt flats and three stream segments on Little Salt Creek in Lancaster County from near its junction with Salt Creek to approximately 7 mi (11 km) upstream. It includes the three existing populations of Salt Creek tiger beetles (Upper Little Salt Creek–North, Arbor Lake, and Little Salt Creek–Roper) present at the time of listing, and an additional site with an extirpated population (Upper Little Salt Creek–South). This Unit contains the physical or biological features essential to the Salt Creek tiger beetle.

Approximately 50 percent of the unit is either owned by entities that will protect or restore saline wetland habitat (see Table 2) or is part of an easement that protects the saline wetland habitat in perpetuity. This portion of the unit is largely protected from future urban development (e.g., commercial and residential development, road construction, and stream channelization) and future agricultural

development (e.g., overgrazing and cultivation) by the landowners' or easement holders' participation in the *Implementation Plan for the Conservation of Nebraska's Eastern Saline Wetlands* and their membership in the Saline Wetlands Conservation Partnership (SWCP). At least two tracts (owned by the city of Lincoln) have been restored (Arbor Lake and Frank Shoemaker Marsh) (Malmstrom 2011 and 2012, entire) and other areas are in the process of being restored or are managed to conserve saline wetlands. However, without continued management, historical impacts from development will continue to adversely affect much of the habitat. The remaining 50 percent of the Little Salt Creek Unit that is not currently being managed for protection and restoration of saline wetland habitat remains vulnerable to both historical and ongoing impacts from development. The lower reaches of Little Salt Creek are in or near the City of Lincoln and, consequently, are most vulnerable to impacts related to urban development; upper stream reaches are more impacted by agricultural development.

Unit 2: Rock Creek Unit

The unit consists of 526 ac (213 ha) of barren salt flats and a stream segment of Rock Creek from approximately 2 mi (3 km) above its confluence with Salt Creek to approximately 12 mi (19 km) upstream. Most of this stream reach is in Lancaster County, but the northernmost portion is in southern Saunders County. This unit was not occupied at the time of listing; however, one population was present there until 1998. This Unit contains the physical or biological features essential to the Salt Creek tiger beetle. It is essential to the conservation of the species because any population established on Rock Creek would provide redundancy, in the event of a natural or manmade disaster on Little Salt Creek.

Approximately 29 percent of the unit is either owned by an entity that will protect or restore saline wetland habitat (see Table 2) or is part of an easement that protects the saline wetland habitat in perpetuity. This portion of the unit is largely protected from future urban development (e.g., commercial and residential development, road construction, and stream channelization), but not future agricultural development (e.g., overgrazing and cultivation). Approximately 152 ac (61 ha) of barren salt flats and the stream segment are part of the Jack Sinn WMA (owned by Nebraska Game and Parks Commission) located in southern Saunders and northern Lancaster Counties. This tract has undergone several projects to restore saline wetlands. However, without protection and restoration, historical impacts from development will continue to adversely affect much of the habitat. The 71 percent of the Rock Creek Unit that is not currently being managed for protection and restoration of saline wetland habitat remains vulnerable to both historical and ongoing impacts from development. This unit is further removed from Lincoln; therefore, it faces fewer threats from urban development (e.g., commercial and residential development, road construction, and stream channelization) and more threats from agricultural development (e.g., overgrazing and cultivation) than the Little Salt Creek Unit.

Unit 3: Oak Creek Unit

The unit consists of 208 ac (84 ha) of barren salt flats and a saline seep complex located within a historic floodplain of Oak Creek. The unit is located along Interstate 80 in the northwest part of Lincoln, near the Municipal airport in Lancaster County. This unit was not occupied at the time of listing; however, one population (Capitol Beach) was present until 1998. This Unit contains the physical or biological features essential to the Salt Creek tiger beetle and is essential to the conservation of the species because any population established on Oak Creek or Capitol Beach would provide redundancy, in the event of a natural or manmade disaster on Little Salt Creek.

Approximately 86 percent of the unit is owned by the City of Lincoln and 14 percent the Nebraska Department of Roads (see Table 2). This unit is largely protected from future urban development (e.g., commercial and residential development, road construction, and stream channelization) and future agricultural development (e.g., overgrazing and cultivation). Barren salt flats including the saline seep complex along Interstate 80 are part of this Unit. This tract was once a part of a large saline wetland complex and is the type locality for the Salt Creek tiger beetle. However, a substantial amount of development has resulted in the loss of the once large saline wetland known from the area. This unit is near the City of Lincoln; however, it faces fewer threats from urban development (e.g., commercial and residential development, road construction, and stream channelization) than the Little Salt Creek Unit given the limitations on development that can be done along the Interstate and within the boundaries of the Lincoln Municipal Airport.

Unit 4: Haines Branch Unit

The unit consists of 92 ac (37 ha) of barren salt flats and 2.8-mile long Haines Branch stream segment. Haines Branch is located on the west side of Lincoln, near Pioneers Park in Lancaster County. This unit was not occupied at the time of listing, but suitable habitat in the form of saline seeps and wetlands are available for the Salt Creek tiger beetle. This Unit contains the physical or biological features essential to the Salt Creek tiger beetle and is essential to the conservation of the species because any population established on Haines Branch Creek would provide redundancy, in the event of a natural or human-caused disaster on Little Salt Creek.

The entire Unit is owned by private entities (see Table 2). This Unit is not protected from future urban development (e.g., commercial and residential development, road construction, and stream channelization) and future agricultural development (e.g., overgrazing and cultivation).

Effects of Critical Habitat Designation

Section 7 Consultation

Section 7(a)(2) of the Act requires Federal agencies, including the Service, to ensure that any action they fund, authorize, or carry out is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of designated critical habitat of such species. In addition, section 7(a)(4) of the Act requires Federal agencies to confer with the Service on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under the Act or result in the destruction or adverse modification of proposed critical habitat.

Decisions by the 5th and 9th Circuit Courts of Appeals have invalidated our regulatory definition of ''destruction or adverse modification'' (50 CFR 402.02) (see *Gifford Pinchot Task Force* v. *U.S. Fish and Wildlife Service,* 378 F. 3d 1059 (9th Cir. 2004) and *Sierra Club* v. *U.S. Fish and Wildlife Service,* 245 F. 3d 434, 442 (5th Cir. 2001)), and we do not rely on this regulatory definition when analyzing whether an action is likely to destroy or adversely modify critical habitat. Under the statutory provisions of the Act, we determine destruction or adverse modification on the basis of whether, with implementation of the proposed Federal action, the affected

critical habitat would continue to serve its intended conservation role for the species.

If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Examples of actions that are subject to the section 7 consultation process are actions on State, tribal, local, or private lands that require a Federal permit (such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (33 U.S.C. 1251 *et seq.*) or a permit from the Service under section 10 of the Act) or that involve some other Federal action (such as funding from the Federal Highway Administration, Federal Aviation Administration, or the Federal Emergency Management Agency). Federal actions not affecting listed species or critical habitat, and actions on State, tribal, local, or private lands that are not federally funded or authorized, do not require section 7 consultation.

As a result of section 7 consultation, we document compliance with the requirements of section 7(a)(2) through our issuance of:

(1) A concurrence letter for Federal actions that may affect, but are not likely to adversely affect, listed species or critical habitat; or

(2) A biological opinion for Federal actions that may affect and are likely to adversely affect, listed species or critical habitat.

When we issue a biological opinion concluding that a project is likely to jeopardize the continued existence of a listed species and/or destroy or adversely modify critical habitat, we provide reasonable and prudent alternatives to the project, if any are identifiable, that would avoid the likelihood of jeopardy and/or destruction or adverse modification of critical habitat. We define ''reasonable and prudent alternatives'' (at 50 CFR 402.02) as alternative actions identified during consultation that:

(1) Can be implemented in a manner consistent with the intended purpose of the action;

(2) Can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction;

(3) Are economically and technologically feasible; and

(4) Would, in the Director's opinion, avoid the likelihood of jeopardizing the continued existence of the listed species and/or avoid the likelihood of destroying or adversely modifying critical habitat.

Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project. Costs associated with implementing a reasonable and prudent alternative are similarly variable.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where we have listed a new species or subsequently designated critical habitat that may be affected and the Federal agency has retained discretionary involvement or control over the action (or the agency's discretionary involvement or control is authorized by law). Consequently, Federal agencies sometimes may need to request reinitiation of consultation with us on actions for which formal consultation has been completed, if those actions with discretionary involvement or control may affect subsequently listed species or designated critical habitat.

Application of the ''Adverse Modification'' Standard

The key factor related to the adverse modification determination is whether, with implementation of the proposed Federal action, the affected critical habitat would continue to serve its intended conservation role for the species. Activities that may destroy or adversely modify critical habitat are those that alter the physical or biological features to an extent that appreciably reduces the conservation value of critical habitat for the Salt Creek tiger beetle. As discussed above, the role of critical habitat is to support life-history needs of the species and provide for the conservation of the species.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe, in any proposed or final regulation that designates critical habitat, activities involving a Federal action that may destroy or adversely modify such habitat, or that may be affected by such designation.

Activities that may affect critical habitat, when carried out, funded, or authorized by a Federal agency, should result in consultation for the Salt Creek tiger beetle. These activities include, but are not limited to:

(1) Actions that would alter soil moisture or salinity—Such activities could include, but are not limited to, development within or adjacent to proposed critical habitat such as installation of tile drains in agricultural lands, construction of storm drains in urban areas, road construction, or further development of residential or commercial areas. These activities could decrease soil moisture levels (in the case of tile drains) or increase soil moisture and decrease salinity levels through increased runoff of fresh surface water (in the case of storm drains, road construction, and residential or commercial development). Any change to soil moisture or salinity levels could degrade or destroy habitat by altering habitat characteristics beyond the narrow range of soil moisture and salinity required by the species. A secondary effect of increased freshwater inputs that lessen soil salinity is the potential invasion of more freshwater-tolerant plants such as cattails (*Typha* spp.) and reed canary grass (*Phalaris arundinacea*) that eliminate the open habitat required by the species (Harvey et al. 2007, p. 749).

(2) Actions that would increase the depth to the water table—Such activities could include, but are not limited to, stream channelization or bank armoring in Little Salt Creek, Rock Creek, Haines Branch, and Oak Creek or adjacent portions of Salt Creek. These activities could result in a lowering of the water table within proposed critical habitat that would compromise groundwater discharge functions necessary to maintain saline wetlands. A further loss of saline wetland habitat could impact our ability to conserve the Salt Creek tiger beetle.

(3) Actions that would cause trampling of open saline areas associated with stream banks, mid-channel islands, and mudflats—Such activities could include, but are not limited to, overgrazing by livestock within proposed critical habitat. Trampling could result in the destruction of larvae and larval burrows, leading to population declines.

(4) Actions that would increase nighttime levels of light—Such activities could include, but are not limited to, new construction of residential or commercial areas that includes nighttime lighting. Light pollution likely disrupts nocturnal behavior by attracting beetles away from their normal habitats (Allgeier et al. 2003, p. 8). Attraction to light from different types of lamps varies, in decreasing order, from blacklight, mercury vapor, fluorescent, incandescent, and sodium vapor, with blacklight being the most favored (Allgeier et al. 2004, p. 10). The disruption in behavior could affect nighttime egg-laying activity of females, if it attracts females into unsuitable habitat.

(5) Actions that would result in modification to the right of way located along Interstate 80 that could alter the hydrology supporting saline seeps and salt flats at Oak Creek (Capitol Beach).

This could include earth disturbance and installation of drainage structures.

Exemptions

Application of Section 4(a)(3) of the Act

The Sikes Act Improvement Act of 1997 (Sikes Act) (16 U.S.C. 670a) required each military installation that includes land and water suitable for the conservation and management of natural resources to complete an integrated natural resources management plan (INRMP) by November 17, 2001. An INRMP integrates implementation of the military mission of the installation with stewardship of the natural resources found on the base. Each INRMP includes:

(1) An assessment of the ecological needs on the installation, including the need to provide for the conservation of listed species;

(2) A statement of goals and priorities;

(3) A detailed description of management actions to be implemented to provide for these ecological needs; and

(4) A monitoring and adaptive management plan.

Among other things, each INRMP must, to the extent appropriate and applicable, provide for fish and wildlife management; fish and wildlife habitat enhancement or modification; wetland protection, enhancement, and restoration where necessary to support fish and wildlife; and enforcement of applicable natural resource laws.

The National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136) amended the Act to limit areas eligible for designation as critical habitat. Specifically, section 4(a)(3)(B)(i) of the Act (16 U.S.C. 1533(a)(3)(B)(i)) now provides: ''The Secretary shall not designate as critical habitat any lands or other geographic areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. 670a), if the Secretary determines in writing that such plan provides a benefit to the species for which critical habitat is proposed for designation.''

There are no Department of Defense lands with a completed INRMP within the proposed critical habitat designation. Therefore, we are not proposing any exemptions based on section 4(a)(3)(B)(i).

Exclusions

Application of Section 4(b)(2) of the Act

Section 4(b)(2) of the Act states that the Secretary shall designate and make revisions to critical habitat on the basis of the best available scientific data after taking into consideration the economic impact, national security impact, and any other relevant impact of specifying any particular area as critical habitat. The Secretary may exclude an area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific data available, that the failure to designate such area as critical habitat will result in the extinction of the species. In making that determination, the statute on its face, as well as the legislative history, are clear that the Secretary has broad discretion regarding which factor(s) to use and how much weight to give to any factor.

Under section 4(b)(2) of the Act, we may exclude an area from designated critical habitat based on economic impacts, impacts on national security, or any other relevant impacts. In considering whether to exclude a particular area from the designation, we identify the benefits of including the area in the designation, identify the benefits of excluding the area from the designation, and evaluate whether the benefits of exclusion outweigh the benefits of inclusion. If the analysis indicates that the benefits of exclusion outweigh the benefits of inclusion, the Secretary may exercise his discretion to exclude the area only if such exclusion would not result in the extinction of the species.

Exclusions Based on Economic Impacts

Under section 4(b)(2) of the Act, we consider the economic impacts of specifying any particular area as critical habitat. In order to consider economic impacts, we are preparing a new analysis of the economic impacts of the proposed revised critical habitat designation and related factors. Upon completion, copies of the draft economic analysis will be available for downloading from the Internet at *http://www.regulations.gov,* or by contacting the Nebraska Fish and Wildlife Office directly (see **FOR FURTHER INFORMATION CONTACT** section). During the development of a final designation, we will consider economic impacts, public comments, and other new information. Areas may be excluded from the final critical habitat designation under section 4(b)(2) of the Act and our implementing regulations at 50 CFR 424.19.

Exclusions Based on National Security Impacts

Under section 4(b)(2) of the Act, we consider whether there are lands owned or managed by the Department of Defense where a national security impact might exist. In preparing this proposal, we have determined that the lands within the proposed designation of critical habitat for the Salt Creek tiger beetle are not owned or managed by the Department of Defense; therefore, we anticipate no impact on national security. Consequently, the Secretary does not propose to exercise his discretion to exclude any areas from the final designation based on impacts on national security.

Exclusions Based on Other Relevant Factors

Under section 4(b)(2) of the Act, we consider any other relevant impacts, in addition to economic impacts and impacts on national security. We consider a number of factors, including whether the landowners have developed any HCPs or other management plans for the area, or whether there are conservation partnerships that would be encouraged by designation of, or exclusion from, critical habitat. In addition, we look at any tribal issues, and consider the government-to-government relationship of the United States with tribal entities. We also consider any social impacts that might occur because of the designation. In preparing this proposal, we have determined that there are currently no completed HCPs for the Salt Creek tiger beetle, and the proposed designation does not include any tribal lands or trust resources.

There are no management plans for the Salt Creek tiger beetle. However, there is an implementation plan for the conservation of Nebraska's remaining eastern saline wetlands (LaGrange et al. 2003, entire). Signatories to this plan include the Nebraska Game and Parks Commission, the City of Lincoln, the County of Lancaster, the Lower Platte South Natural Resources District, and The Nature Conservancy. This plan may protect and restore Salt Creek tiger beetle habitat. The goal of the plan is no net loss of saline wetlands and their associated functions, with long-term improvements in wetland functions through restoration of the hydrological system, prescribed wetland management, and watershed protection (LaGrange et al. 2003, p. 6). This plan led to formation of the SWCP, which has purchased nearly 1,200 ac (486 ha) of eastern saline wetlands and associated uplands, and acquired

conservation easements on more than 2,000 ac (810 ha) of additional lands (Malmstrom 2011 and 2012, entire). Overall, approximately 29 percent of proposed critical habitat is protected through these acquisitions. We believe that activities implemented under the plan or under the SWCP would be supported by designation of critical habitat because the Salt Creek tiger beetle is described by the plan and the SWCP as one of the values supported by these saline wetlands. Therefore, no areas are proposed for exclusion from this designation based on other relevant impacts.

Peer Review

In accordance with our joint policy on peer review published in the **Federal Register** on July 1, 1994 (59 FR 34270), we will seek the expert opinions of at least three appropriate and independent specialists regarding this proposed rule. The purpose of peer review is to ensure that our critical habitat designation is based on scientifically sound data and analyses. We have invited these peer reviewers to comment during this public comment period.

We will consider all comments and information received during this comment period on this proposed rule during our preparation of a final determination. Accordingly, the final decision may differ from this proposal.

Public Hearings

Section 4(b)(5) of the Act provides for one or more public hearings on this proposal, if requested. Requests must be received within 45 days after the date of publication of this proposed rule in the **Federal Register**. Such requests must be sent to the address shown in **ADDRESSES**. We will schedule public hearings on this proposal, if any are requested, and announce the dates, times, and places of those hearings, as well as how to obtain reasonable accommodations, in the **Federal Register** and local newspapers at least 15 days before the hearing.

Required Determinations

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Executive Order 12866 provides that the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will review all significant rules. The OIRA has determined that this rule is not significant.

Executive Order 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The executive order directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility and freedom of choice for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. E.O. 13563 emphasizes further that regulations must be based on the best available science and that the rulemaking process must allow for public participation and an open exchange of ideas. We have developed this rule in a manner consistent with these requirements.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (RFA; 5 U.S.C. 601 *et seq.*) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA; 5 U.S.C 801 *et seq.*), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. The SBREFA amended the RFA to require Federal agencies to provide a certification statement of the factual basis for certifying that the rule will not have a significant economic impact on a substantial number of small entities.

According to the Small Business Administration, small entities include small organizations such as independent nonprofit organizations; small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents; and small businesses (13 CFR 121.201). Small businesses include such businesses as manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and forestry and logging operations with fewer than 500 employees and annual business less than $7 million. To determine whether small entities may be affected, we will consider the types of activities that might trigger regulatory impacts under this designation as well as types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

Importantly, the incremental impacts of a rule must be *both* significant and substantial to prevent certification of the rule under the RFA and to require the preparation of an initial regulatory flexibility analysis. If a substantial number of small entities are affected by the proposed critical habitat designation, but the per-entity economic impact is not significant, the Service may certify. Likewise, if the per-entity economic impact is likely to be significant, but the number of affected entities is not substantial, the Service may also certify.

Under the RFA, as amended, and following recent court decisions, Federal agencies are only required to evaluate the potential incremental impacts of rulemaking on those entities directly regulated by the rulemaking itself, and not the potential impacts to indirectly affected entities. The regulatory mechanism through which critical habitat protections are realized is section 7 of the Act, which requires Federal agencies, in consultation with the Service, to ensure that any action authorized, funded, or carried out by the Agency is not likely to adversely modify critical habitat. Therefore, only Federal action agencies are directly subject to the specific regulatory requirement (avoiding destruction and adverse modification) imposed by critical habitat designation. Under these circumstances, it is our position that only Federal action agencies will be directly regulated by this designation. Therefore, because Federal agencies are not small entities, the Service may certify that the proposed critical habitat rule will not have a significant economic impact on a substantial number of small entities.

We acknowledge, however, that in some cases, third-party proponents of the action subject to permitting or funding may participate in a section 7 consultation, and thus may be indirectly affected. We believe it is good policy to assess these impacts if we have sufficient data before us to complete the necessary analysis, whether or not this analysis is strictly required by the RFA. While this regulation does not directly regulate these entities, in our draft economic analysis we will conduct a brief evaluation of the potential number of third parties participating in consultations on an annual basis in order to ensure a more complete

examination of the incremental effects of this proposed rule in the context of the RFA.

In conclusion, we believe that, based on our interpretation of directly regulated entities under the RFA and relevant case law, this designation of critical habitat will only directly regulate Federal agencies which are not by definition small business entities. And as such, we certify that, if promulgated, this designation of critical habitat would not have a significant economic impact on a substantial number of small business entities. Therefore, an initial regulatory flexibility analysis is not required. However, though not necessarily required by the RFA, in our draft economic analysis for this proposal we will consider and evaluate the potential effects to third parties that may be involved with consultations with Federal action agencies related to this action.

Energy Supply, Distribution, or Use—— Executive Order 13211

Executive Order 13211 (Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use) requires agencies to prepare Statements of Energy Effects when undertaking certain actions. We do not expect the designation of this proposed critical habitat to significantly affect energy supplies, distribution, or use as there is no energy supply or distribution infrastructure near the proposed critical habitat. Therefore, this action is not a significant energy action, and no Statement of Energy Effects is required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*), we make the following findings:

(1) This rule will not produce a Federal mandate. In general, a Federal mandate is a provision in legislation, statute, or regulation that would impose an enforceable duty upon State, local, or tribal governments, or the private sector, and includes both ''Federal intergovernmental mandates'' and ''Federal private sector mandates.'' These terms are defined in 2 U.S.C. 658(5)–(7). ''Federal intergovernmental mandates'' include a regulation that ''would impose an enforceable duty upon State, local, or tribal governments'' with two exceptions. It excludes ''a condition of Federal assistance.'' It also excludes ''a duty arising from participation in a voluntary Federal program,'' unless the regulation ''relates to a then-existing Federal program under which $500,000,000 or more is provided annually to State, local, and tribal governments under entitlement authority,'' if the provision would ''increase the stringency of conditions of assistance'' or ''place caps upon, or otherwise decrease, the Federal Government's responsibility to provide funding,'' and the State, local, or tribal governments ''lack authority'' to adjust accordingly. At the time of enactment, these entitlement programs were: Medicaid; Aid to Families with Dependent Children work programs; Child Nutrition; Food Stamps; Social Services Block Grants; Vocational Rehabilitation State Grants; Foster Care, Adoption Assistance, and Independent Living; Family Support Welfare Services; and Child Support Enforcement. ''Federal private sector mandates'' include a regulation that ''would impose an enforceable duty upon the private sector, except (i) a condition of Federal assistance or (ii) a duty arising from participation in a voluntary Federal program.''

The designation of critical habitat does not impose a legally binding duty on non-Federal Government entities or private parties. Under the Act, the only regulatory effect is that Federal agencies must ensure that their actions do not destroy or adversely modify critical habitat under section 7. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency. Furthermore, to the extent that non-Federal entities are indirectly impacted because they receive Federal assistance or participate in a voluntary Federal aid program, the Unfunded Mandates Reform Act would not apply, nor would critical habitat shift the costs of the large entitlement programs listed above onto State governments.

(2) We do not believe that this rule will significantly or uniquely affect small governments because most of the lands within the proposed critical habitat do not occur within the jurisdiction of small governments. This rule will not produce a Federal mandate of $100 million or greater in any year. Therefore, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act. The designation of critical habitat imposes no obligations on State or local governments. Consequently, a Small Government Agency Plan is not required. However, we will further evaluate this issue as we conduct our economic analysis, and review and revise this assessment as warranted.

Takings—Executive Order 12630

In accordance with Executive Order 12630 (''Government Actions and Interference with Constitutionally Protected Private Property rights''), this rule is not anticipated to have significant takings implications. As discussed above, the designation of critical habitat affects only Federal actions. Critical habitat designation does not affect landowner actions that do not require Federal funding or permits, nor does it preclude development of habitat conservation programs or issuance of incidental take permits to permit actions that do require Federal funding or permits to go forward. Due to current public knowledge of the species protections and the prohibition against take of the species both within and outside of the proposed areas, we do not anticipate that property values will be affected by the critical habitat designation. However, we have not yet completed the economic analysis for this proposed rule. Once the economic analysis is available, we will review and revise this preliminary assessment as warranted, and prepare a Takings Implication Assessment.

Federalism—Executive Order 13132

In accordance with Executive Order 13132 (Federalism), this proposed rule does not have significant Federalism effects. A Federalism summary impact statement is not required. In keeping with Department of the Interior and Department of Commerce policy, we requested information from, and coordinated development of, this proposed critical habitat designation with appropriate State resource agencies in Nebraska. The designation of critical habitat in areas currently occupied by the Salt Creek tiger beetle imposes no additional restrictions to those currently in place and, therefore, has little incremental impact on State and local governments and their activities. The designation may have some benefit to these governments because the areas that contain the physical or biological features essential to the conservation of the species are more clearly defined, and the elements of the features necessary to the conservation of the species are more clearly defined, and the elements of the features necessary to the conservation of the species are specifically identified. This information

does not alter where and what federally sponsored activities may occur. However, it may assist local governments in long-range planning (rather than having them wait for case-by-case section 7 consultations to occur).

Where State and local governments require approval or authorization from a Federal agency for actions that may affect critical habitat, consultation under section 7(a)(2) would be required. While non-Federal entities that receive Federal funding, assistance, or permits, or that otherwise require approval or authorization from a Federal agency for an action, may be indirectly impacted by the designation of critical habitat, the legally binding duty to avoid destruction or adverse modification of critical habitat rests squarely on the Federal agency.

Civil Justice Reform—Executive Order 12988

In accordance with Executive Order 12988 (Civil Justice Reform), the Office of the Solicitor has determined that the rule does not unduly burden the judicial system and that it meets the requirements of sections 3(a) and 3(b)(2) of the Order. We have proposed designating critical habitat in accordance with the provisions of the Act. To assist the public in understanding the habitat needs of the species, the rule identifies the elements of physical or biological features essential to the conservation of the species. The designated areas of critical habitat are presented on a map, and the rule provides several options for the interested public to obtain more detailed location information, if desired.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by OMB under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This rule will not impose recordkeeping or reporting requirements on State or local governments, individuals, businesses, or organizations. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act (42 U.S.C. 4321 et seq.)

It is our position that, outside the jurisdiction of the U.S. Court of Appeals for the Tenth Circuit, we do not need to prepare environmental analyses pursuant to the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*) in connection with designating critical habitat under the Act. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This position was upheld by the U.S. Court of Appeals for the Ninth Circuit (*Douglas County* v. *Babbitt,* 48 F.3d 1495 (9th Cir. 1995), cert. denied 516 U.S. 1042 (1996)). However, under the Tenth Circuit ruling in *Catron County Board of Commissioners* v. *U.S. Fish and Wildlife Service,* 75 F.3d 1429 (10th Cir. 1996), we are required to complete NEPA analysis when designating critical habitat under the Act within the boundaries of the Tenth Circuit. We prepared an environmental assessment for our 2010 final rule designating critical habitat for the Salt Creek tiger beetle, and made a finding of no significant impacts. Although the State of Nebraska is not part of the Tenth Circuit, and therefore, NEPA analysis is not required, we will undertake a NEPA analysis in this case since we conducted one previously for our 2010 final rule.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994 (Government-to-Government Relations with Native American Tribal Governments; 59 FR 22951), Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments), and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with recognized Federal Tribes on a government-to-government basis. In accordance with Secretarial Order 3206 of June 5, 1997 (American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act), we readily acknowledge our responsibilities to work directly with tribes in developing programs for healthy ecosystems, to acknowledge that tribal lands are not subject to the same controls as Federal public lands, to remain sensitive to Indian culture, and to make information available to tribes. We determined that there are no tribal lands that were occupied by the Salt Creek tiger beetle at the time of listing that contain the features essential for conservation of the species, and no tribal lands unoccupied by the Salt Creek tiger beetle that are essential for the conservation of the species. Therefore, we are not proposing to designate critical habitat for the Salt Creek tiger beetle on tribal lands.

Clarity of the Rule

We are required by Executive Orders 12866 and 12988 and by the Presidential Memorandum of June 1, 1998, to write all rules in plain language. This means that each rule we publish must:

(1) Be logically organized;

(2) Use the active voice to address readers directly;

(3) Use clear language rather than jargon;

(4) Be divided into short sections and sentences; and

(5) Use lists and tables wherever possible.

If you feel that we have not met these requirements, send us comments by one of the methods listed in the **ADDRESSES** section. To better help us revise the rule, your comments should be as specific as possible. For example, you should tell us the numbers of the sections or paragraphs that are unclearly written, which sections or sentences are too long, the sections where you feel lists or tables would be useful, etc.

References Cited

A complete list of references cited in this rulemaking is available on the Internet at *http://www.regulations.gov* and upon request from the Nebraska Ecological Services Field Office (see **FOR FURTHER INFORMATION CONTACT**).

Authors

The primary authors of this package are the staff members of the Nebraska Ecological Services Field Office and the Mountain-Prairie Regional Office.

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Proposed Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations, as set forth below:

PART 17—ENDANGERED AND THREATENED WILDLIFE AND PLANTS

■ 1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 1531–1544; 4201–4245; unless otherwise noted.

■ 2. In § 17.95(i), revise the entry for ''Salt Creek Tiger Beetle (*Cicindela nevadica lincolniana*),'' to read as follows:

§ 17.95 Critical habitat—fish and wildlife.

* * * * *

(i) *Insects.*

* * * * *

Salt Creek Tiger Beetle (*Cicindela nevadica lincolniana*)

(1) Four critical habitat units are depicted for Lancaster and Saunders Counties, Nebraska, on the map below.

(2) Within these areas, the primary constituent elements of the physical or biological features essential to the conservation of Salt Creek tiger beetle consist of the following components:

(i) Saline barrens and seeps found within saline wetland habitat in Little Salt, Rock, Oak and Haines Branch Creeks. For our evaluation, we determined that two habitat types within suitable wetlands are required by the Salt Creek tiger beetle:

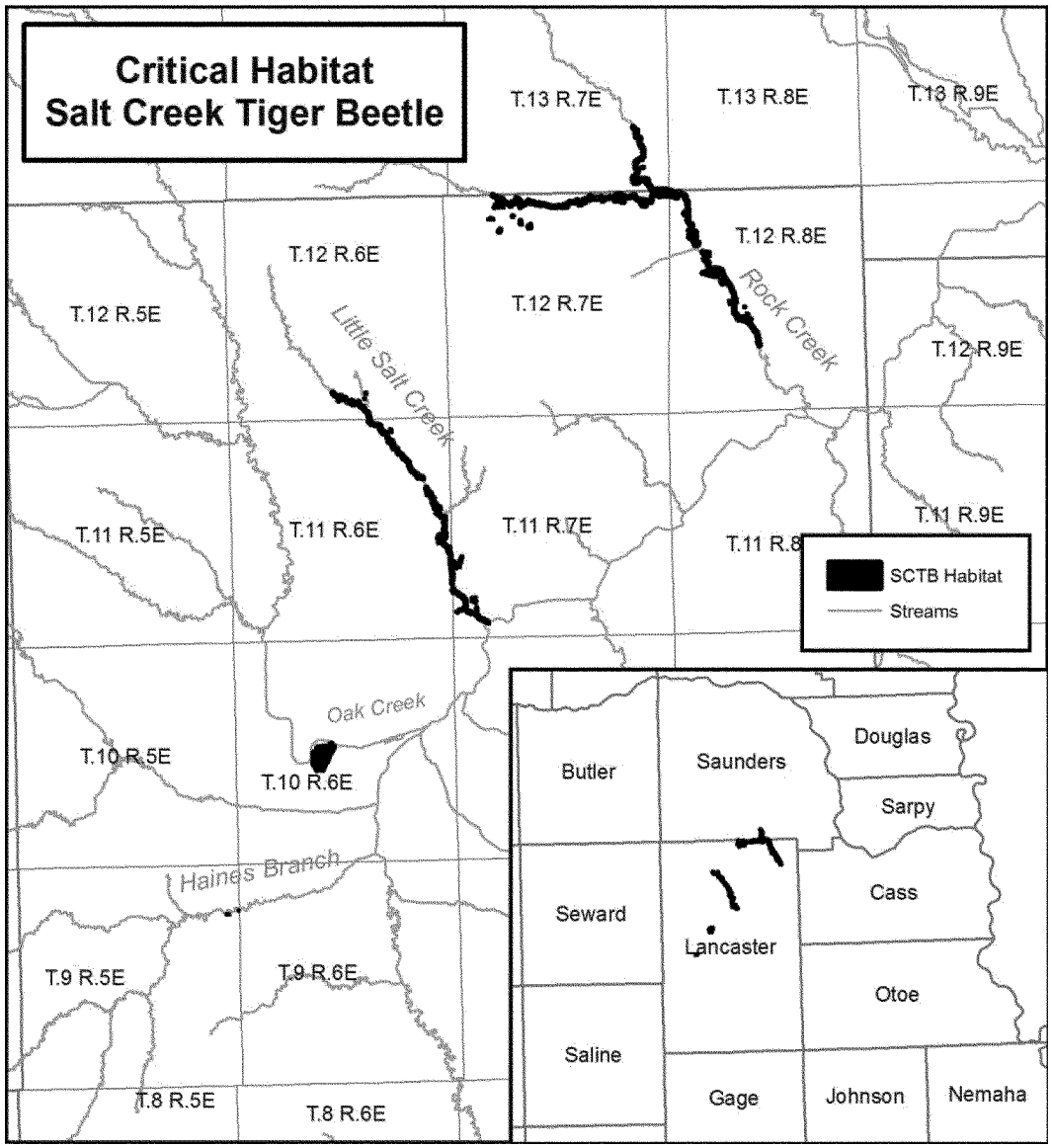
(ii) Exposed mudflats associated with saline wetlands or the exposed banks and islands of streams and seeps that contain adequate soil moisture and soil salinity are essential core habitats. These habitats support egg-laying and foraging requirements. The ''Salmo'' soil series is the only soil type that currently supports occupied habitat; however ''Saltillo'' is the other soil series that has adequate soil moisture and salinity and can also provide suitable habitat.

(iii) Vegetated wetlands adjacent to core habitats that provide shade for species thermoregulation, support a source of prey for adults and larval forms of Salt Creek tiger beetles, and protect core habitats.

(iv) Critical habitat does not include manmade structures (such as buildings, aqueducts, runways, roads, and other paved areas) and the land on which they are located existing within the legal boundaries on the effective date of this rule.

(v) *Critical habitat map units.* The map in this entry, as modified by any accompanying regulatory text, establishes the boundaries of the critical habitat designation. The coordinates or plot points or both on which the map is based are available to the public at the Service's internet site, *http://www.fws.gov/nebraskaes,* at *http://www.regulations.gov* at Docket No. FWS–R6–ES–2013–0068, and at the field office responsible for this designation. You may obtain field office location information by contacting one of the Service regional offices, the addresses of which are listed at 50 CFR 2.2.

(vi) *Note:* Map showing critical habitat units for the Salt Creek tiger beetle follows:



BILLING CODE 4310–55–P

* * * * *

Dated: May 20, 2013.

Rachel Jacobsen,

Principal Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 2013–13098 Filed 6–3–13; 8:45 am]

BILLING CODE 4310–55–C

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 224

[Docket No. 101004485–3501–02]

RIN 0648–XZ50

Endangered and Threatened Wildlife and Plants; 12-Month Finding and Proposed Endangered Listing of Five Species of Sawfish Under the Endangered Species Act

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

ACTION: Proposed rule; 12-month petition finding; request for comments.

SUMMARY: We, NMFS, have completed comprehensive status reviews under the Endangered Species Act (ESA) of five species of sawfishes in response to a petition to list six sawfish species. In our 90-day finding we determined that *Pristis pristis,* as described in the petition, was not a valid species and began our status review on the remaining five species (*Anoxypristis cuspidata; Pristis clavata; Pristis microdon; Pristis zijsron;* and all non-listed population(s) of *Pristis pectinata*). During our status review, new scientific information revealed that three previously recognized species (*P. microdon, P. pristis,* and *P. perotteti*) were in fact a single species, *Pristis pristis.* We had previously listed *P. perotteti* as an endangered species (July 12, 2011). We therefore also considered the information from our 2010 status review of *P. perotteti,* herein *P. pristis.* We have determined, based on the best scientific and commercial data available and after taking into account efforts being made to protect the species, that the narrow sawfish (*A. cuspidata*); dwarf sawfish (*P. clavata*); largetooth sawfish (collectively *P. pristis;* formerly *P. pristis, P. microdon,* and *P. perotteti*); green sawfish (*P. zijsron*); and the non-listed population(s) of smalltooth sawfish *P. pectinata* meet the definition of an endangered species. We also include a change in the scientific name for largetooth sawfish in this proposed rule to codify the taxonomic reclassification of *P. perotteti* to *P. pristis.* We are not proposing to designate critical habitat because the geographical areas occupied by the species are entirely outside U.S. jurisdiction and we have not identified any unoccupied areas that are currently essential to the conservation of any of these species. We are soliciting information that may be relevant to these listing and critical habitat determinations, especially on the status and conservation of these species.

DATES: Comments on this proposed rule must be received by August 5, 2013. Public hearing requests must be made by July 19, 2013.

ADDRESSES: You may submit comments, identified by the following document number, NOAA–NMFS–2011–0073, 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-2011-0073.* click the ''Comment Now'' icon, complete the required fields, and enter or attach your comments.
- *Fax:* 727–824–5309; Attn: Assistant Regional Administrator for Protected Resources.

Instructions: You must submit comments by one of the above methods to ensure that we receive, document, and consider them. Comments sent by any other method, to any other address or individual, or received after the end of the comment period may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *http://www.regulations.gov* without change. All personal identifying information (e.g., name, address, etc.) confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. We 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.

You can obtain the petition, the proposed rule, and the list of references electronically on our NMFS Web site at *http://sero.nmfs.noaa.gov/pr/pr.htm.*

FOR FURTHER INFORMATION CONTACT: Shelley Norton, NMFS, Southeast Regional Office (727) 824–5312 or Dr. Dwayne Meadows, NMFS, Office of Protected Resources (301) 427–8403.

SUPPLEMENTARY INFORMATION:

Background

On September 10, 2010, we received a petition from the WildEarth Guardians (WEG) requesting we list six sawfish species: knifetooth, narrow, or pointed sawfish (*A. cuspidata,* hereinafter the narrow sawfish); dwarf or Queensland sawfish (*P. clavata,* hereinafter the dwarf sawfish); largetooth sawfish (*P. pristis* and *P. microdon*); green sawfish (*P. zijsron*); and the non-listed population(s) of smalltooth sawfish (*P. pectinata*) as endangered or threatened under the ESA; or alternatively to list any distinct population segments (DPS) that exist under the ESA. On March 7, 2011, we published a 90-day finding (76 FR 12308) stating the petitioned action may be warranted for five of the six species *A. cuspidata, P. clavata, P. microdon, P. zijsron,* and the non-listed population(s) of *P. pectinata.* Information in our records indicated that *P.* p*ristis* as described in the petition, was not a valid species. Our 90-day finding requested information to inform our decision, and announced the initiation of status reviews for the five species. During the comment period we received five public comments.

We are responsible for determining whether species are threatened or endangered under the ESA (16 U.S.C. 1531 *et seq.*). To make this determination, we first consider whether a group of organisms constitutes a ''species'' under the ESA, then whether the status of the species qualifies it for listing as either threatened or endangered. Section 3 of the ESA defines a ''species'' as ''any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.'' Section 3 of the ESA further defines an endangered species as ''any species which is in danger of extinction throughout all or a significant portion of its range'' and a threatened species as one ''which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.'' Thus, we interpret an ''endangered species'' to be one that is presently in danger of extinction. A ''threatened species,'' on the other hand, is not presently in danger of extinction, but is likely to become so in the foreseeable future (that is, at a later time). In other words, the primary statutory difference between a threatened and endangered species is the timing of when a species may be in danger of extinction, either presently (endangered) or in the foreseeable future (threatened). Section 4(a)(1) of the ESA requires us to determine whether any

species is endangered or threatened due to any one or a combination of the following five factors: (A) The present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. We are required to make listing determinations based solely on the best scientific and commercial data available after conducting a review of the status of the species and after taking into account efforts being made by any state or foreign nation to protect the species.

In making listing determinations for these five species, we first determine whether each petitioned species meet the ESA definition of a ''species''. Next, using the best available information gathered during the status reviews, we complete an extinction risk assessment using the general procedure of Wainwright and Kope (1999). We then assess the threats affecting the status of each species using the five factors identified in section 4(a)(1) of the ESA.

Once we have determined the threats, we assess efforts being made to protect the species to determine if these conservation efforts were adequate to mitigate the existing threats. We evaluate conservation efforts using the criteria outlined in the joint NMFS and U.S. Fish and Wildlife Service (USFWS) Policy for Evaluating Conservation Efforts (PECE; 68 FR 15100; March 28, 2003) to determine their certainty of implementation and effectiveness for future or not yet fully implemented conservation efforts. Finally, we re-assess the extinction risk of each species in light of the existing conservation efforts.

Status Reviews

In order to conduct a comprehensive review, NMFS Southeast Region Protected Resources Division and NMFS Southeast Fisheries Science Center, Panama City Laboratory, staff members collaborated to identify the best available information. Unlike some previous 12-month findings from this agency, we have not developed a separate status review report. Instead, we present all information available for these species in this **Federal Register** notice; we first discuss background information relative to all five species and then include descriptions of the natural history specific to each species.

Sawfish General Species Description

Sawfishes are a group of shark-like rays. Taxonomically they are classified in the Family Pristidae (sawfishes), Order Rajiformes (skates, rays, and sawfishes) and Class Chondrichthyes (cartilaginous fish), also commonly known as elasmobranchs. The overall body form of sawfishes is similar to sharks, but they are flattened dorso-ventrally. Sawfishes are covered with dermal denticles (teeth-like scales) and possess enlarged pectoral fins.

The most distinct characteristic of sawfishes is their large, flat, toothed rostrum or 'saw' with large teeth on each side. The rostral teeth are made from calcified tissue that is neither dentin nor enamel, though it is more similar to the latter (Bradford, 1957). Rostral teeth develop inside sockets on the rostrum and are held in place by strong fibers. Unlike sharks, sawfish rostral teeth are not replaced, although partially broken teeth may continue to grow (Miller, 1974). For some species of sawfish, the number of rostral teeth can vary by geographic region.

Sawfishes use their rostrum to locate, stun, and kill prey, generally small schooling fishes such as mullet, herring, shad, and sardines (Bigelow and Schroeder, 1953). Breder (1952), in summarizing the literature on observations of sawfish feeding behavior, noted that they attack fish by slashing sideways through schools of fish, and then impale the fish on their rostral teeth. Prey are subsequently scraped off their rostral teeth by rubbing the rostrum on the bottom and then ingesting the whole fish. Bigelow and Schroeder (1953) also report that sawfish feed on crustaceans and other benthic species. Recent studies indicate that sawfishes may use their toothed rostrum to sense their prey's electric fields (Wueringer *et al.,* 2011; 2012).

All sawfish species are distributed primarily in circumtropical shallow coastal waters that generally vary in salinity. While sawfishes are commonly found in shallow water, adults are known to also inhabit deeper waters (greater than 130 ft, 39.6 m). Some sawfishes are found in freshwater, with established populations in major rivers and lakes of South America, Africa, and southeast Asia. The physical characteristics of habitat, such as salinity and temperature, likely influence a sawfish's movement patterns. Tides limit the physical habitat area available, which may explain movement into shallow water areas during specific tidal cycles (Blaber *et al.,* 1989).

Life history data on sawfishes are limited. Fertilization is internal by means of male claspers and reproduction is ovoviviparous; females carry eggs with a yolk sac that nourishes developing young until they hatch within the body. Sawfishes are born with a gelatinous substance around their rostral teeth to protect the mother during birth (Last and Stevens, 1994; Rainboth, 1996; Compagno and Last, 1999; Raje and Joshi, 2003; Field *et al.,* 2009). It is thought that most sawfishes breed every two years and have a gestation period of about four to five months (Bigelow and Schroeder, 1953; Thorson, 1976a). The number of young in a litter varies by species, as does the age at sexual maturity.

Like most chondrichthyes, sawfishes occupy the mid to upper level of the food web. Smaller sawfishes, including juveniles, may be preyed upon by larger sharks like the bull shark (*Carcharhinus leucas*), estuarine crocodiles (*Crocodylus porosus*) or alligators (*Alligator mississippiensis*). Sawfishes may use their saw as a weapon for defense against these predators (Brewer *et al.,* 1997; Wueringer *et al.,* 2009).

Previously, seven valid species of sawfish were recognized worldwide (Compagno, 1999). Per Compagno and Cook (1995) and Compagno (1999) these are *A. cuspidata* (Latham 1794), *P. microdon* Latham 1794, *P. perotteti* Muller & Henle 1841, *P. pristis* (Linnaeus 1758), *P. clavata* Garman 1906, *P. pectinata* (Latham 1794), and *P. zijsron (*Bleeker 1851). Since then, the taxonomy, delineation, and identification of these species have proven problematic (Oijen *et al.,* 2007; Wiley *et al.,* 2008; Wueringer *et al.,* 2009). Most recently, Faria *et al.* (2013) hypothesized that the taxonomic uncertainty occurred due to several factors: many original species descriptions were abbreviated, few holotypes are available for examination, reference material is not available for comparison in museum collections, and it is difficult to obtain fresh specimens because of the infrequent captures of all sawfishes. The majority of the confusion regarding taxonomic classification of Pristidae was related to the species *P. pristis.* To resolve these questions regarding the taxonomy of pristids, Faria *et al.* (2013) used historical taxonomy, external morphology, and mitochondrial DNA (mtDNA) sequences (NADH-2 loci) to hypothesize that the sawfishes comprise five species in two genera: *P. pristis, P. clavata, P. pectinata, P. zijsron,* and *A. cuspidata.* We accept this proposed taxonomy as the best available science at this time.

Natural History of the Narrow Sawfish (*Anoxypristis cuspidata*)

Taxonomy and Morphology

The narrow sawfish was first described by Latham in 1794 as *P. cuspidatus.* It was later reclassified as *Anoxypristis* due to morphological differences from *Pristis* that include its narrow rostral saw, which lacks teeth on the first quarter of the saw closest to the head in adults, and the distinct shape of the lower lobe of the caudal fin (Compagno *et al.,* 2006a). In juveniles the portion of the rostrum without teeth is only about one-sixth of the saw length (Wueringer *et al.,* 2009).

In addition, the narrow sawfish is characterized by dagger-shaped rostral teeth (Fowler, 1941; Blegvad and Loppenthin, 1944; Compagno and Last, 1999; Faria *et al.,* 2013). The narrow sawfish also has a second pair of lateral canals in its rostrum that are not present in other sawfishes. These canals contain an additional connection to the ampullae of Lorenzini located on the underside of the rostrum (Wueringer *et al.,* 2009).

Rostral tooth count varies for this species between 18–22 (Last and Stevens, 1994), 24–28 (Hussakof, 1912), and 27–32 (Miller, 1974). Total number of teeth has been found to vary by individual, region, and sex. Some studies report males having fewer rostral teeth than females, and others the opposite (Last and Stevens, 1994; Compagno and Last, 1999). While total rostral tooth count is often inconsistent among individuals or studies, the number of teeth an individual has is fixed during development (Wueringer *et al.,* 2009).

The pectoral fins of the narrow sawfish are narrow, short, and shark-like in shape. The first dorsal fin is located posterior to the insertion of the pelvic fins (Compagno and Last, 1999). Within the jaw, there are 94 teeth on the upper jaw and 102 on the lower jaw (Taniuchi *et al.,* 1991a). The eyes are large and very close to the spiracles. Coloration is dark grey dorsally and whitish ventrally (Fowler, 1941; Compagno and Last, 1999).

Narrow sawfish are the only sawfish having tricuspid (three-pointed) denticles (White and Moy-Thomas, 1941). Because these denticles first appear on neonate sawfish at 25.6–28 in (65–71 cm) total length (TL), they are developed post-natally. In general, the narrow sawfish is considered ''naked'' because denticle coverage in adults is often sporadic and widely spaced, usually only covering the rostrum and anterior fin margins, making the skin appear smooth (Fowler, 1941; Gloerfelt-Tarp and Kailola, 1984; Last and Stevens, 1994; Wueringer *et al.,* 2009). Narrow sawfish also have buccopharyngeal denticles present in their mouth. This species does not have tubercles or thorns on their skin (Deynat, 2005).

Habitat Use and Migration

The narrow sawfish is largely euryhaline and moves between estuarine and marine environments (Gloerfelt-Tarp and Kailola, 1984; Last, 2002; Compagno, 2002b; Compagno *et al.,* 2006a; Peverell, 2008). It is generally found in inshore waters in depths of less than 130 ft (39.6 m) with salinities between 25 and 35 parts per thousand (ppt), spending most of its time near the substrate or in the water column over coastal flats (Compagno and Last, 1999; Last, 2002; Peverell, 2005; Peverell, 2008; Wueringer *et al.,* 2009). While Smith (1936) described it as a possible freshwater species, there are only a few reports from freshwater (Taniuchi and Shimizu, 1991; Last and Compagno, 2002; Bonfil and Abdallah, 2004; Wueringer *et al.,* 2009). We are not aware of any fresh or salt water tolerance studies on the species (Compagno, 2002a; Compagno, 2002b) and conclude its habitat is euryhaline.

In studies conducted by Peverell (2008), the narrow sawfish in the Gulf of Carpentaria, Australia undergo an ontogenetic shift in habitat. Larger individuals were commonly encountered offshore, while smaller individuals were mostly found in inshore waters. Peverell (2008) also found females were more likely to be offshore compared to males, at least during the months of the study (February to May). This suggests that smaller narrow sawfish use the protection and prey abundance found in shallow, coastal waters (Dan *et al.,* 1994; Peverell, 2005; Peverell, 2008).

Age and Growth

Two studies have been conducted on age and growth of narrow sawfish. Field *et al.* (2009) compared previously-aged vertebrae with aged rostral teeth and found a direct correlation up to age 6. After age 6, an individual's age was often underestimated using tooth growth bands as the teeth become worn over time (Field *et al.,* 2009). Peverell (2008) then used aged vertebrae to develop more accurate growth curves for both sexes. While the maximum observed age of narrow sawfish from vertebrae was 9 years, the theoretical longevity was calculated at 27 years (Peverell, 2008). At an age of one year, saw length is approximately 4.5 in (11.5 cm). Female narrow sawfish begin to mature at 8 ft 1 in (246 cm) TL and all are mature at 15 ft 5 in (470 cm) TL; males are mature at 8 ft (245 cm) TL (Pogonoski *et al.,* 2002; Bonfil and Abdallah, 2004; Peverell, 2005; 2008). The maximum recorded length of a narrow sawfish is 15 ft 5 in (4.7 m) TL, with unconfirmed records of 20 ft (6.1 m) TL (Last and Stevens, 1994; Compagno and Last, 1999; Pogonoski *et al.,* 2002; Bonfil and Abdallah, 2004; Faria *et al.,* 2013).

Reproduction

The narrow sawfish gives birth to a maximum of 23 pups in the spring. The total length (TL) of pups at birth is between 17–24 in (43–61 cm) (Compagno and Last, 1999; Peverell, 2005; 2008). The reproductive cycle is assumed to be annual, with an average of 12 pups per litter (Peverell, 2005; D'Anastasi, 2010). The number of pups is related to female body size, as smaller females produce fewer offspring than larger females (Compagno and Last, 1999). Preliminary genetic research suggests that the narrow sawfish may not have multiple fathers per litter (D'Anastasi, 2010).

Female narrow sawfish captured in August (dry season) in the Gulf of Carpentaria, Australia, all contained large eggs indicating they were mature (Peverell, 2005). Mature males were also captured in similar locations during the same time of year (McDavitt, 2006). Although sexually mature, mating may not occur until the rainy season in March-May (Raje and Joshi, 2003).

Age at maturity for narrow sawfish is 2 years for males and 3 years for females (Peverell, 2008). The intrinsic rate of population increase (rate of growth of the population) based on life history data from the exploited population in the Gulf of Carpentaria, Australia, has been estimated at 0.27 per year (Moreno Iturria, 2012), with a population doubling time of 2.6 years.

Diet and Feeding

Narrow sawfish feed on small fish and cuttlefish (Compagno and Last, 1999; Field *et al.,* 2009) and, likely, crustaceans, polychaetes, and amphipods (Raje and Joshi, 2003).

Population Structure

Genetic and morphological data support the division of the global species of narrow sawfish into subpopulations (Faria *et al.,* 2013). Based on gene sequence data, there is a very low level of gene flow between the northern Indian Ocean (N=2) and west Pacific (N=11) populations. In a qualitative analysis when data were pooled, four haplotypes were identified:

northern Indian Ocean; Indonesian; New Guinean-Australian; and a northern Indian Ocean haplotype from a single specimen that lacked capture location (Faria *et al.,* 2013). A morphological distinction in narrow sawfish between the Indian Ocean and western Pacific Ocean subpopulations occurs in the number of rostral teeth (Faria *et al.,* 2013). Specimens collected from the Indian Ocean had a higher number of rostral teeth per side than those collected from the western Pacific.

Field *et al.* (2009) examined the primary chemical components of rostral teeth (i.e., oxygen, calcium, and phosphorous) from narrow sawfish captured throughout Australia in an attempt to separate subpopulations based on the isotopes of these chemicals. They found distinctions between regions indicating two separate subpopulations within the Gulf of Carpentaria Australia: one in the west (Northern Territory) and one in the east (Queensland). However, we realize that using isotopes to separate elasmobranch populations is in its infancy and, coupled with the limited number of samples, it is not yet clear whether these results agree with the above genetic studies of population structure. Isotopic signatures indicate the location where an animal spends most of its time and identifies its major prey resources, and do not necessarily provide information on reproductive connectivity between regions. Therefore, we conclude that the best available information on isotopic signatures does not support separating narrow sawfish into subpopulations.

Distribution and Abundance

The narrow sawfish is found throughout the eastern and western portions of the Indian Ocean as well as much of the western Pacific Ocean. The range once extended from as far west as the Red Sea in Egypt and Somalia (M. McDavitt pers. comm. to IUCN, 2012) to as far north as Honshu, Japan, including India, Sri Lanka, and China (Blaber *et al.,* 1994; Last and Stevens, 1994; Compagno and Last, 1999; Compagno *et al.,* 2006a; Van Oijen *et al.,* 2007). The species has also been recorded in rivers in India, Burma, Malaysia, and Thailand (Compagno, 2002b).

While uncertain, the current status of narrow sawfish populations across its range has declined substantially from historic levels. The species was previously commonly reported throughout its range but it is now becoming rare in catches by both commercial and recreational fishers (Brewer *et al.,* 2006; Compagno *et al.,* 2006a). To evaluate the current and historic distribution and abundance of the narrow sawfish, we conducted an extensive search of peer-reviewed publications and technical reports, newspaper, and magazine articles. The result of that search is summarized below by major geographic region.

Indian Ocean

The earliest reports of narrow sawfish in the Indian Ocean were from 1937 and 1938. Two sawfish were captured from the northern Indian Ocean (no specific location was reported). A third specimen was later caught in the same area (Blegvad and Loppenthin, 1944).

From areas in the western Indian Ocean around the Arabian Sea, three rostra were collected in 1938: two near Bushire, Iran, presumably from the Gulf of Oman, and a third in Jask, Iran, also adjacent to the Gulf of Oman (Blegvad and Loppenthin, 1944). The most extensive report was 13 rostra from the Persian Gulf (one of those was from Iran) but it did not include date information (Faria *et al.,* 2013). Four juveniles were recorded in Pakistan waters in 1975; two females and two males.

Most records of narrow sawfish in the Indian Ocean are from the Bay of Bengal. In 1960 and 1961, 118 sawfish, mostly narrow sawfish, were captured during fishery surveys using gillnets and long lines (James, 1973). There are several additional records of rostra from Bangladesh in the 1960s (Faria *et al.,* 2013). A narrow sawfish was used for a 1969 parasitological study in Bangladesh but no further information was recorded (Moravec *et al.,* 2006). Faria *et al.* (2013) also reported one specimen from 1976, as well as eleven more records off India, but no dates were recorded. From 1982–1994, one juvenile female, one juvenile male, and three rostra were recorded in Pondicherry, India (Deynat, 2005). Two female neonate specimens were recorded in Sri Lanka, and three juveniles (two males and one female) from Malabar in southwest India were also reported from 1982–1994 (Deynat, 2005). Between 1981–2000, in the Bay of Bengal, total elasmobranch landings records are dominated by rays, but include narrow sawfish (Raje and Joshi, 2003).

Landings of narrow sawfish are currently reported from the Indian Ocean off India although they are infrequent (K.K. Bineesh pers. comm. to IUCN, 2012). The last published record of narrow sawfish from the western edge of the range, in the Straits of Hormuz, was in 1997 (A. Moore pers. comm. to IUCN, 2012).

Indo-Pacific Ocean (excluding Australia)

There are several accounts of narrow sawfish over time from various unspecified locations throughout the Indo-Pacific. The first records of narrow sawfish were for juvenile males in 1852 and 1854 (Faria et al., 2013). In 1952, two females were captured from Batavia, Semarang, Indonesia along with a third female without a rostrum (Van Oijen *et al.,* 2007). Both a female and male were recorded in 1867. Prior to 1879, one male and one female were also recorded from Indonesia and four rostra were reported from China in 1898 (Faria *et al.,* 2013).

The next reports of narrow sawfish from the Indo-Pacific occurred in the 1930's. A female was reported in 1931 in Indonesia (no specific location), and a male in Singapore in 1937 (Blegvad and Loppenthin, 1944). A narrow sawfish was caught in the Gulf of Thailand in March 1937 (Blegvad and Loppenthin, 1944). A single report from Papua-New Guinea was recorded in 1938 (Faria *et al.,* 2013). In 1945, narrow sawfish were reported in the Chao Phraya River, Thailand and its tributaries (Smith, 1945).

Records of narrow sawfish throughout the Indo-Pacific continue to be scattered and infrequent throughout the 1950's. Faria *et al.* (2013) recorded rostra from Papua-New Guinea; two from 1955, one each from 1966, 1980, and 2000. A male was caught in 1989 from the Oriomo River, Papua-New Guinea (Taniuchi *et al.,* 1991b; Taniuchi and Shimizu, 1991; Taniuchi, 2002). There are other reports of narrow sawfish from Papua-New Guinea around the Gulf of Papua and in Bootless Bay from the 1970's, but there are no recent records (Taniuchi *et al.,* 1991b). In a comprehensive literature search for the period 1923–1996 on the biodiversity of elasmobranchs in the south China Sea, Compagno (2002a) found no records of sawfishes. However, fresh dorsal and caudal fins of narrow sawfish were found during a survey of fish markets from 1996–1997 in Thailand (Manjaji, 2002b).

There are even fewer records of narrow sawfish from the Indo-Pacific over the last few decades. The only known specimen in the 21st century is a single report from New Guinea in 2001 (L. Harrison pers. comm.).

Australia

Australia may have larger populations of narrow sawfish than any other area within the species range (Peverell, 2005). The earliest record of narrow sawfish is from 1926 from Sydney (Pogonoski *et al.,* 2002). We found no

reports of narrow sawfish from Australia from 1926 until the 1990s. Two narrow sawfish were reported from the Gulf of Carpentaria in 1990 (Blaber *et al.,* 1994). Single specimens were captured in 1991 from the west coast of Australia (Alexander, 1991), the Gulf of Carpentaria in 1995 (Brewer *et al.,* 1997) and the Arafura Sea in 1999 (Beveridge *et al.,* 2005). Faria *et al.* (2013) reported 3 rostra records from private collections in Australia from 1998–1999, but no other information on the collection location was reported.

Narrow sawfish have been reported in multiple studies between 2000 and 2011, mostly from northern Australia. In a bycatch reduction device study conducted in 2001 in the Gulf of Carpentaria, 25 narrow sawfish were captured in trawling gear (Brewer *et al.,* 2006). A survey of fisheries data and records identified 74 offshore and 37 inshore records of narrow sawfish in the Gulf of Carpentaria (Peverell, 2005). Between April 2004 and April 2005, 16 narrow sawfish were caught in the Gulf of Carpentaria during a trawl bycatch study; the mean catch rate was 0.16 sawfish per hour (Dell *et al.,* 2009). Observers on commercial fishing boats recorded nine captures of narrow sawfish in 2007 within the Great Barrier Reef World Heritage Area, Queensland, which accounted for 0.86 percent of the shark and ray catch in the commercial fisheries (Williams, 2007). Observers in the Northern Territory's Offshore Net and Line Fishery encountered several narrow sawfish from 2007–2010 (Davies, 2010). Data from the Kimberley, Australia (R. McAuley pers. comm.to C. Simpfendorfer, 2012), the Northern Territory (Field *et al.,* 2009), the Gulf of Carpentaria (Peverell, 2005), and parts of the Queensland east coast (Harry *et al.,* 2011) suggest viable subpopulations may remain locally, but at significantly lower levels compared to historic levels.

In summary, it appears the current range of narrow sawfish is restricted largely to Australia. Narrow sawfish are considered very rare in many places where evidence is available, including parts of India (Roy, 2010), Bangladesh (Roy, 2010), Burma (FIRMS, 2007–2012), Malaysia (including Borneo; Almada-Villela 2002; Manjaji, 2002), Indonesia (White and Kyne, 2010), Thailand (CITES, 2007; Compagno, 2002a; Vidthayanon, 2002), and Singapore (CITES, 2007). In Australia, narrow sawfish are primarily located in the northern area. For example, a bycatch reduction device study conducted in 2001 reported narrow sawfish in the Gulf of Carpentaria, a similar study conducted off the eastern coast did not capture a single specimen (Courtney *et al.,* 2006). The most recent museum record for narrow sawfish in southern Australia was from New South Wales in the 1970s (Pogonoski *et al.,* 2002). Data from the Queensland Shark Control Program, conducted along the east coast of Queensland, from 1969–2003 shows a clear decline in sawfish catch (although not species-specific) with the complete disappearance of sawfish in southern regions of Queensland by 1993 (Stevens *et al.,* 2005). Although we cannot rule out underreporting of narrow sawfish, especially in remote areas of its historic range, we conclude from the consistent lack of records that narrow sawfish have been severely depleted in numbers and their range has contracted.

Natural History of Dwarf Sawfish (*Pristis clavata*)

Taxonomy and Morphology

Due to its small size and geographic location where it was described, *P. clavata* is referred to as the dwarf or the Queensland sawfish. The species was first described by Garman in 1906; however it has often been confused with the smalltooth sawfish or largetooth sawfish species complex (Last and Stevens, 1994; Cook *et al.,* 2006; Morgan *et al.,* 2010a) given the lack of distinct characters. Ishihara *et al.* (1991a) provides the most concise review of the physical characteristics of the dwarf sawfish.

The dwarf sawfish is olive brown in color dorsally with a white underside. The rostrum of this species is quite short, with 19–23 rostral teeth that are moderately flattened, elongated, and peg-like. Studies indicate that this species does not display significant differences in the number of rostral teeth between males (19–23 teeth) and females (20–23 teeth) (Ishihara *et al.,* 1991a; Thorburn *et al.,* 2008; Morgan *et al.,* 2010a; Morgan *et al.,* 2011). This species can be distinguished from largetooth sawfish based on tooth morphology as described by Thorburn *et al.* (2007). The rostrum makes up 21–26 percent of the total length of the dwarf sawfish (Blaber *et al.,* 1989; Grant, 1991; Last and Stevens, 1994; Compagno and Last, 1999; Larson *et al.,* 2006; Wueringer *et al.,* 2009; Morgan *et al.,* 2011).

Morphologically, the origin of the first dorsal fin is slightly posterior to the insertion of the pelvic fins, and the second dorsal fin is smaller than the first. The pectoral fins are small, compared to other sawfish species, and are ''poorly developed'' (Ishihara *et al.,* 1991a). There is no lower lobe on the caudal fin. Lateral and low keels are present along the base of the tail (Compagno and Last, 1999; Wueringer *et al.,* 2009; Morgan *et al.,* 2010a; Morgan *et al.,* 2011). Within the mouth are 82–84 tooth rows on the upper jaw. Total vertebrae number is 225–231. The dwarf sawfish has regularly overlapping monocuspidate denticles on its skin. As a result, there are no keels or furrows formed on the skin (Fowler, 1941; Last and Stevens, 1994; Deynat, 2005).

Habitat Use and Migration

The dwarf sawfish has been found along tropical coasts in marine and estuarine waters, mostly from northern Australia; it may inhabit similar habitats in other areas. Dwarf sawfish are reported on mudflats in water 6 ft 7 in to 9 ft 10 in (2–3 m) deep that is often turbid and influenced heavily by tides. This species has also been reported in rivers (Last and Stevens, 1994; Wueringer *et al.,* 2009; Morgan *et al.,* 2010a) and as commonly occurring in both brackish and freshwater, and in both marine and estuarine habitats (Rainboth, 1996; Thorburn *et al.,* 2008).

Juvenile dwarf sawfish may use the estuaries associated with the Fitzroy River, Australia as nursery habitat for up to three years (Thorburn *et al.,* 2008). Dwarf sawfish are also known to use the Gulf of Carpentaria, Australia as nursery area (Gorham, 2006). No adults or juveniles were found in freshwater areas of the river during the time of the study. However, physical characteristics such as salinity, temperature, and turbidity may limit the seasonal movements of the dwarf sawfish (Blaber *et al.,* 1989).

Age and Growth

While small compared to other sawfishes, the maximum size of dwarf sawfish has been reported as: 4 ft 11 in (1.5 m) TL (Grant, 1991), 4 ft 7 in (140 cm) TL (Last and Stevens, 1994; Rainboth, 1996; Compagno and Last, 1999), 10 ft (306 cm) TL (Peverell, 2005), and 11.5 ft (350 cm) TL (Peverell, 2005). Specimens from western Australia in 2008 indicate that females reach at least 10 ft 2 in (310 cm) TL (Morgan *et al.,* 2010a; Morgan *et al.,* 2011).

Thorburn *et al.* (2008) and Peverell (2008) estimated age and growth for this species based on the number of vertebral rings and total length. The average growth estimates for dwarf sawfish are 16.1 in (41cm) TL in the first year, slowing to 9.4 in (24cm) in the second year (Peverell 2008). Thorburn *et al.* (2008) determined that animals close to 3 ft (90 cm) TL were age 1, those between 3.5 and 4 ft (110 cm and 120 cm) TL were age 2, and those around 5 ft (160 cm) TL were age 6. Peverell

(2008) reported dwarf sawfish between 2 ft 11 in and 3 ft 3 in (90 and 98 cm) TL were age 0, those between 3 ft 7 in and 5 ft 9 in (110–175 cm) TL were considered 1 to 3 years old, and those between 6 ft 7 in and 8 ft (201–244 cm) TL were considered 4 to 6 years old (Peverell, 2008). Any dwarf sawfish over 9 ft 10 in (300 cm) TL is considered to be at least 9 years old (Morgan *et al.,* 2010a). The theoretical maximum age calculated from von Bertalanffy parameters for dwarf sawfish is 94 years (Peverell, 2008).

Reproduction

There is little information available regarding the time or location of dwarf sawfish mating. It is hypothesized dwarf sawfish move into estuarine or fresh waters to breed during the wet season (Larson *et al.,* 2006), however no information on pupping habitat, gestation period, or litter size has been recorded (Morgan *et al.,* 2010a).

Dwarf sawfish are born between 2 ft 2 in and 2 ft 8 in (65 cm and 81 cm) TL (Morgan *et al.,* 2010a; Morgan *et al.,* 2011). Males become sexually mature between 9 ft 8 in and 10 ft (295 and 306 cm) TL with fully calcified claspers, though they may mature at smaller sizes, around 8 ft 5 in (255–260 cm) TL (Peverell, 2005; Thorburn *et al.,* 2008; Last and Stevens, 2009; Morgan *et al.,* 2011). All males captured by Thorburn *et al.* (2008) less than 7 ft 5 in (226 cm) TL were immature; two females, both smaller than 3 ft 11 in (120 cm) TL, were also immature. There is little specific information about sexual maturation of females; females are considered immature at 6 ft 11 in (210 cm) TL (Peverell, 2005; Peverell, 2008; Morgan *et al.,* 2010a). Wueringer *et al.* (2009) indicates that neither males nor females are mature before 7 ft 8 in (233 cm) TL.

Intrinsic rates of population increase, based on life history data from Peverell (2008), has been estimated to be about 0.10 per year (Moreno Iturria, 2012), with a population doubling time of 7.2 years.

Diet and Feeding

Dwarf sawfish, like other sawfishes, uses its saw to stun small schooling fishes. They may also use the saw for rooting in the mud and sand for crustaceans and mollusks (Breder Jr., 1952; Raje and Joshi, 2003; Larson *et al.,* 2006; Last and Stevens, 2009). In Western Australia, the dwarf sawfish eats shrimp, mullet, herring, and croaker (Thorburn *et al.,* 2008; Morgan *et al.,* 2010a).

Population Structure

Phillips *et al.* (2011) conducted a genetic study looking at mtDNA of dwarf sawfish and found no distinct difference in dwarf sawfish from the west coast of Australia and those from the Gulf of Carpentaria in northern Australia. The genetic diversity of this species was moderate overall; however, dwarf sawfish from the Gulf of Carpentaria may have a lower genetic diversity than those of the west coast, possibly due to either a small sample size or a reduction in abundance (Phillips *et al.,* 2008). Further declines in abundance as well as genetic drift may result in reduced genetic diversity (Morgan *et al.,* 2010a; Morgan *et al.,* 2011).

Later, Phillips *et al.* (2011), using additional samples determined the populations of the dwarf sawfish are organized matrilineally (from mother to daughter), indicating the possibility that females are philopatric (return to their birth place). Genetic analysis of dwarf sawfish on the northern coast of Australia determined that they were distinct from those in other areas (Phillips *et al.,* 2011). While the genetic diversity of this species is considered low to moderate across Australia, haplotype diversity in the Gulf of Carpentaria was very low but was greater in the west compared to the east. Low diversity among and within groups of dwarf sawfish may be detrimental (Phillips *et al.,* 2011).

Distribution and Abundance

Dwarf sawfish are thought to historically occur in the Indo-Pacific, western Pacific, and eastern Indian Oceans, with the population largely occurring in northern Australia (Last and Stevens, 1994; Last and Compagno, 2002; Compagno, 2002a; Compagno, 2002b; Thorburn *et al.,* 2008; Wueringer *et al.,* 2009; Morgan *et al.,* 2010a). While dwarf sawfish may have been historically more widespread throughout the Indo-West Pacific (Compagno and Last 1999, Last and Stevens, 2009), there are questions regarding records outside of Australian waters (DSEWPaC, 2011). In an effort to gather more information on the historic and current range and abundance, we conducted an extensive search of peer-reviewed publications and technical reports, newspaper, and magazine articles. A summary of those findings is presented below by major geographic region.

Indian Ocean

Dwarf sawfish are considered extremely rare in the Indian Ocean and there are few records indicating its current presence (Last, 2002). Faria *et al.* (2013) report dwarf sawfish from the Indian Ocean: a female from the Reunion Islands, a female from an unidentified location in the Indian Ocean, and a male from India. There are no reports of dwarf sawfish from Sri Lanka in more than a decade, although they have been assumed to occur there (Last, 2002).

Indo-Pacific (excluding Australia)

Dwarf sawfish are considered very rare in Indonesia, with only a few records (Last, 2002). Faria *et al.* (2013) compiled most reports of dwarf sawfish in Indonesia; since the first record in 1894, there has been two rostral saws in 1910, and 5 other rostra without date or length information.

Although reported historically, dwarf sawfish have not been reported from most other areas in the Indo-Pacific in over a decade. The most recent report of a dwarf sawfish in Thailand was in the Mekong River Basin, Laos in 1996. No sawfish species, including the dwarf sawfish, were reported from the South China Sea from 1923–1996 (Compagno, 2002a).

Pacific Ocean

Very few reports of the dwarf sawfish have been recorded in the western Pacific Ocean. Deynat (2005) reported on two skin samples from a juvenile female found in Tasmanian waters, and Faria *et al.* (2013) reported on two additional specimens but no specifics were provided.

Australia

Australia likely represents the center of the range of dwarf sawfish. Dwarf sawfish have been reported from Cairns to the east through the Gulf of Carpentaria in the north and through Kimberley to the west (Compagno and Last, 1999, Last and Stevens, 2009).

Most records for dwarf sawfish are from the north and northwest areas of Australia. The earliest record of this species is from 1877 (Faria *et al.,* 2013). A single rostrum from a dwarf sawfish was found in 1916, but no other information was recorded. In 1946, a number of dwarf sawfish were reported (Faria *et al.,* 2013).

Most records over the last 30 years have been from north and northwest Australia. Five female and five male dwarf sawfish (32–55 in; 82–140 cm TL) were captured in 1990 in the Pentecost River using gillnets (Taniuchi and Shimizu, 1991; Taniuchi, 2002). Between 1994 and 2010, almost 75 tissue samples were taken from live dwarf sawfish or dried rostra from the

Gulf of Carpentaria and the northwest coast of Australia (Phillips *et al.,* 2011). In 1997, two specimens were collected near the mouth of Buffalo Creek in Darwin, Northern Territory (Chisholm and Whittington, 2000). In 2005, Naylor *et al.* (2005) collected one dwarf sawfish from Darwin, Australia. One dwarf sawfish was captured in 1998 in the upper reaches of the Keep River estuary (Larson, 1999; Gunn *et al.,* 2010). One interaction was reported between 2007 and 2010 by observers in the Northern Territory Offshore Net and Line Fishery (Davies, 2010). A single specimen from Queensland (eastern Australia) is preserved at the Harvard Museum of Comparative Zoology (Fowler, 1941).

In a comprehensive survey of the Gulf of Carpentaria from 2001–2002, Peverell (2005; 2008) indicated dwarf sawfish were concentrated in the western portion of the Gulf of Carpentaria; twelve males and ten females were captured. Most individuals caught in the inshore fishery were immature except for two mature males: 10 ft and 9 ft 8 in (306 cm and 296 cm) TL (Peverell, 2005; 2008).

In northwestern Australia within specific riverine basins, dwarf sawfish have been reported in various surveys. Forty-four dwarf sawfish were captured between October 2002 and July 2004 in the King Sound and the Robison, May, and Fitzroy Rivers (Thorburn *et al.,* 2008). Between 2001 and 2002, one dwarf sawfish was caught at the mouth of the Fitzroy River in western Australia (Morgan *et al.,* 2004). Morgan *et al.* (2011) acquired 109 rostra from dwarf sawfish from the King Sound area that were part of museum or personal collections.

In summary, there is some uncertainty in the species identification of historic records of dwarf sawfish, the intense fishing pressures within the range has likely caused the dwarf sawfish to become extirpated from much of the Indo-Pacific region and the species appears to be extirpated from eastern Australia. An October 2001 study on the effectiveness of turtle excluder devices in the prawn trawl fishery in Queensland, Australia, reported no dwarf sawfish (Courtney *et al.,* 2006). Dwarf sawfish are now considered rare in the Gulf of Carpentaria. It is likely the Kimberley territory and Pilbara region (western Australia) may be the last significant remaining areas for dwarf sawfish (P. Kyne pers. comm. to IUCN, 2012).

Natural History of the Largetooth Sawfish (*Pristis pristis*)

Taxonomy and Morphology

Many have suggested classification of largetooth sawfish into a single circumtropical species given common morphological features of robust rostrum, origin of first dorsal fin anterior to origin of pelvic fins, and presence of a caudal-fin lower lobe (Günther, 1870; Garman, 1913; Fowler, 1936; Poll, 1951; Dingerkus, 1983; Daget, 1984; Séret and McEachran, 1986; McEachran and Fechhelm, 1998; Carvalho *et al.,* 2007). The recent analysis by Faria *et al.* (2013) used mtDNA and contemporary genetic analysis to argue the previously classified *P. pristis, P. microdon,* and *P. perotteti* should now be considered one species named *P. pristis.* After reviewing Faria *et al.* (2013) and consulting other sawfish experts we conclude, based on the best available information, that *P. pristis* applies to all the largetooth sawfishes previously identified as *P. pristis, P. microdon,* and *P. perotteti.* The largetooth sawfish has a robust rostrum, noticeably widening posteriorly (width between the two posterior-most rostral teeth is 1.7–2 times the width between the second anterior-most rostral teeth). Rostral teeth number is between 14 and 23 per side with grooves on the posterior margin. The body is robust with the origin of the first dorsal-fin anterior to the origin of the pelvic fin; dorsal fins are high and pointed with the height of the second dorsal fin greater than the first. The lower lobe of the caudal-fin is small but well-defined with the lower anterior margin about half as long as the upper anterior margin (Wallace, 1967; Taniuchi *et al.,* 1991a; Last and Stevens, 1994; Compagno and Last, 1999; Deynat, 2005; Wueringer *et al.,* 2009; Morgan *et al.,* 2010a; Morgan *et al.,* 2010b; Morgan *et al.,* 2011).

The largetooth sawfish has buccopharyngeal denticles and regularly overlapping monocuspidate dermal denticles on its skin. The denticles are present on both dorsal and ventral portions of the body (Wallace, 1967; Deynat, 2005). Within the mouth, there are between 70 and 72 tooth rows on the upper jaw, and 64–68 tooth rows on the lower jaw. The number of vertebrae is between 226 and 228 (Morgan *et al.,* 2010a). Coloration of the largetooth sawfish is a reddish brown dorsally and dull white ventrally (Fowler, 1941; Wallace, 1967; Compagno *et al.,* 1989; Taniuchi *et al.,* 1991a; Compagno and Last, 1999; Chidlow, 2007).

Male and female largetooth sawfish differ in the number of rostral teeth. Using largetooth sawfish teeth collected from Papua New Guinea and Australia, Ishihara *et al.* (1991b) found males to have an average of 21 rostral teeth on the left and 22 on the right; females averaged 19 rostral teeth on both the left and the right side of the rostrum. Rostrum length can vary between males and females (Wueringer *et al.,* 2009).

Habitat Use and Migration

Largetooth sawfish are commonly found in coastal, inshore waters and are considered euryhaline (Compagno *et al.,* 1989; Last and Stevens, 1994; Compagno and Last, 1999; Chisholm and Whittington, 2000; Last, 2002; Compagno, 2002b; Peverell, 2005; Peverell, 2008; Wueringer *et al.,* 2009), being found in salinities ranging from 0 to 40 ppt (Thorburn *et al.,* 2007). The species has been found far upriver, often occupying freshwater lakes and pools; they are associated with freshwater more than any other sawfish species (Last and Stevens, 1994; Rainboth, 1996; Peter and Tan, 1997; Compagno and Last, 1999; Larson, 1999). Largetooth sawfish have even been observed in isolated fresh water billabongs or pools until floodwaters allow them to escape; juveniles often use these areas for multiple years as deep water refuges (Gorham, 2006; Thorburn *et al.,* 2007; Wueringer *et al.,* 2009; Morgan *et al.,* 2010b). Similarly, largetooth sawfish have been found in Lake Nicaragua in depths up to 400 ft (122 m) and are common in deeper holes, occupying muddy or sandy bottoms (NMFS, 2010a).

Adults more often utilize marine habitats than juveniles, and are typically found in waters with salinity at 31 ppt (Wueringer *et al.,* 2009). Despite the variety of habitats occupied, females have been found to be highly philopatric as indicated by mtDNA studies, while males often undergo long movements (Lack *et al.,* 2009; Phillips *et al.,* 2009; Morgan *et al.,* 2010a; Morgan *et al.,* 2010b; Morgan *et al.,* 2011). Within the Gulf of Mexico, America, mature largetooth sawfish have historically moved as far north as Texas (NMFS, 2010a).

The physical characteristics of habitat strongly influence the movements and areas utilized by largetooth sawfish. Recruitment of neonate largetooth sawfish was correlated with the rise in water levels during the wet season in Australia (Whitty *et al.,* 2009). A study of juvenile largetooth sawfish movements in the Fitzroy River in Australia found young-of-the-year utilize extremely shallow areas (0–1 ft 7 in or 0–0.49 m) up to 80 percent of the time, mostly to avoid predators

(Thorburn *et al.,* 2007). Juveniles and adult largetooth sawfish also utilize rivers (Compagno, 2002b; Gorham, 2006) and can be found in areas up to 248.5 miles (400 km) upstream (Chidlow, 2007). Activity space of largetooth sawfish increases with body length (Whitty *et al.,* 2009).

Age and Growth

There are several age and growth studies for the largetooth sawfish; results vary due to differences in aging techniques, data collection, or location. At birth, largetooth sawfish are between 2 ft 6 in and 3 ft (76 and 91 cm) TL, with females being slightly smaller than males on average (Chidlow, 2007; Morgan *et al.,* 2011). Thorson (1982) found pups at birth average 2 ft 4.7 in to 2 ft 7.5 in (73–80 cm) TL with a growth rate of 35–40 cm per year (NMFS, 2010a). Juveniles (age 1 to age at maturity) range in size from 2 ft 6 in to 9 ft (76 to 277 cm) TL (Morgan *et al.,* 2011).

Size at maturity is estimated to be around 9 ft 10 in (300 cm) TL for both sexes at around age 8 (Lack *et al.,* 2009; Morgan *et al.,* 2010a; Morgan *et al.,* 2010b; NMFS, 2010; Morgan *et al.,* 2011). Thorson (1982) estimated age of maturity to be 10 years at 9 ft 10 in (300 cm) TL in Lake Nicaragua (NMFS, 2010a). Generally, males under 7 ft 7 in (230 cm) TL and females under 8 ft 10 in (270 cm) TL are considered immature (Whitty *et al.,* 2009; Wueringer *et al.,* 2009).

The largest recorded length of a largetooth sawfish is 22 ft 11 in (700 cm) TL (Compagno *et al.,* 1989; Last and Stevens, 1994; Rainboth, 1996; Peter and Tan, 1997; Compagno and Last, 1999; Thorburn and Morgan, 2005; Compagno *et al.,* 2006b; Chidlow, 2007; NMFS, 2010a). The largest largetooth sawfish recorded in Kimberley, Queensland measured 21 ft 6 in (656 cm) TL (Morgan *et al.,* 2011). In other areas of Australia, the largetooth sawfish can reach up to 15 ft (457 cm) and at least 11 ft 10 in (361 cm) TL (Fowler, 1941; Chidlow, 2007; Gunn *et al.,* 2010).

Age and growth for largetooth sawfish has been estimated by Tanaka (1991) who generated a von Bertalanffy growth model for specimens collected from Papua New Guinea and Australia. For both sexes combined, the theoretical maximum size was calculated at 11 ft 11 in (363 cm) TL with a relative growth rate of 0.066 per year. Based on these calculations, it was determined that largetooth sawfish grow around 7 in (18 cm) in the first year and 4 in (10 cm) by the tenth year. Thorson (1982a) estimated an early juvenile growth rate of 13–15 in (35–40 cm) per year and annual adult growth rate of 1 in (4.4 cm) per year based on largetooth from Lake Nicaragua. Peverell (2008) calculated a theoretical maximum size of 20 ft 11 in (638 cm) TL with a relative growth rate of 0.08 per year. The theoretical maximum age estimated for this species has been calculated to be 80 years (Morgan *et al.,* 2010a).

Reproduction

Largetooth sawfish are thought to reproduce in freshwater environments (Compagno and Last, 1999; Last, 2002; Compagno, 2002b; Martin, 2005; Thorburn and Morgan, 2005; Compagno *et al.,* 2006b) from May to July (Raje and Joshi, 2003). The number of pups in a largetooth sawfish litter varies by location, and possibly due to other factors. One of the earliest reproductive studies on largetooth sawfish by Thorson (1976a) indicated litter size ranged between 1 to 13 pups, with an average of 7 pups per cycle (NMFS, 2010a). Thorson (1976a) also found that both ovaries appeared to be functional, though the left seemed to be larger and carry more ova (NMFS, 2010a). Length of gestation for largetooth sawfish is approximately five months, with a biennial reproductive cycle (NMFS, 2010a). Chidlow (2007) reported largetooth sawfish had litters with up to 12 pups.

Intrinsic rates of population growth vary tremendously throughout the species range. Simpfendorfer (2000) estimated that the largetooth sawfish in Lake Nicaragua had an intrinsic rate of population growth of 0.05 to 0.07 per year, with a population doubling time of 10.3 to 13.6 years. Using data from Australia, rates of population increase were estimated to be around 0.12 per year (Moreno Iturria, 2012), with a population doubling time of approximately 5.8 years. Data from the western Atlantic Ocean indicate an intrinsic rate of increase of 0.03 per year, with a population doubling time of 23.3 years (Moreno Iturria, 2012).

Diet and Feeding

Largetooth sawfish diet is predominately fish, but varies depending on study and geographic area. Small fishes including seer fish, mackerels, ribbon fish, sciaenids, and pomfrets are likely main diet items of largetooth sawfish in the Indian Ocean (Devadoss, 1978; Rainboth, 1996; Raje and Joshi, 2003). Small sharks, mollusks, and crustaceans are also potential prey items (Devadoss, 1978; Rainboth, 1996; Raje and Joshi, 2003). Taniuchi *et al.,* (1991a) found small fishes and shrimp in the stomachs of juveniles in Lake Murray, Papua New Guinea, while juvenile sawfish in western Australia had catfish, cherabin, mollusks, and insect parts in their stomachs (Thorburn *et al.,* 2007; Whitty *et al.,* 2009; Morgan *et al.,* 2010a). Largetooth sawfish have also been found to feed on catfish, shrimp, small crustaceans, croaker, and mollusks (Chidlow, 2007; Thorburn *et al.,* 2007; Morgan *et al.,* 2010a; Morgan *et al.,* 2010b). Largetooth sawfish captured off South Africa had bony fish and shellfish as common diet items (Compagno *et al.,* 1989; Compagno and Last, 1999). In general, largetooth sawfish subsist on the most abundant small schooling fishes in the area (NMFS, 2010a).

Population Structure

Genetic analyses based on a 480 base pair sequencing of the mtDNA gene NADH–2 sequence revealed information indicating largetooth sawfish subpopulations. Evidence of restricted gene flow has also been found with largetooth sawfish among these geographic areas: Atlantic and Indo-West Pacific; Atlantic and eastern Pacific; and Indo-West Pacific and eastern Pacific. Collectively a total of 19 haplotypes were identified across largetooth sawfish: one east Pacific haplotype; 12 western Atlantic haplotypes, two eastern Atlantic haplotypes; one Indian Ocean haplotype, one Vietnamese–New Guinean haplotype, and two Australian haplotypes (Faria *et al.,* 2013). This fine-scale structuring of sub-populations by haplotypes was only partially corroborated by the regional variation in the number of rostral teeth. While the rostral tooth count differed significantly in largetooth sawfish collected from the western and eastern Atlantic Ocean, it did not vary significantly between specimens collected from the Indian Ocean and western Pacific (Faria *et al.,* 2013). Largetooth sawfish collected from the western Atlantic specimens had a higher rostral teeth count than those collected from the eastern Atlantic. Data from separate protein and genetics studies indicates some evidence of distinction among sub-populations of largetooth sawfish in the Indo-Pacific. At a broad scale, Watabe (1991) found that there was limited genetic variability between samples taken from Australia and Papua New Guinea based on lactate dehydrogenase (LDH) isozyme patterns. Largetooth sawfish might be genetically subdivided within the Gulf of Carpentaria, Australia, with both eastern and western gulf populations (Lack *et al.,* 2009).

Phillips *et al.* (2011) found that the population of largetooth sawfish in the Gulf of Carpentaria is different from

animals on the west coast of Australia (Fitzroy River) based on mtDNA. Recent data (Phillips, 2012) suggests that matrilineal structuring is found at relatively small spatial scales within the Gulf of Carpentaria region (i.e., this region contains more than one maternal 'population'), although the precise location and nature of population boundaries are unknown. The difference in the genetic structuring using markers with different modes of inheritance (maternal versus bi-parental) suggests that largetooth sawfish may have male-biased dispersal and with females remaining at, or returning to, their birth place to mate (Phillips *et al.,* 2009, Phillips, 2012). Phillips (2012) noted that the presence of male gene flow between populations in Australian waters suggests that a decline of males in one location could affect the abundance and genetic diversity of assemblages in other locations.

The genetic diversity for largetooth sawfish throughout Australia seems to be low to moderate. Genetic diversity was greater in the Gulf of Carpentaria than in rivers in Australia, also suggesting potential philopatry (Lack *et al.,* 2009). However, given limited sampling, additional research is needed to better understand potential population structure of largetooth sawfish in Australia (Lack *et al.,* 2009; Phillips *et al.,* 2009; Morgan *et al.,* 2010a; Morgan *et al.,* 2010b).

Distribution and Abundance

Largetooth sawfish have the largest historic range of all sawfishes. The species historically occurred throughout the Indo-Pacific near southeast Asia and Australia and throughout the Indian Ocean to east Africa. Largetooth sawfish have also been noted in the eastern Pacific Ocean from Mexico to Ecuador (Cook *et al.,* 2005) or possibly Peru (Chirichigno and Cornejo, 2001). In the Atlantic Ocean, largetooth sawfish inhabit warm temperate to tropical marine waters from Brazil to the Gulf of Mexico in the western Atlantic, and Namibia to Mauritania in the eastern Atlantic (Burgess *et al.,* 2009). Older literature notes the presence of this species in Zanzibar, Madagascar, India, and the south-west Pacific (Fowler, 1941; Wallace, 1967; Taniuchi *et al.,* 2003).

Given the recent taxonomic changes for largetooth sawfish, we examined all current and historic records of *P. microdon, P. perotteti,* and *P. pristis* for a comprehensive overview on distribution and abundance. We conducted an extensive search of peer-reviewed publications and technical reports, newspaper, and magazine articles. The result of that search is summarized below by major geographic region.

Indian Ocean

Largetooth sawfish historically occurred throughout the Indian Ocean; however current records are rare for many areas. The earliest record of largetooth sawfish was in 1936 from Grand Lac near the Gulf of Aden, Indian Ocean (Kottelat, 1985). A second record in 1936 is from Mangoky River, Madagascar (Taniuchi *et al.,* 2003).

Records from the 1960's and 1970's are largely from India and South Africa. One largetooth sawfish was reported from the confluence of the Lundi and Sabi Rivers, South Africa in 1960, over 200 miles inland (Jubb, 1967). Between 1964 and 1966, several largetooth sawfish were caught in the Zambesi River, South Africa during a general survey of rays and skates; they have also been recorded in the shark nets off Durban, South Africa (Wallace, 1967). In 1966, a male (10 ft; 305 cm TL) was captured in a trawl net in the Gulf of Mannar, Sri Lanka (Gunn *et al.,* 2010). Largetooth sawfish were commonly caught between 1973 and 1974 in the Bay of Bengal during the wet season (July and September) but rarely during other times of the year (Devadoss, 1978). Largetooth sawfish are also recorded in three major rivers that empty into the Bay of Bengal: the Pennaiyar, Paravanar, and Gadilam (Devadoss, 1978).

Current reports of largetooth sawfish throughout the Indian Ocean are isolated and rare. While the species could not be confirmed, a survey of fishing landing sites and interviews with 99 fishers in Kenya, Nyungi (unpublished report to J. Carlson, NMFS 2007), found 71 reports of sawfishes over the last 40 years. The longest time series of largetooth sawfish catches is from the protective beach nets off Natal, South Africa with a yearly average capture rate of 0.2 sawfish per 0.6 mi (1 km) net per year from 1981 to 1990; since then only two specimens have been caught in the last decade (CITES, 2007). Largetooth sawfish were reported in Cochin, India by the Central Marine Fisheries Research Institute in 1994, but no information about location, size or number of animals is available (Dan *et al.,* 1994). Commercial landings of elasmobranchs from 1981 to 2000 in the Bay of Bengal were mostly rays with some largetooth sawfish (Raje and Joshi, 2003). In the Betsiboka River, Madagascar, four largetooth sawfish were caught in 2001. The most recent capture of largetooth sawfish (18 ft; 550 cm TL) in India occurred on January 18, 2011, between Karnataka and Goa (*www.mangalorean.com*).

Indo-Pacific Ocean (excluding Australia)

Many islands within the Indo-Pacific region contain suitable habitat for largetooth sawfish, but few reports are available, perhaps due to the lack of surveys or data reporting. The earliest records of largetooth sawfish from the Indo-Pacific are from a compilation study of elasmobranchs in the waters off Thailand that reports a largetooth sawfish in the Chao Phraya River and its tributaries in 1945 (Vidthayanon, 2002). In 1955, two largetooth sawfish were captured from Lake Santani (present day Irian Jaya, Indonesia). Juvenile largetooth sawfish had also been reported around the same time in a freshwater river close to Genjem, Indonesia (Boeseman, 1956). In 1956, largetooth sawfish were recorded in Lake Sentani, New Guinea (Boeseman, 1956; Thorson *et al.,* 1966). However, in a study by Munro (1967) in the Laloki River in the southeastern portion of New Guinea, no sawfish were captured (Berra *et al.,* 1975). From 1967 to 1977, five largetooth sawfish were captured from the Indragiri River, Sumatra (Taniuchi, 2002). From 1970 to 1971, Berra *et al.* (1975) collected five largetooth sawfish from the Laloki River, Papua New Guinea.

More recently, 36 largetooth sawfish were captured in September 1989 in Papua New Guinea (Taniuchi and Shimizu, 1991; Taniuchi, 2002). In a survey of the Fly River system, Papau New Guinea, 23 individuals were captured in 1978 (Roberts, 1978; Taniuchi and Shimizu, 1991; Taniuchi *et al.,* 1991b; Taniuchi, 2002). The presence of largetooth sawfish in the Mahakam River, Borneo was recorded in 1987 (Christensen, 1992). Three largetooth sawfish rostra were acquired from local fish markets in Sabah in 1996 (Manjaji, 2002a) and survey indicate largetooth sawfish are still present in these areas, although locals have noticed a decline in their abundance (Manjaji, 2002a).

The scarcity of records from Indonesia led to an increased effort to document species presence (Fowler, 2002). Anecdotal evidence suggests that sawfishes have not been recorded in Indonesia for more than 25 years (White and Last, 2010). Largetooth sawfish have not been recorded in the Mekong River, Laos for decades (Rainboth, 1996). In a comprehensive study compiled by Compagno (2002a), no sawfishes were found in the south China Sea between the years of 1923 and 1996. Data from 200 survey days at fish landing sites in

eastern Indonesia between 2001 and 2005 recorded over 40,000 elasmobranchs, but only two largetooth sawfish (White and Dharmadi, 2007).

Australian Waters

Australia may have a higher abundance of largetooth sawfish than other areas within the species' current range (Thorburn and Morgan, 2005; Field *et al.,* 2009). Despite their current abundance levels, we only identified a few historic records from Australia. The first record of a largetooth sawfish was in 1945 in the Northern Territory (Stevens *et al.,* 2005). Faria *et al.* (2013) obtained a rostrum that was collected in Australia in 1960.

The most current reports of largetooth sawfish began in the 1980's. We found many more records of largetooth sawfish in Australia compared to other countries. A largetooth sawfish was captured from the Keep River, Australia in 1981 (Compagno and Last, 1999). Blaber *et al.* (1990) found that largetooth sawfish were among the top twenty-five most abundant species in the trawl fisheries of Albatross Bay from 1986 to 1988. Eight individuals were captured in the Leichhardt River in 2008 (Morgan *et al.,* 2010b). In a preliminary survey of the McArthur River, Northern Territory, Gorham (2006) reported two largetooth sawfish captured between 2002 and 2006. Surveys (Peverell, 2005; Gill *et al.,* 2006; Peverell, 2008) in the Gulf of Carpentaria found largetooth sawfish widely distributed throughout the eastern portion of the Gulf with most catches occurring near the mouth of many rivers (Mitchell, Gilbert, Archer, Nassau, Ord, and Staaten).

Juvenile largetooth sawfish in Australia use the Fitzroy River and other tributaries of the King Sound (Morgan *et al.,* 2004) as nursery areas while adults are found more often offshore (Morgan *et al.,* 2010a). Outside of the Fitzroy River and King Sound in western Australia, the only other areas where juvenile sawfish have been recently recorded are in Willie Creek and Roebuck Bay (Gill *et al.,* 2006; Morgan *et al.,* 2011). Nursery areas for largetooth sawfish are also reported in northern Australia in the Gulf of Carpentaria (Gorham, 2006). Despite the abundance of records from northern Australia, no sawfish have recently been captured within the Adelaide River, Australia, and abundance estimates from areas that have higher human populations may be declining (Taniuchi and Shimizu, 1991; Taniuchi *et al.,* 1991a; Morgan *et al.,* 2010a). Whitty *et al.* (2009) found that the population of juvenile largetooth sawfish in the Fitzroy River have declined in recent years as catch per unit effort was 56.7 sawfish per 100 hours in 2003, compared to 12.4 in 2009. There were no reported captures of largetooth sawfish in 2008 from the Roper River system, which drains into the western Gulf of Carpentaria, Northern Territory (Dally and Larson, 2008). No adult sawfish were captured in any of the prawn trawl fisheries in Queensland, Australia during the month of October 2001 (Courtney *et al.,* 2006).

Outside the northern and western areas of Australia, largetooth sawfish do occur but reports are less frequent. In southwestern Australian waters, one female sawfish was captured by a commercial shark fisherman in February 2003, east of Cape Naturaliste (Chidlow, 2007). Data from the Queensland, Australia Shark Control Program shows a clear decline in sawfish catch over a 30 year period from the 1960's, and the complete disappearance of sawfish in southern regions by 1993 (Stevens *et al.,* 2005).

Eastern Pacific

In the eastern Pacific, the historic range of largetooth sawfish was from Mazatlan, Mexico to Guayaquil, Ecuador (Cook *et al.,* 2005) or possibly Peru (Chirichigno and Cornejo, 2001). There is very little information on the population status in this region and few reports of capture records. The species has been reported in freshwater in the Tuyra, Culebra, Tilapa, Chucunaque, Bayeno, and Rio Sambu Rivers, and at the Balboa and Miraflores locks in the Panama Canal, Panama; Rio San Juan, Colombia; and in the Rio Goascoran, along the border of El Salvador and Honduras (Fowler, 1936; 1941; Beebe and Tee-Van, 1941; Bigelow and Schroeder, 1953; Thorson *et al.,* 1966a; Dahl, 1971; Thorson, 1974; 1976; 1982a; 1982b, 1987; Compagno and Cook, 1995; all as cited in Cook *et al.,* 2005). The only recent reports of largetooth sawfish in this area are anecdotal reports from Columbia, Nicaragua, and Panama (R. Graham pers. comm. to IUCN, 2012).

Western Atlantic Ocean

In the western Atlantic Ocean, largetooth sawfish were widely distributed throughout the marine and estuarine waters in tropical and subtropical climates and historically found from Brazil through the Caribbean, Central America, the Gulf of Mexico, and seasonally into waters of the U.S. (Burgess *et al.,* 2009). Largetooth sawfish also occurred in freshwater habitats in Central and South America. Throughout the Caribbean Sea, the historical presence of the largetooth sawfish is uncertain and early records might have been misidentified smalltooth sawfish (G. Burgess pers. comm. to IUCN, 2012).

Historic records of largetooth sawfish in the western north Atlantic have been previously reported in NMFS (2010a). Sawfish were documented in Central America in Nicaragua as early as 1529 by a Spanish chronicler (Gill and Bransford, 1877). This species was also historically reported in Nicaragua by Meek (1907), Regan (1908), Marden (1944), Bigelow and Schroeder (1953) and Hagberg (1968). Five largetooth sawfish were from a survey of Lake Izaba, Guatemala from 1946 to 1947, and sawfishes were reported to be important inland fisheries (Saunders *et al.,* 1950). The lone largetooth sawfish reported from Honduras was acquired from that country, but the true origin of the rostrum and the date of capture could not be confirmed (NMFS, 2010a).

In Atlantic drainages, largetooth sawfish were found in freshwater at least 833 miles (1,340 km) from the ocean in the Amazon River system (Manacapuru, Brazil), as well as in Lake Nicaragua and the San Juan River; the Rio Coco, on the border of Nicaragua and Honduras; Rio Patuca, Honduras; Lago de Izabal, Rio Motagua, and Rio Dulce, Guatemala; and the Belize River, Belize. Largetooth sawfish are found in Mexican streams that flow into the Gulf of Mexico; Las Lagunas Del Tortuguero, Rio Parismina, Rio Pacuare, and Rio Matina, Costa Rica; and the Rio San Juan and the Magdalena River, Colombia; (Thorson, 1974; 1982b; Castro-Augiree, 1978 as cited in Thorson, 1982b; Compagno and Cook, 1995; C. Scharpf and M. McDavitt, pers. comm., as cited in Cook *et al.,* 2005).

In the U.S., largetooth sawfish were reported in the Gulf of Mexico mainly along the Texas coast east into Florida waters, though nearly all records of largetooth sawfish encountered in U.S. waters were limited to the Texas coast (NMFS, 2010a). Though reported in the U.S., it appears that largetooth sawfish were never abundant, with approximately 39 confirmed records (33 in Texas) from 1910 through 1961.

The Amazon River basin and adjacent waters are traditionally the most abundant known range of largetooth sawfish in Brazil (Bates 1964; Marlier 1967; Furneau 1969). Most of the records for which location is known originated in the state of Amazonas, which encompasses the middle section of the Amazon River basin along with the confluence of the Rio Negro and Rio Solimoes Rivers. The other known locations are from the states of Rio Grande do Norte, Sergipe, Bahia, Espirito Santo, Rio de Janeiro, and Sao

Paulo, Para, and Maranhao (NMFS, 2010a). Most records of largetooth sawfish in the Amazon River (Amazonia) predate 1974. The Magdalena River estuary was the primary source for largetooth sawfish encounters in Colombia from the 1940's (Miles, 1945), while other records originated from the Bahia de Cartagena and Isla de Salamanca (both marine), and Rio Sinu (freshwater) from the 1960's through the 1980's (Dahl, 1964; 1971; Frank and Rodriguez, 1976; Alvarez and Blanco 1985). In other areas of South America, there are only single records from Guyana, French Guiana, and Trinidad from the late 1800's and early 1900's. Of the five records from Suriname, the most recent was 1962. Though thought to have once been abundant in some areas of Venezuela (Cervignon 1966a; 1966b), the most recent confirmed records of largetooth sawfish from that country was in 1962.

Many records in the 1970's and 1980's are largely due to Thorson's (1982a; 1982b) research on the Lake Nicaragua-Rio San Juan system in Nicaragua and Costa Rica. Bussing (2002) indicated that this species was known to inhabit the Rio Tempisque and tributaries of the San Juan basin in Costa Rica. Following Thorson's (1982a; 1982b) studies, records of largetooth sawfish in the western North Atlantic decline considerably. By 1981, Thorson (1982a) was unable to locate a single live specimen in the original areas he surveyed. There are no known Nicaraguan records of the largetooth sawfish outside of the Lake Nicaragua-Rio San Juan-Rio Colorado system (Burgess *et al.,* 2009), although largetooth sawfish are still captured incidentally by fishers netting for other species (McDavitt, 2002). Of the known largetooth sawfish reported from Mexico, most records are prior to 1978, and Caribbean records are very sparse (NMFS, 2010a). The last record of a largetooth sawfish in U.S. waters was in 1961 (Burgess *et al.,* 2009).

Most recent records for largetooth sawfish are in isolated areas. While many reports of largetooth sawfish from Brazil were from the 1980's and 1990's (Lessa, 1986; Martins-Juras *et al.,* 1987; Stride and Batista, 1992; Menni and Lessa, 1998; and Lessa *et al.,* 1999), recent records indicate largetooth sawfish primarily in fish markets at the Amazon-Orinoco estuaries (Charvet-Almeida, 2002; Burgess *et al.,* 2009). A Lake Nicaraguan fisherman reports he encounters a few sawfish annually (McDavitt, 2002). Other records are rare for the area. Three recent occurrences were found in Internet searches, one being a 200 lb. (90.7 kg) specimen caught recreationally in Costa Rica (Burgess *et al.,* 2009). Though reported by Thorson *et al.* (1966a; 1966b) to be common throughout the area, there are no recent reports of encounters with sawfishes in Guatemala. Scientists in Columbia have not reported any sawfish sightings between 1999 and 2009 (Burgess *et al.,* 2009).

Eastern Atlantic Ocean

Historic records indicate that largetooth sawfish were once relatively common in the coastal estuaries along the west coast of Africa. Verified records exist from Senegal (1841–1902), Gambia (1885–1909), Guinea-Bissau (1912), Republic of Guinea (1965), Sierra Leone (date unknown), Liberia (1927), Cote d'Ivoire (1881–1923), Congo (1951–1958), Democratic Republic of the Congo (1951–1959), and Angola (1951). Most records, however, lacked species identification and locality data and may have been confused taxonomically with other species. Unpublished notes from a 1950's survey detail 12 largetooth sawfish from Mauritania, Senegal, Guinea, Cote d'Ivoire, and Nigeria, ranging in size from 35–275 in (89–700 cm) TL (Burgess *et al.,* 2009).

A more recent status review by Ballouard *et al.* (2006) reported that sawfishes, including the largetooth sawfish, were once common from Mauritania to the Republic of Guinea, but are now rarely captured or encountered. According to this report, the range of sawfishes has decreased to the Bissagos Archipelago (Guinea Bissau). The most recent sawfish encounters outside Guinea Bissau were in the 1990's in Mauritania, Senegal, Gambia, and the Republic of Guinea. The most recent documented largetooth sawfish capture was from 2005 in Nord de Caravela (Guinea Bissau), along with anecdotal accounts from fishers of captures off of two islands in the same area in 2008 (Burgess *et al.,* 2009).

In summary, on a global scale, largetooth sawfish appear to have been severely fragmented throughout their historic range into isolated populations of low abundance. Largetooth sawfish are now considered very rare in many places where evidence is available, including parts of east Africa, India, parts of the Indo-Pacific region, Central and South America and west Africa. Even within areas like Australia and Brazil, the species is primarily located in remote areas. Information from genetic studies indicates that largetooth sawfish display strong sex-biased dispersal patterns; with females exhibiting patterns of natal philopatry while males move more broadly between populations (Phillips *et al.,* 2011). Thus, the opportunity for re-establishment of these isolated populations is limited because any reduction in female abundance in one region is not likely to be replenished by migration from another region (Phillips, 2012).

Natural History of Green Sawfish (*Pristis zijsron*)

Taxonomy and Morphology

Pristis zijsron (Bleeker 1851) is frequently known as the narrow snout sawfish or the green sawfish. Synonymous names include *P. dubius* (Gloerfelt-Tarp and Kailola, 1984; Van Oijen *et al.,* 2007; Wueringer *et al.,* 2009). An alternative spelling for this species' scientific name (*P. zysron*) is found in older literature, due to either inconsistent writing or errors in translation or transcription (Van Oijen *et al.,* 2007).

The green sawfish has a slim saw with 25–32 small, slender rostral teeth; tooth count may vary geographically (Marichamy, 1969; Last and Stevens, 1994; Morgan *et al.,* 2010a). Specimens collected along the west coast of Australia have 24–30 left rostral teeth and 23–30 right rostral teeth (Morgan *et al.,* 2010a), although other reports are 23–34 (Morgan *et al.,* 2011). There have been no studies to determine sexual dimorphism from rostral tooth counts for green sawfish. The rostral teeth are generally denser near the base of the saw than at the apical part of the saw (Blegvad and Loppenthin, 1944). The total rostrum length is between 20.6–29.3 percent of the total length of the animal and may vary based on the number and size of individuals. In general, green sawfish have a greater rostrum length to total length ratio than other sawfish species (Morgan *et al.,* 2010a; Morgan *et al.,* 2011).

In terms of body morphology, the origin of the first dorsal fin on green sawfish is slightly posterior to the origin of pelvic fins. The lower caudal lobe is not well defined and there is no subterminal notch (Gloerfelt-Tarp and Kailola, 1984; Compagno *et al.,* 1989; Last and Stevens, 1994; Compagno and Last, 1999; Bonfil and Abdallah, 2004; Wueringer *et al.,* 2009; Morgan *et al.,* 2010a; Morgan *et al.,* 2011). The green sawfish has limited buccopharyngeal denticles and regularly overlapping monocuspidate dermal denticles on its skin. As a result, there are no keels or furrows formed on the skin (Deynat, 2005). The aptly named green sawfish is greenish brown dorsally and white ventrally. This species might be confused with the dwarf or smalltooth

sawfish due to its similar size and range (Compagno *et al.,* 2006c).

Habitat Use and Migration

The green sawfish mostly utilizes inshore, marine habitats, but it has been found in freshwater environments (Gloerfelt-Tarp and Kailola, 1984; Compagno *et al.,* 1989; Compagno, 2002b; Stevens *et al.,* 2008; Wueringer *et al.,* 2009). In the Gilbert and Walsh Rivers of Queensland, Australia, specimens have been captured as far as 149 miles (240 km) upriver (Grant, 1991). However, Morgan *et al.* (2010a; 2011) report green sawfish do not move into freshwater for any portion of its lifecycle. Like most sawfishes, the green sawfish prefers muddy bottoms in estuarine environments (Last, 2002). The maximum depth recorded for this species is 131 ft (40 m) but it is often found in much shallower waters, around 16 ft (5 m; Compagno and Last, 1999; Wueringer *et al.,* 2009). Adults tend to spend more time in offshore waters in Australia, as indicated by interactions with the offshore Pilbara Fish Trawl Fishery, while juveniles prefer protected, inshore waters (Morgan *et al.,* 2010a; Morgan *et al.,* 2011).

Age and Growth

At birth pups are between 2 ft and 2 ft 7 in (61 and 80 cm) TL. At age 1 green sawfish are generally around 4 ft 3 in (130 cm) TL (Morgan *et al.,* 2010a). Peverell (2008) found between age 1–5, green sawfish measure between 4 ft 2 in and 8 ft 5 in (128 and 257 cm) TL, based on the vertebral analysis of six individuals (Peverell, 2008; Morgan *et al.,* 2010a; Morgan *et al.,* 2011). A 12 ft 6 in (380 cm) TL green sawfish was found to be age 8, a 14 ft 4 in (438 cm) TL individual was found to be age 10, a 14 ft 9 in (449 cm) TL specimen was found to be age 16, and a 15 ft (482 cm) TL specimen was found to be age 18 (Peverell, 2008; Morgan *et al.,* 2011).

Adult green sawfish often reach 16 ft 5 in (5 m) TL, but may grow as large as 23 ft (7 m) TL (Compagno *et al.,* 1989; Grant, 1991; Last and Stevens, 1994; Compagno and Last, 1999; Bonfil and Abdallah, 2004; Compagno *et al.,* 2006c; Morgan *et al.,* 2010a). The largest green sawfish collected in Australia was estimated to be 19 ft 8 in (600 cm) TL based on a rostrum length of 5 ft 5 in (165.5 cm; Morgan *et al.,* 2010a; Morgan *et al.,* 2011).

Peverell (2008) completed an age and growth study for green sawfish using vertebral growth bands. Von Bertalanffy growth model parameters from both sexes combined resulted in estimated maximum theoretical size of 16 ft (482 cm) TL, relative growth rate of 0.12 per year and theoretical time at zero length of 1.12 yrs. The theoretical maximum age for this species is calculated to be 53 years (Peverell, 2008; Morgan *et al.,* 2010a).

Reproduction

Last and Stevens (2009) reported size at maturity for green sawfish at 9 ft 10 in (300 cm) TL, corresponding to age 9. In contrast, Peverell (2008) reported one mature individual of 12 ft 4 in (380 cm) TL and estimated its age as 9 yrs. Using the growth function from Peverell (2008) and assuming length of maturity at 118 in (300 cm), Moreno Iturria (2012) determined maturation is likely to occur at age 5. Demographic models based on life history data from the Gulf of Carpentaria indicate the generation time is 14.6 years, the intrinsic rate of population increase is 0.02 per year, and population doubling time is approximately 28 years (Moreno Iturria, 2012).

Green sawfish give birth to as many as 12 pups during the wet season (January through July; Last and Stevens, 1994; Peverell, 2008; Morgan *et al.,* 2010a; Morgan *et al.,* 2011). In Western Australia, females are known to pup in areas between One Arm Point and Whim Creek, with limited data for all other areas (Morgan *et al.,* 2010a; Morgan *et al.,* 2011). The Gulf of Carpentaria, Australia is also a known nursery area for green sawfish (Gorham, 2006). It is not known where the green sawfish breed or length of gestation.

Diet and Feeding

Like other sawfish, green sawfish use their rostra to stun small, schooling fishes, such as mullet, or use it to dig up benthic prey, including mollusks and crustaceans (Breder Jr., 1952; Rainboth, 1996; Raje and Joshi, 2003; Compagno *et al.,* 2006c; Last and Stevens, 2009). One specimen captured in 1967 in the Indian Ocean had jacks and razor fish (*Caranx* and *Centriscus)* species in its stomach (Marichamy, 1969). In Australia, the diet of this species often includes shrimp, croaker, salmon, glassfish, grunter, and ponyfish (Morgan *et al.,* 2010a).

Population Structure

Faria *et al.* (2013) found no global population structure for green sawfish in their genetic studies. However, geographical variation was found in the number of rostral teeth per side, suggesting some population structure may occur. Green sawfish from the Indian Ocean have a higher number of rostral teeth per side than those from Western Pacific specimens (Faria *et al.,* 2013).

In Australia, genetic analysis found differences in green sawfish between the west coast, the east coast, and the Gulf of Carpentaria (Phillips *et al.,* 2011). Genetic data suggests these populations are structured matrilineally (from the mother to daughter) but there is no information on male genet flow at this time. These results may be indicative of philopatry where adult females return to or remain in the same area they were born (Morgan *et al.,* 2010a; Morgan *et al.,* 2011; Phillips *et al.,* 2011). Phillips *et al.* (2011) also found low levels of genetic diversity for green sawfish in the Gulf of Carpentaria, suggesting the population may have undergone a genetic bottleneck.

Distribution and Abundance

The green sawfish historically ranged throughout the Indo-West Pacific from South Africa northward along the east coast of Africa, through the Red Sea, Persian Gulf, southern Asia, Indo-Australian archipelago, and east to Asia as far north as Taiwan and southern China (Fowler, 1941; Blegvad and Løppenthin, 1944; Smith, 1945; Misra, 1969; Compagno *et al.,* 2002a and 2002b; Last and Stevens, 2009). Historic records indicating species presence are available from India, southeast Asia, Thailand, Malaysia, Indonesia, New South Wales, and Australia (Cavanagh *et al.,* 2003; Wueringer *et al.,* 2009; Morgan *et al.,* 2010a; Morgan *et al.,* 2011). Green sawfish have also been found in South Africa, the south China Sea, and the Persian Gulf (Fowler, 1941; Compagno *et al.,* 1989; Grant, 1991; Compagno and Last, 1999; Last, 2002; Compagno, 2002b; Morgan *et al.,* 2010a). To evaluate the current distribution and abundance of the green sawfish, we conducted an extensive search of peer-reviewed publications and technical reports, newspaper, and magazine articles. The results are summarized below by geographic area.

Indian Ocean

Green sawfish are widely distributed throughout the Indian Ocean with the first record in 1852 and several green sawfish were described near the Indian archipelago in the late 1800's (Van Oijen *et al.,* 2007). Additional historical records include one female specimen captured in the Red Sea near Dollfus in 1929. In Egypt, two green sawfish rostra were found in 1938 and an additional rostrum was found on Henjam Island, Gulf of Oman (Blegvad and Loppenthin, 1994).

Unconfirmed reports of green sawfish are available from the Andaman and

Nicobar Islands, India. In 1963, a male was captured at Port Blair, Gulf of Andaman (James, 1973). A female was captured in 1967 in the same area (Marichamy, 1969). One green sawfish was captured in the St. Lucia estuary, South Africa during a survey between 1975 and 1976 (Whitfield, 1999).

Despite historic records, there are few current records of green sawfish in the Indian Ocean. We presume green sawfish are extirpated in the Indian Ocean based on the lack of current records.

Indo-Pacific Ocean (Excluding Australia)

The first description of the green sawfish was based on a rostral saw (Bleeker, 1851) from Bandjarmasin, Borneo (Van Oijen *et al.,* 2007). A juvenile male was captured in Amboine, Indonesia in 1856 (Deynat, 2005). An isolated saw from the Gulf of Thailand was obtained in 1895 and estimated to be from a green sawfish 4 ft 8 in (143 cm) TL (Deynat, 2005). Eight specimens were sent to the Wistar Institute of Anatomy in 1898 from Baram, British North Borneo (Fowler, 1941).

Many islands within the Indo-Pacific region contain suitable habitat for sawfish but few records are available, possibly due to the lack of surveys or data reporting. Before 1995, there were few local scientific studies on the elasmobranchs, and only two species of freshwater ray had been recorded in Borneo. As a result, a great effort to document any unknown species was undertaken by Fowler (2002). Rostra and records were documented in the study, including several dried rostra of green sawfish from the Kinabatangan River area in the local markets of Sabah; no collection specifics were provided. Locals also indicated that this species could often be found in the Labuk Bay area (Manjaji, 2002a) and in the country's freshwater systems (Manjaji, 2002b), and reported a decline of sawfish overall.

Elsewhere in the Indo-Pacific region, few records of green sawfish have been reported. This species is currently considered endangered in Thailand by Vidthayanon (2002), and Compagno (2002a) reported no sawfish species from the south China Sea from 1923 through 1996. Anecdotal evidence suggests that sawfishes have not been recorded in Indonesia for more than 25 years (White and Last, 2010).

Australia

In Australian waters, records indicate green sawfish abundance is higher in the north compared to the south. The earliest record obtained was from the Queensland Museum in 1929 indicating that green sawfish were found in Moreton Bay, Queensland (Fowler, 1941).

We found a paucity of records for green sawfish during the middle part of the last century. Reports of green sawfish occur again in the 1980's when two green sawfish were captured from Balgal, Queensland, Australia in 1985 (Beveridge and Campbell, 2005). One green sawfish was caught in the southern portion of the Gulf of Carpentaria in late 1990 during a fish fauna survey (Blaber *et al.,* 1994). Alexander (1991) captured a female green sawfish from the west coast of Australia that was used for a morphological study. Between 1994 and 2010, almost 50 tissue samples were taken from live green sawfish or dried rostra from multiple areas around Australia, primarily the Gulf of Carpentaria and northwest and northeast coasts (Phillips *et al.,* 2011). In 1997, one green sawfish was found at the mouth of Buffalo Creek near Darwin, Northern Territory, Australia (Chisholm and Whittington, 2000) and in a survey from 1999 through 2001 by White and Potter (2004) one green sawfish was captured in Shark Bay, Queensland. Peverell (2005; 2008) noted the green sawfish was the least encountered species in a survey from the Gulf of Carpentaria. In 2008, no green sawfish were captured from the Roper River system, which drains into the western Gulf of Carpentaria, Northern Territory, Australia (Dally and Larson, 2008). Some records have been reported for the east coast of Australia; one female green sawfish was acoustically tracked for 27 hours in May 2004 (Peverell and Pillans, 2004; Porteous, 2004).

In summary, the limited data makes it difficult to determine the current range and abundance of green sawfish. However, given the uniqueness (size and physical characteristics) of the sawfish, we believe the lack of records in the areas where the species was historically found likely indicates the species may no longer be present. In Australian waters, based on our review, all sawfish species have undergone significant declines. The southern extent of the range of green sawfishes in Australia has contracted (Harry *et al.,* 2011). Green sawfish have been reported as far south as Sydney, Australia, but are rarely found as far south as Townsville (Porteous, 2004). Green sawfish are currently found primarily along the northern coast of Australia.

Extensive surveys at fish landing sites throughout Indonesia since 2001 have failed to record the green sawfish (White pers. comm. to IUCN, 2012). There is some evidence from the Persian Gulf and Red Sea (e.g., Sudan) of small but extant populations (A. Moore pers. comm. to IUCN, 2012). However, lack of data from surveys and commercial fisheries throughout much of the remainder of the range suggests that the abundance of green sawfish has declined significantly and it is currently at only a small fraction of its historic abundance.

Natural History of the Non-listed Population(s) of Smalltooth Sawfish (*Pristis pectinata*)

Taxonomy and Morphology

The smalltooth sawfish was first described as *Pristis pectinatus* (Latham, 1794). The name was changed to the currently valid *P. pectinata* to match gender of the genus and species.

The smalltooth sawfish has a thick body with a moderately sized rostrum. As with many other sawfishes, tooth count may vary by individual or region. While there is no reported difference in rostral tooth count between sexes, there have been reports of sexual dimorphism in tooth shape, with males having broader teeth than females (Wueringer *et al.,* 2009). Rostral teeth are denser near the apex of the saw than the base. Most studies report a rostral tooth count of 25 to 29 for smalltooth sawfish (Wueringer *et al.,* 2009). The saw may constitute up to one-fourth of the total body length (McEachran and De Carvalho, 2002).

The pectoral fins are broad and long with the origin of the first dorsal fin over or anterior to the origin of the pelvic fins (Faria *et al.,* 2013). The lower caudal lobe is not well defined and lacks a ventral lobe (Wallace, 1967; Gloerfelt-Tarp and Kailola, 1984; Last and Stevens, 1994; Compagno and Last, 1999; Bonfil and Abdallah, 2004; Wueringer *et al.,* 2009). This species has between 228 and 232 vertebrae (Wallace, 1967).

The smalltooth sawfish has buccopharyngeal denticles and regularly overlapping monocuspidate (single-pointed) dermal denticles on their skin. As a result, there are no keels or furrows formed on the skin (Last and Stevens, 1994; Deynat, 2005). The body is an olive grey color dorsally, with a white ventral surface (Compagno *et al.,* 1989; Last and Stevens, 1994; Compagno and Last, 1999). This species may be confused with narrow or green sawfish (Compagno, 2002b).

Habitat Use and Migration

All research on habitat use and migration has been conducted on the U.S. DPS of smalltooth sawfish. A

summary of recent information is found in NMFS (2010b), which indicates sawfish are generally found in shallow waters with varying salinity level that are associated with red mangroves. Juvenile sawfish also appear to have small home ranges and limited movements. Since NMFS (2010b), Simpfendorfer *et al.* (2011) reported electivity analysis on sawfish movements and demonstrated an affinity for salinities between 18 and at least 24 ppt, suggesting movements are likely made, in part, to remain within this salinity range. Therefore, freshwater flow may affect the location of individuals within an estuary. Poulakis *et al.* (2011) found juvenile smalltooth sawfish had an affinity for water less than 3 ft (1.0 m) deep, water temperatures greater than 30 degrees Celsius (86 degrees Fahrenheit), dissolved oxygen greater than 6 mg per liter, and salinity between 18 and 30 ppt. Greater catch rates for smalltooth sawfish less than 1 year old were associated with shoreline habitats with overhanging vegetation such as mangroves. Poulakis *et al.* (2012) further determined daily activity space of smalltooth sawfish is less than 1 mi (0.7 km) of river distance. Hollensead (2012) reported smalltooth sawfish activity areas ranged in size from 837 square yards to 240,000 square yards to approximately 3 million square yards (0.0007 to 2.59 km^2) with average range of movements of 7 ft to 20 ft (2.4 to 6.1 m) per minute. Hollensead (2012) also found no difference in activity area or range of movement between ebb and flood, or high and low tide. Activity area decreased and range of movement increased at night, indicating possible nocturnal foraging. Using a combination of data from pop-off archival transmitting tags across multiple institutional programs, movements and habitat use of adult smalltooth sawfish were determined in southern Florida and the Bahamas (Carlson *et al.,* in review). All smalltooth sawfish generally remained in coastal waters at shallow depths (96 percent of their time at depths less than 32 ft; 10 m) and warm water temperatures (22–28 degrees Celsius (71.6–82.4 degrees Fahrenheit) within the region where they were initially tagged, travelling an average of 49 mi (80.2 km) from deployment to pop-off location on an average of 95 days. No smalltooth sawfish tagged within U.S. or Bahamian waters have been tracked to countries outside where they were tagged.

Age and Growth

There is no age and growth data for smalltooth sawfish outside of the U.S. DPS. A summary of age and growth data on the U.S. DPS of smalltooth sawfish is found in NMFS (2010b) indicates rapid juvenile growth for smalltooth sawfish for the first 2 years after birth. Recently, Scharer *et al.* (2012) counted bands on sectioned vertebrae from naturally deceased smalltooth sawfish and estimated von Bertalanffy growth parameters. Theoretical maximum size was estimated at 14.7 ft (4.48 m), relative growth was 0.219 per year, with theoretical maximum size at 15.8 years.

Reproduction

Outside U.S. waters, smalltooth sawfish have been recorded breeding in Richard's Bay and St. Lucia, South Africa (Wallace, 1967; Compagno *et al.,* 1989; Compagno and Last, 1999). Pupping grounds are usually inshore, in marine or freshwater, and pupping occurs year around in the tropics, but in only spring and summer at higher latitudes (Compagno and Last, 1999). Records of captive breeding have been reported from the Atlantis Paradise Island Resort Aquarium in Nassau, Bahamas; copulatory behavior was observed in 2003 and 6 months later the female aborted the pups for unknown reasons (McDavitt, 2006). In October 2012, a female sawfish gave birth to five live pups (J. Choromanski, pers. comm.).

Several studies have examined demography of smalltooth sawfish in U.S. waters. Moreno Iturria (2012) calculated demographic parameters for smalltooth sawfish in U.S. waters and estimated intrinsic rates of increase at 7 percent annually with a population doubling time of 9.7 years. However, preliminary results of a different model by Carlson *et al.* (2012) indicates population increase rates may be greater, up to 17.6 percent annually, for the U.S. population of smalltooth sawfish. It is not clear which of these models is more appropriate for the non-U.S. populations of smalltooth sawfish.

Diet and Feeding

Smalltooth sawfish often use their rostrum saw in a side-sweeping motion to stun its prey, which may include small fishes, or dig up invertebrates from the bottom (Breder Jr., 1952; Compagno *et al.,* 1989; Rainboth, 1996; McEachran and De Carvalho, 2002; Raje and Joshi, 2003; Last and Stevens, 2009; Wueringer *et al.,* 2009).

Population Structure

A qualitative examination of genetic (NADH–2) sequences revealed no geographical structuring of smalltooth sawfish haplotypes (Faria *et al.,* 2013). However, variation in the number of rostral teeth number per side was found in specimens from the western and eastern Atlantic Ocean (Faria *et al.,* 2013).

Distribution and Abundance

Outside U.S. waters, smalltooth sawfish were thought to be historically found in South Africa, Madagascar, the Red Sea, Arabia, India, the Philippines, along the coast of west Africa, portions of South America including Brazil, Ecuador, the Caribbean Sea, the Mexican Gulf of Mexico, as well as Bermuda (Bigelow and Scheroder, 1953; Wallace, 1967; Van der Elst, 1981; Compagno *et al.,* 1989; Last and Stevens, 1994; IUCN, 1996; Compagno and Last, 1999; McEachran and De Carvalho, 2002; Monte-Luna *et al.,* 2009; Wueringer *et al.,* 2009). However, reports of smalltooth sawfish from other than the Atlantic Ocean are likely misidentifications of other sawfish (Faria *et al.,* 2013). In the eastern Atlantic Ocean, smalltooth sawfish were historically found along the west coast of Africa from Angola to Mauritania (Faria *et al.,* 2013). Although smalltooth sawfish were included in historic faunal lists of species found in the Mediterranean Sea (Serena, 2005), it is still unclear if smalltooth sawfish occurred as part of the Mediterranean ichthyofauna or were only seasonal migrants.

To evaluate the current and historic distribution and abundance of the smalltooth sawfish outside the U.S. DPS, we conducted an extensive search of peer-reviewed publications and technical reports, newspaper, and magazine articles. The result of that search is summarized below by major geographic region.

Eastern Atlantic Ocean

Smalltooth sawfish were once common in waters off west Africa, but are now rarely reported or documented in the area. The earliest record of smalltooth sawfish in Africa was in 1907 from Cameroon: seven records for five males and two females. Female specimens were recorded in the Republic of the Congo in 1911 and 1948. Other reports from the Republic of Congo include a male and two females, but dates were not recorded. A female specimen from Mauritania was recorded but no date is given (Faria *et al.,* 2013). A rostra from the Republic of the Congo, Pointe Noire, Molez was found in 1958 as well as a record of a large female from Somalia in 1909 (Deynat, 2005; Faria *et al.,* 2013). There are records of smalltooth sawfish from Senegal as early as 1956 and another rostral saw was recorded in 1959. Faria *et al.* (2013) also reports on four other rostra from

Senegal, but no specific information is available.

In the 1970s, records of smalltooth sawfish became limited to more northern areas of west Africa. One rostral saw from Senegal was recorded in 1975 (Alexander, 1991). Similarly, one rostral saw was reported from Gambia in 1977, but information about exact location or sex of the animal was absent (Faria *et al.,* 2013). Faria *et al.* (2013) report a record of smalltooth sawfish in Guinea Bissau in 1983 and a record of a saw in 1987. For a morphological study, Deynat (2005) obtained a juvenile female from Port-Etienne, Mauritania, in 1986, and another from Cacheu, Guinea-Bissau in 1983. Two rostra were reported from the Republic of Guinea: one in 980 and one in 1988 (Faria *et al.,* 2013).

In the last 10 years, there has been only one confirmed record of a smalltooth sawfish outside of U.S. waters in Sierra Leone, west Africa, in 2003 (M. Diop, pers. comm.). Two other countries have recently reported sawfish (Guinea Bissau, Africa in 2011, and Mauritania in 2010) but these reports did not specify them as smalltooth sawfish.

Western Atlantic Ocean (Outside U.S. Waters)

Overall, records of smalltooth sawfish in the western Atlantic Ocean are scarce and show a non-continuous range, potentially due to misidentification with largetooth sawfish. Faria *et al.* (2013) summarized most records of smalltooth sawfish in these areas as described below. The earliest records are a female smalltooth sawfish from Haiti in 1831 and a female sawfish from Trinidad and Tobago in 1876. Another early record of two smalltooth sawfish saws is from Guyana in 1886 and an additional saw was later recorded in 1900. In Brazil, there is a 1910 report of a female smalltooth sawfish.

In the middle part of the 20th century there are reports of two female smalltooth sawfish from Mexico in 1926. Rostral saws were found in Suriname in 1943, 1944 and 1963, but no additional location or biotic information is known. Similarly, one rostrum was reported from Costa Rica in 1960, one rostral saw from Trinidad and Tobago in 1944, and in 1958 and 1960, several whole individuals and one rostrum were recorded from Guyana. There are also several other undated specimens recorded from Guyana from this period.

There are other records of smalltooth sawfish's presence in the western Atlantic Ocean but specific information is lacking. For example, Faria *et al.,* (2013) reports that four rostral saws came from Mexico and two from Belize. One female was reported from Venezuela and two saws from Trinidad and Tobago.

In conclusion, while records are sparse, it is likely the distribution of smalltooth sawfish in the Atlantic Ocean is patchy and has been reduced in a pattern similar to largetooth sawfish. Data suggests only a few viable populations might exist outside the U.S. Due to better quality of habitat and low urbanization, some areas in the Caribbean Sea may have a greater number of smalltooth sawfish than other areas. For example, smalltooth sawfish have been repeatedly reported along the western coast of Andros Island, Bahamas (R.D. Grubbs pers. comm., 2010) and The Nature Conservancy noted two smalltooth sawfish at the northern and southern end of the island in 2006. Fishing guides commonly encounter smalltooth sawfish around Andros Island while fishing for bonefish and tarpon (R.D. Grubbs pers. comm., 2010), and researchers tagged two in 2010 (Carlson *et al.,* in review). In Bimini, Bahamas, generally one smalltooth sawfish has been caught every two years as part of shark surveys conducted by the Bimini Biological Station (D. Chapman pers. comm.). In west Africa, Guinea Bissau represents the last areas where sawfish can be found (M. Diop pers. comm. to IUCN, 2012). Anecdotal reports indicate smalltooth sawfish may also be found in localized areas off Honduras, Belize, and Cuba (R. Graham pers. comm. to IUCN, 2012).

Species Determinations

We first consider whether or not the narrow sawfish (*A. cuspidata*), dwarf sawfish (*P. clavata*), largetooth sawfish (*P. pristis*), green sawfish (*P. zijsron*), and all non-listed population(s) of smalltooth sawfish (*P. pectinata*) meet the definition of ''species'' pursuant to section 3 of the ESA. Then we consider if any populations meet the DPS criteria.

Consideration as a ''Species'' Under the Endangered Species Act

Based on the best available scientific and commercial information described above in the natural history sections for each species, we have determined that the narrow sawfish (*A. cuspidata*), dwarf sawfish (*P. clavata*), largetooth sawfish (*P. pristis*), and green sawfish (*P. zijsron*) are taxonomically-distinct species and therefore eligible for listing under the ESA.

Distinct Population Segments

In order to determine if any populations segments of the above species, and especially the petitioned and currently non-listed population segment of smalltooth sawfish (*P. pectinata*), constitutes a ''species'' eligible for listing under the ESA, we used the natural history information and our joint NMFS- USFWS Policy regarding the recognition of distinct population segments (DPS) under the ESA (61 FR 4722; February 7, 1996). We examined the three criteria that must be met for a DPS to be listed under the ESA: (1) The discreteness of the population segment in relation to the remainder of the species to which it belongs; (2) the significance of the population segment to the remainder of the species to which it belongs; and (3) the population segment's conservation status in relation to the Act's standards for listing (i.e., is the population segment, when treated as if it were a species, endangered or threatened?).

A population may be considered discrete, if it satisfies one on the following conditions: (1) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors; or (2) it is delimited by international governmental boundaries within which differences of control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the ESA.

We looked for information indicating that population segments of narrow sawfish (*A. cuspidata*); dwarf sawfish (*P. clavata*); largetooth sawfish (*P. pristis*); green sawfish (*P. zijsron*) were markedly separate from other populations. There are few data available to examine physical, physiological, ecological, or behavioral distinctiveness of these sawfish. The morphology, ecology, and physiology of a sawfish likely limits extensive transoceanic movements; however local migrations are likely and limited movement data exists among larger individuals (Carlson *et al,.* in review). Phillips *et al.* (2011) noted the presence of matrilineal structuring of narrow sawfish (*A. cuspidata*), dwarf sawfish (*P. clavata*), and green sawfish (*P. zijsron*), suggesting the presence of either barriers to dispersal or some aspect of adult behavior limiting the effective dispersal of at least the female component of populations. Information on the population structure of the largetooth sawfish (*P. pristis*) indicates restricted gene flow between the

Atlantic and Indo-West Pacific; Atlantic and Eastern Pacific; and Indo-West Pacific and Eastern Pacific (Faria *et al.,* 2013). Fine-scale structuring of subpopulations was only partially collaborated by the regional variation in the number of rostral teeth (Faria *et al.,* 2013).

The genetic diversity for largetooth sawfish across Australia seems to be low to moderate. More genetic diversity was found in the Gulf of Carpentaria than in specific Australian Rivers, indicative of potential philopatry (Lack *et al.,* 2009). However, data are limited and more samples are required to fully realize any population structure of largetooth sawfish (Lack *et al.,* 2009; Phillips *et al.,* 2009; Morgan *et al.,* 2010a; Morgan *et al.,* 2010b).

Genetic studies of narrow sawfish have also been completed to evaluate the population structure of the species. Field *et al.* (2009) used genetic samples of narrow sawfish and found distinctions in the isotopic content of their rostral teeth, indicating differences within samples from the eastern and western portions of the Gulf of Carpentaria. The techniques used by Field *et al.* (2009) are still in its infancy and it is not clear whether or not these results are typically concordant with the parallel genetic studies of population structure. Isotopic signatures provide information on the location where the animal spends most of its time, and does not necessarily provide information on the reproductive connectivity between various regions.

Although some studies report geographic variation in rostral tooth counts and some matrilineal structuring, we conclude that the best available information indicates individuals of narrow sawfish (*A. cuspidata*), dwarf sawfish (*P. clavata*), green sawfish (*P. zijsron*), and largetooth sawfish (*P. pristis*), are not markedly separated from the remainder of the species and therefore are not discrete as defined by the DPS policy. Largetooth sawfish under their original taxonomic classification (i.e., 3 separate species) might have geographically separate populations (e.g., western North Atlantic, eastern Pacific, and Indo-Pacific Ocean), but we cannot conclude any population meets the DPS criteria of discreteness given the lack of supporting biological information. Therefore, we will examine the global status of narrow sawfish, dwarf sawfish, largetooth sawfish, and green sawfish in our evaluation for endangered or threatened status.

We previously determined that the U.S. DPS of smalltooth sawfish was discrete (68 FR 15674; April 1, 2003), as no information was available to indicate smalltooth sawfish in U.S. waters interact with those in international waters or other countries. The joint DPS policy states that the agency may consider a population discrete because it ''is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the Act.'' In 2003, we concluded that the U.S. population of smalltooth sawfish is effectively isolated and listed it as endangered along international governmental boundaries (68 FR 15674; April 1, 2003).

We now evaluate the non-U.S. populations of smalltooth sawfish to determine if they meet the discreteness criteria of the joint DPS policy. First, we determine the non-U.S. populations of smalltooth sawfish are discrete from the U.S. population because they are delimited by international governmental boundaries within which differences of control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the ESA. Because we have designated critical habitat for the U.S. DPS population of smalltooth sawfish, there is a regulatory mechanism for protecting juvenile smalltooth sawfish and their habitats in the U.S. that does not exist for the non-U.S. populations of smalltooth sawfish. Movement data from smalltooth sawfish tagged in U .S. and Bahamian waters also indicate no movement to countries outside where they were tagged. This information supports the DPS discreteness criterion of being markedly separate as a consequence of ecological factors. However, we have no information indicating genetic differences exist between the smalltooth sawfishes throughout their range outside U.S. waters or other biological information that would provide a strong basis for further separating the non-U.S. smalltooth sawfish population into smaller units. We, therefore, conclude that the non-U.S. populations of smalltooth sawfish meet the discreteness criterion of the joint DPS policy and we consider these populations as a single potential DPS.

After meeting the discreteness criterion in the DPS policy, we then considered whether the non-U.S. population of smalltooth sawfish meets the significance criterion. The joint DPS policy gives examples of potential considerations indicating the population's significance to the larger taxon. Among these considerations is evidence that the discrete population segment would result in a significant gap in the range of the taxon. Smalltooth sawfish are limited in their distribution outside of the U.S. to west Africa, the Caribbean, Mexico, and Central and South America. Loss of this group of smalltooth sawfish would result in a significant gap in the range of this species and restrict distribution to U.S. waters. Because the loss of smalltooth sawfish in areas outside the U.S. would result in a significant gap in the range of the species, we conclude the non-U.S. population of smalltooth sawfish is significant as defined by the DPS policy. We also note that no difference in status of the species is found among all areas.

Based on the above analysis of discreteness and significance, we conclude that the non-U.S. population of smalltooth sawfish (*P. pectinata*) meets the definition of a DPS and is eligible for listing under the ESA, and hereafter refer to it as the non-U.S. DPS of smalltooth sawfish.

Extinction Risk

We next consider the risk of extinction for narrow sawfish, dwarf sawfish, green sawfish, largetooth sawfish, and the non-U.S. DPS of smalltooth sawfish to determine whether the species are threatened or endangered per the ESA definition. We used the methods developed by Wainwright and Kope (1999) to organize and summarize our findings. This approach has been used in the review of many other species (Pacific salmonid, Pacific hake, walleye pollock, Pacific cod, Puget Sound rockfishes, Pacific herring, and black abalone) to summarize the status of the species according to demographic risk criteria. The methods developed by Wainwright and Kope (1999) further consider the risk to small populations based on potential genetic effects or random demographic effects, and considered habitat capacity to answer questions about the carrying capacity and whether or not the carrying capacity can ensure the populations viability. Using these concepts, we estimated the extinction risk for each of the five species at both current and anticipated risks expected in the foreseeable future. We also performed a threats assessment by identifying the severity of threats that exist now and in the foreseeable future. We defined the ''foreseeable future'' as the timeframe over which threats, or the species response to those threats, can be reliably predicted to impact the biological status of the species. We determined that the foreseeable future is approximately three generation times, calculated for each of the species based

on the demographic calculations of Moreno Iturria (2012): narrow sawfish, 14 years; dwarf sawfish, 49 years; largetooth sawfish, 48 years; green sawfish, 38 years; and the non-U.S. DPS of smalltooth sawfish, 30 years. After considering the life history of the each species, availability of data, and type of threats, we concluded that 3 generations was an appropriate measure to evaluate threats in the foreseeable future. As a late-maturing species, with slow growth rate and low productivity, it would take more than one generation for any conservation management action to be realized and reflected in population abundance indices. The timeframe of 3 generations is a widely used scientific indicator of biological status, and has been applied to decision making models by many other conservation management organizations, including the American Fisheries Society, the CITES, and the IUCN.

Wainwright and Kope (1999) used trends in abundance, productivity, and genetic variability to examine short and long-term trends in abundance as the primary indicators of risk. Wainwright and Kope (1999) also considered genetic integrity (introduced genotypes, interactions with hatchery fish, or anthropogenic selection) and connectivity to assess genetic diversity and take into account the potential for genetic exchange. Populations that are more fragmented have less genetic exchange and therefore less connectivity, which increases the risk of extinction. Loss of fitness and loss of diversity can occur from random genetic effects and increase the risk of extinction for a species. The last factor that Wainwright and Kope (1999) evaluated is the risks associated with recent events. Changes in harvest rates or natural events (floods, volcanic eruptions) can pose a risk for species but may not have been adequately considered by looking at the other effects above when there is a time-lag in seeing the effect of recent events. Given the global distribution of these sawfishes, coupled with limited data on catch rates, we did not include these additional factors in our extinction risk analysis.

We consider four categories to assess extinction risk of each sawfish species: (1) Abundance, (2) growth rate/productivity, (3) genetic integrity which includes the connectivity and genetic diversity of the species, and (4) spatial structure/connectivity. We determined extinction risk for each category for both now and in the foreseeable future using a five level qualitative scale to describe our assessment of the risk of extinction. At the lowest level, a factor, either alone or in combination with other factors, is considered ''unlikely'' to significantly contribute to risk of extinction for a species. The next lowest level is considered to be a ''low'' risk to contribute to the extinction risk, but could contribute in combination with other factors. The next level is considered a ''moderate'' risk of extinction for the species, but in combination with other factors contributes significantly to the risk of extinction. A ranking of ''likely'' means that factor by itself is likely to contribute significantly to the risk of extinction. Finally, the most threatening factors are considered ''highly likely'' to contributes significantly to the risk of extinction.

We ranked abundance as likely or highly likely to contribute significantly to the current and foreseeable risk of extinction for all sawfishes. It appears the northern coast of Australia supports the largest remaining groups of dwarf, largetooth, green, and narrow sawfish in the Pacific and Indian Ocean, with some isolated groups in the western and central Indo-Pacific region, where the latter three species occur. Smalltooth sawfish are still being reported outside of U.S. waters in the Caribbean Sea, but records are few and mostly insular (e.g., Andros Island) where habitat is available and gillnet fisheries are not a threat to the species (see below). There are only four records of largetooth sawfish in the eastern Atlantic Ocean over the last decade. Similarly, recent largetooth sawfish records in the western Atlantic are from only the Amazon River basin and the Rio Colorado-Rio San Juan area in Nicaragua. We considered the current levels of abundance and realize many areas where sawfish still occur are subject to commercial and artisanal fisheries and potential habitat loss, and therefore rank the risk of extinction due to low abundance as high into the foreseeable future.

Wainright and Kope (1999) stated short- and long-term trends in abundance are a primary indicator of extinction risk and may be calculated from a variety of quantitative data such as research surveys, commercial logbook or observer data, and landings information when accompanied by effort. Similar to information relative to abundance, we found that the natural history information indicates an absence of long-term monitoring data for all five sawfishes. We looked for inferences about extinctions risk of species based on the trends in past observations using the presence of a particular species at specified places and times (e.g., Dulvy *et al.,* 2003; Rivadeneira *et al.,* 2009). The available museum records, negative scientific survey results, and anecdotal reports indicate the abundance trend for all five sawfishes is declining and population sizes are small. Information available on the species' distribution also indicates the populations are significantly reduced.

We next considered that sawfish have historically been classified as having both low reproductive productivity and low recovery potential. We looked to the demography of smalltooth and largetooth sawfish from the northwest Atlantic Ocean that was originally investigated using an age-structured life table (Simpfendorfer, 2000). Using known estimates of growth, mortality, and reproduction at the time, Simpfendorfer (2000) determined that intrinsic rates of population increase ranged from 8–13 percent per year, and population doubling times were approximately 5 to 8.5 years for both species. These estimates included assumptions that there was no fishing mortality, no habitat limitations, no population fragmentation, or other effects of small population sizes. Simpfendorfer (2006) further modeled the demography of smalltooth sawfish using a method for estimating the rebound potential of a population by assuming that maximum sustainable yield was achieved when the total mortality was twice that of natural mortality (Au and Smith, 1997). This demographic model produced intrinsic rates of population increase that were from 2–7 percent per year for both smalltooth and largetooth sawfish. These values are similar to those calculated by Smith *et al.* (2008) using the same methodology corresponding to elasmobranch species with the lowest productivity (Smith *et al.,* 2008). Musick *et al.* (2000) noted that species with intrinsic rates of increase of less than 10 percent were particularly vulnerable to rapid population declines and a higher risk of extinction.

Some recent studies on the life history of sawfish, however, indicate they are potentially more productive than originally proposed. Growth rates (von Bertalannfy ''K'') for some species, like narrow sawfish, approach 0.34 per year (Peverell, 2008). Data from tag-recapture studies and analysis of vertebral growth bands from smalltooth sawfish indicates that the first few years after birth represent the time when growth is most rapid (e.g., Simpfendorfer *et al.,* 2008; Scharer *et al.,* 2012). Using updated life history information, Moreno Iturria (2012) calculated intrinsic rates of increase for these five species of sawfish and determined values ranging from a low of 0.03 per year for largetooth

sawfish to a high of 0.27 per year for narrow sawfish. Considering this information, and the inferred declining trend in abundance, we conclude productivity was a moderate risk for the narrow sawfish but a high risk for the other four species. We also determined that productivity would remain a moderate risk for the narrow sawfish and a high risk for the other four species, in the foreseeable future.

We also combined consideration of the two categories including genetic diversity, spatial structure, and connectivity of each species as it relates to the genetic integrity. Population structure and levels of genetic diversity have recently been assessed for the green sawfish, dwarf sawfish, and largetooth sawfish across northern Australia using a portion of the mtDNA control region. Phillips *et al.* (2011) found statistically significant genetic structure within species and moderate genetic diversity among these species. These results suggest that sawfish may be more vulnerable to local extirpation along certain parts of their range, especially in areas where the population has been fragmented and movement between these areas is limited. However, these results do not necessarily suggest a higher risk of extinction throughout the entire range of the species. Chapman *et al.* (2011) investigated the genetic diversity of the U.S. DPS of smalltooth sawfish that has declined to between one to five percent of its abundance in the 1900's, while its core distribution has contracted to less than 10 percent of its former range (NMFS, 2009). Unexpectedly, the U.S. DPS of smalltooth sawfish exhibited no genetic bottleneck and has genetic diversity that is similar to other, less depleted elasmobranch populations (Chapman *et al.,* 2011). Given that all species of sawfish have suffered similar abundance declines, we believe this conclusion should serve as a surrogate for the other sawfish species. Because the U.S. DPS of smalltooth sawfish has not undergone a genetic bottleneck, we ranked genetic integrity as a moderate risk for all sawfish species as it is likely in combination with other factors to contribute significantly to the risk of extinction. However, we determined that the risk of extinction due to the lack of connectivity was high for all five species, primarily because all populations have undergone severe fragmentation. While genetic results provide optimism for the remaining populations of sawfish, this does not preclude the promotion of management actions to enhance connectivity among populations that have been historically fragmented. We are also somewhat optimistic that sawfish populations may begin to rebuild in some areas and the risk of connectivity was determined to decrease for smalltooth and the narrow sawfish in the foreseeable future, although by only a small amount.

After reviewing the best available scientific data and the extinction risk evaluation on the 5 species of sawfishes, we conclude the risk of extinction for all five species of sawfish is high now and in the foreseeable future.

Summary of Factors Affecting the Five Species of Sawfishes

Next we consider whether any of the five factors specified in section 4(a)(1) of the ESA are contributing to the extinction risk of these five sawfishes.

The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range

We identified habitat destruction, modification, or curtailment of habitat or range as a potential threat to all five species of sawfishes and determined this factor is currently, and in the foreseeable future, contributing significantly to the risk of extinction of these species.

Coastal and Riverine Habitats

Loss of habitat is one of the factors determined to be associated with the decline of smalltooth sawfish in the U.S. (NMFS, 2009). As juveniles, sawfishes rely on shallow nearshore environments, primarily mangrove-fringed estuaries as nurseries (e.g., Wiley and Simpfendorfer, 2010; Norton *et al.,* 2012). Coastal development and urbanization have caused these habitats to be reduced or removed from many areas throughout the species' historic and current range. Habitat loss was identified as one of the most serious threats to the persistence of all species of sawfish, posing high risks for extinction. It is still unclear how anthropogenic impacts to habitats affect the recruitment of juvenile sawfish, and therefore adequate protection of remaining natural areas is essential. Given the threat from coastal urbanization coupled with the predicted reduction of mangroves globally (Alongi, 2008), we believe the risk of habitat loss would significantly contribute to both the decline of sawfish and their reduced viability.

We expect habitat modification throughout the range of these sawfishes to continue with human population increases. As humans continue to develop rural areas, habitat for other species, like sawfish, becomes compromised (Compagno, 2002b). Habitat modification affects all five species of sawfish, especially those inshore, coastal habitats near estuaries and marshes (Compagno and Last, 1999; Cavanagh *et al.,* 2003; Martin, 2005; Chin *et al.,* 2010; NMFS, 2010). Mining and mangrove deforestation severely alter the coast habitats of estuaries and wetlands that support sawfish (Vidthayanon, 2002; Polhemus *et al.,* 2004; Martin, 2005). In addition, riverine systems throughout most of these species' historical range have been altered or dammed. For example, the potential expansion of the McArthur River Mine would permanently realign channels that would in turn affect the number of pools formed during the wet and dry seasons, many of which are used as refuge areas for dwarf, green, or largetooth sawfish (Polhemus *et al.,* 2004; Gorham, 2006).

While the status of habitats across the global range of these sawfishes is not well known, we expect the continued development and human population growth to have negative effects on habitat, especially to nearshore nursery habitats. For example, Ruiz-Luna *et al.* (2008) acknowledge that deforestation of mangrove forests in Mexico has occurred from logging practices, construction of harbors, tourism, and aquaculture activities. Valiela *et al.* (2001) reported on mangrove declines worldwide. They showed that the area of mangrove habitat in Brazil decreased by almost half (9652 to 5173 square miles) from 1983–1997, with similar trends in Guinnea-Bissau (1837 to 959 square miles) from 1953–1995. The areas with the most rapid mangrove declines in the Americas included Venezuela, Mexico, Panama, the U.S., and Brazil. Along the western coast of Africa, the largest declines have occurred in Senegal, Gambia, Sierra Leone, and Guinnea-Bissau. World-wide mangrove habitat loss was estimated at 35 percent from 1980–2000 (Valiela *et al.,* 2001). These areas where mangroves are known to have decreased are within both the historic and current ranges of these five species.

Hydroelectric and Flood Control Dams

Hydroelectric and flood control dams pose a major threat to freshwater inflow into the euryhaline habitats of sawfishes. Alterations of flow, physical barriers, and increased water temperature affect water quality and quantity in the rivers, as well as adjacent estuaries that are important nursery areas for sawfish. Regulating water flow affects the environmental cues of monsoonal rains and increased freshwater flow for pupping (Peverell, 2008; Morgan *et al.,* 2011). Increases in

siltation due to regulated water flow may also affect benthic habitat or prey abundance for these sawfishes (Compagno, 2002; Polhemus *et al.,* 2004; Martin, 2005; Thorburn *et al.,* 2007; Chin *et al.,* 2010; Morgan *et al.,* 2010a).

New dams being proposed to provide additional irrigation to farmland upstream may affect sawfish habitat. For example, the Gilbert River, in Queensland, Australia drains into the Gulf of Carpentaria which is the nursery area for green, dwarf, and largetooth sawfish. Further modification of the McArthur and Gilbert Rivers, along with increased commercial fishing in coastal waters, will negatively affect sawfishes by reducing available habitat while increasing bycatch mortality (Gorham, 2006).

Water Quality

Largetooth sawfish in particular, and likely the other sawfishes, have experienced a loss of habitat throughout their range due to the decline in water quality. Agriculture and logging practices increase runoff, change salinity, and reduce the flow of water into freshwater rivers and streams that affects the habitat of the largetooth sawfish (Polhemus *et al.,* 2004; IUCN Red List, 2006); mining seems to be the most detrimental activity to water quality. Pollution from industrial waste, urban and rural sewage, fertilizers and pesticides, and tourist development all end up in these freshwater systems and eventually the oceans. Pollution from these operations, as well as cyanide spills (Papua-New Guinea, 1996), has caused a reduction in the number of sawfish in these freshwater systems (Vidthayanon, 2002; Polhemus *et al.,* 2004).

In summary, habitat alterations that potentially affect sawfishes include commercial and residential development, construction of water control structures, and modification to freshwater inflows. All sawfishes are vulnerable to a host of habitat impacts because they use rivers, estuaries, bays, and the ocean at various times of their life cycle. Based on our review of current literature, scientific survey and anecdotal information on the historic and current distribution, we find that destruction, modification, and curtailment of habitat or ranges is a factor affecting the status of each species, and we conclude that this factor is contributing, on its own or in combination with other factors, to the extinction risk of all five species of sawfishes.

Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

We identified overutilization for commercial, recreational, scientific, or educational purposes as a potential threat to all five species of sawfishes and determined that it is currently and in the foreseeable future contributing significantly to their risk of extinction.

Commercial Fisheries

Commercial fisheries pose the biggest threat to these sawfishes, as these species are bycatch from many fisheries. Their unusual morphology and prominent saw makes sawfishes particularly vulnerable to most types of fishing gear, most notably any type of net (Anak, 2002; Hart, 2002; Last, 2002; Pogonoski *et al.,* 2002; Cavanagh *et al.,* 2003; Porteous, 2004; Gorham, 2006; IUCN Red List, 2006; Chidlow, 2007; Field, 2009; Chin *et al.,* 2010; NMFS, 2010, Morgan *et al.,* 2011). Trawling gear is of particular concern as it is the most common gear used within the range and habitat of sawfishes (Compagno and Last, 1999; Taniuchi, 2002; Walden and Nou, 2008). In Thailand, for example, all sawfish fins obtained and sold to markets are a result of bycatch by otter-board trawling and gillnet fisheries as there are no directed sawfish fisheries in the country (Pauly, 1988; Vidthayanon, 2002). The Lake Nicaragua commercial fishery for largetooth sawfish that collapsed prior to the 1980's was comprised mostly of gillnet boats (Thorson 1982a), and the commercial small coastal shark fishery in Brazil mainly utilizes gillnets and some handlines (Charvet-Almeida, 2002). Subadult and adult smalltooth sawfish have been reported as bycatch in the U.S. Gulf of Mexico and south Atlantic shrimp trawl fishery (NMFS SEFSC, 2011). However, if proper techniques are used, all sawfish species, particularly adults, are fairly resilient and can be released alive from most fishing gear (Lack *et al.,* 2009).

While the occasional live release from commercial fishing gear does occur, sawfishes are often retained. The meat is generally consumed locally, but the fins and rostra are of high value and sold in markets where these products are unregulated (CITES, 2007). In Brazil a captured sawfish is most likely retained because of the value of their products, as the rostra, teeth, and fins are valued at upwards of $1,000 U.S. in foreign markets (NMFS, 2010a). The proportion of largetooth sawfish in these markets is unknown, although as many as 180 largetooth sawfish saws were annually sold at a single market in northern Brazil in the early 2000's (McDavitt and Charvet-Almeida, 2004). The Trade Records Analysis of Flora and Fauna in Commerce (TRAFFIC) organization found that meat, liver oil, fins, and skin are among the most preferred sawfish products in Asian markets (Anak, 2002; Vidthayanon, 2002). In the Gulf of Thailand, over 5,291 US tons (4,800 tonnes) of rays were caught annually from 1976–1989; at the same time over 1,102 US tons (1,000 tonnes) of rays were caught in the Andaman Sea (Vidthayanon, 2002). It is likely that most of these products were sold in Asian markets because of the high demand for sawfish products. Reports of sawfish products in various markets throughout Asia are often inconsistent and inaccurate despite international rules on take and possession of sawfish products (Fowler, 2002; Clarke *et al.,* 2008; Kiessling *et al.,* 2009).

Recreational or commercial fishing gear may be abandoned or lost at sea. These ''ghost'' nets are an entanglement hazard for sawfishes and have become an increasing problem in the Gulf of Carpentaria where over 5,500 ''ghost nets'' were removed in 2009. Sawfish captures are expected to occur in regions where no quantitative information about ''ghost nets'' exists (Gunn *et al.,* 2010).

Misidentification, general species-composition grouping, and failure to record information are all concerns for reporting sawfish captures in direct or indirect commercial fisheries (Stobutzki *et al.,* 2002b). With little enforcement of regional and international laws, the practice of landing sawfishes may continue (NMFS, 2010a). All sawfish populations have been declining worldwide, partly due to the negative effects of commercial fishing (Stevens *et al.,* 2000; Peverell, 2008).

Recreational Fisheries

Sawfish are bycatch of many recreational fisheries throughout their range, even in areas where they are protected, including many Australian rivers (Walden and Nou, 2008; Field *et al.,* 2009). Peverell (2008) reports that some sawfish are a target sport fish for recreational fishermen in the Gulf of Carpentaria, Queensland. Historic information from the U.S. indicates that recreational hook and line fishers in Texas sometimes target large sharks as trophy fish but may capture sawfish (Burgess *et al.,* 2009). Elsewhere in the U.S., the abundance of sawfishes is low and likely never high enough for recreational fishers to encounter sawfish, much less target it (NMFS, 2010a). With the increase in human

population along the coast, recreational fishing has the potential to put additional pressure on sawfish species that utilize coastal habitats (Walden and Nou, 2008).

Indigenous Take

Due to the large populations of various indigenous people throughout the range of these five species, and the lack of data on the animals they harvest, the number of sawfish taken by local peoples is unknown. Elasmobranchs are caught for consumption throughout the Indo-Pacific. In some areas the meat and fins of these animals is of high market value and are sold rather than consumed. Due to this unregulated consumption, removal of elasmobranchs, which includes sawfishes, is a serious threat (Compagno and Last, 1999; Pogonoski *et al.,* 2002; Vidthayanon, 2002; Thorburn *et al.,* 2007; Peverell, 2008; Morgan *et al.,* 2010a).

Some studies have been conducted on the use and value of elasmobranch parts to various indigenous groups, particularly those in eastern Sabah, Indonesia. One study (Almada-Villela, 2002) found the majority of natives from Pulau Tetabuan and Pulau Mabul only take what is necessary for subsistence. Sawfish rostra are also valued and kept as decoration or given as gifts at the expense of the animal (Almada-Villela, 2002; McDavitt *et al.,* 1996; Vidthayanon, 2002).

Protective Coastal Nets

The use of protective gillnets to prevent shark attacks on humans is great in some areas but can have a negative impact due to bycatch. Sawfishes are highly susceptible to nets because of their saws that are easily tangled in the nets. In Africa, the first protective gillnets lined the southeast tip of the continent's coast as early as 1952. By 1990, over 44 km of nets lined the area between Richards Bay and Mzamba (Dudley and Cliff, 1993). In these nets specifically, about 350 sharks and rays were captured between 1981 and 1990. A high percentage of entangled sawfish are released alive because of their ability to breathe while motionless. Dudley and Cliff (1993) reported 100 percent and 67 percent of largetooth and smalltooth sawfish caught during that time were released alive. However, subsequent mortality post-release due to stress or injury from the process is unknown and potentially detrimental given other fishing pressures (Dudley and Cliff, 1993).

Scientific and Educational Uses

Because of their unique morphology, sawfishes are in high demand by aquariums throughout the world for display (McDavitt *et al.,* 1996). Removal of these animals from their natural habitats has caused some concern for these sawfish species and their ecosystems. The animals removed from the wild could be adult females and would not available for reproduction (Anak, 2002; Harsan and Petrescu-Mag, 2008). No information is available on the level of mortality that occurs during the capture and transporting of live sawfish to aquaria.

Worldwide, we are not aware of any narrow sawfish in captivity (Peverell, 2005; 2008). We are aware of two dwarf sawfish held in captivity in Japan (McDavitt, 2006). Largetooth sawfish are the most common sawfish species in captivity (NMFS, 2010a). Juvenile largetooth are most often caught for the aquaria trade, measuring less than 3.5 ft (1 m) TL on average (Peter and Tan, 1997). We are aware of over 45 individual largetooth sawfish in captivity globally.

Globally, scientists are collecting information on sawfish biology. Research efforts began in 2003, on the U.S. DPS population of smalltooth sawfish and no negative impacts have been found due to that research.

While no quantitative data on fishery impacts are available, we conclude that given the susceptibility of sawfish to entanglement in predominant fishing gear (nets) throughout their range, that sawfishes are likely captured as incidental take as we are not aware of any fisheries specifically targeting sawfishes. This impact from fisheries is the most likely cause of the range contraction and presumed low number in many areas of their former range. There are few data available describing the trade of sawfish parts, however we are aware sawfish parts are often sold on Internet sites such as eBay. The use of sawfish teeth as cockfighting spurs and the sale of meat and fins for consumption continue. Therefore we conclude the overutilization for commercial and recreational purposes, alone or in combination with other factors as discussed herein, is contributing significantly to the risk of extinction of the narrow, dwarf, largetooth, green, and the non-U.S. DPS of smalltooth sawfish.

Disease and Predation

We determine disease and predation are not potential threats to any of the five species of sawfish and that it is unlikely that this factor, on its own or in combination with other factors is, currently or in the foreseeable future contributing significantly to their risk of extinction.

Although sympatric with other sawfishes and large sharks, we are not aware of any studies or information documenting interspecific competition in terms of either habitat or prey (NMFS, 2010a). Thorson (1971) speculated that the Lake Nicaragua bull shark population may compete with the sawfishes, as both were quite prevalent, but he offered no additional data. Sawfishes have been documented within the stomach of a dolphin near Bermuda (Bigelow and Schroeder, 1953; Monte-Luna *et al.,* 2009), in the stomach of a bull shark in Australia (Thorburn *et al.,* 2004), and a juvenile smalltooth sawfish was captured in the U.S. with fresh bite marks from what appeared to be a bull shark (T. Wiley-Lescher, pers. comm.). The International Union for Conservation of Nature (IUCN) Red List states that crocodiles prey on sawfishes (Cook, S.F. & Compagno, L.J.V. 2005).

Scientific data does not exist on diseases that may affect sawfishes, but there are reports of a smalltooth sawfish found dead during a red tide event on the west coast of Florida (International Sawfish Encounter Database, 2009). There is no evidence that unusual levels of disease or predation on their own, or in combination with other factors, pose an extinction risk to any of these sawfishes.

Inadequacy of Existing Regulatory Mechanisms

We identified inadequacy of existing regulatory mechanisms as a potential threat to each of the five species of sawfish. We determined that this factor alone, or in combination with other factors, is currently, and in the foreseeable future, contributing significantly to their risk of extinction.

While the use of turtle exclusion devices (TEDs) in the nets of trawl fisheries to conserve sea turtles occurs throughout the range of sawfishes, TEDs are not efficient in directing sawfish out of nets because sawfish rostra get entangled (Stobutzki *et al.,* 2002a; Brewer *et al.,* 2006) prior to reaching the TED. TEDs are often used when trawling occurs along the sea bottom or at depths of 49 ft to 131 ft (15 to 40 m), both areas where sawfish are likely to be found (Stobutzki *et al.,* 2002a). Most sawfishes show no difference in recovery after going through a trawl net, regardless of the presence or absence of a TED (Griffiths, 2006). Stobutzki *et al.* (2002a) found that large females are more likely to survive after passing through a trawling net compared to smaller males.

Only narrow sawfish were found to benefit from the presence of TEDs in nets as 73.3 percent escaped (Brewer *et al.,* 2006; Griffiths, 2006). In general, TEDs tend to have negligible or a negative impact on sawfish that get captured by trawling nets (Stobutzki *et al.,* 2002a; Griffiths, 2006), but they do provide an escape route if the animal does not get entangled.

While the international organizations including the Trade Records Analysis of Flora and Fauna in Commerce (TRAFFIC), the Food and Agricultural Organization (FAO), the International Council for the Exploration of the Sea (ICES), and the International Commission for the Conservation of Atlantic Tuna (ICCAT) work to develop global networks to monitor wildlife trade, there is no consistent reporting of the trade in elasmobranchs (Clarke *et al.,* 2008; Lack and Sant, 2011) perhaps due to their lower commercial value compared to bony fish (Holmes *et al.,* 2009). Data reporting is often inconsistent among these groups, customs agencies and national fisheries (Anak, 2002). Reports are often vague and include general descriptions like ''shark fin'' or ''ray,'' lending practically no information of trading rates of specific products (Lack and Sant, 2011). Other countries in the Indo-Pacific do not report bycatch statistics or elasmobranchs taken illegally (Holmes *et al.,* 2009). In order for effective management plans to be implemented in fin markets and for sawfish product trade, data need to be consistent.

Many countries in the Indo-Pacific and the Middle East do not have formal legislation for management or national protection of the sawfish that may occur in their waters. Presently, Thailand has no protective legislation for any elasmobranch in the country, only some regulated fisheries (Vidthayanon, 2002). Thailand recently (1995) banned export of marine species for aquaria (Vidthayanon, 2002). Despite efforts by the International Plan of Action for the Conservation and Management of Sharks (IPOA Shark Plan) requiring all Gulf of Oman countries to have a shark conservation plan by 2001, none have been developed as of 2010. Iran has no regulations regarding fin removal, but they do limit the shark fishing season in the Gulf of Oman (Moore, 2011). The countries in Africa face similar circumstances as enforcement for sawfish protection is unknown (NMFS, 2010a). Those countries that do have protective legislation are often taken advantage of by foreign vessels because no punishment results. In one study, DNA barcoding was used to identify fins from the green sawfish confiscated from foreign boats illegally fishing in northern Australian waters (Holmes, 2009).

While it appears that several organizations are trying to regulate and manage sawfish, many have proven to be inadequate. Illegal exploitation by foreign fishers often occurs when regulations exist but are not enforced (Kiessling *et al.,* 2009). Preventative measures on existing fishing mechanisms to avoid sawfish catch, international monitoring of trade and governmental influence on fisheries are not presently sufficient to protect sawfishes. Specific regulation and monitoring of sawfishes by country would provide better protection (Vidthayanon, 2002; Walden and Nou, 2008). Therefore we conclude the inadequacy of existing regulatory mechanisms has and continues to significantly contribute to the risk of extinction of the narrow, dwarf, largetooth, green, and the non-U.S. DPS of smalltooth sawfish.

Other Natural or Manmade Factors Affecting its Continued Existence

We do not have information to determine that other natural or manmade factors are potential threats to any of the five species of sawfishes and conclude it is unlikely that this factor, on its own or in combination with other factors, is currently or in the foreseeable future contributing significantly to the risk of extinction.

An increase in global sea-surface temperature and sea level may already be influencing sawfish populations (Clark, 2006; Walden and Nou, 2008; Chin *et al.,* 2010). Fish assemblages are likely to change their distribution and could affect the prey base for sawfishes. Estuaries, including sawfish pupping grounds, may be affected as climate change changes patterns in freshwater flow due to rainfall and droughts. Skewed salinities in these areas or extreme tide levels might discourage adults from making up-river migrations (Clark, 2006). Saltwater marsh grass and mangrove areas play important roles in sawfish habitat as well (Simpfendorfer *et al.,* 2010); any disruption to these areas may affect sawfish populations. While many scientists can agree on the presence of climate change, few can agree on the effects that climate change will have on sawfish and their environments specifically (Clark, 2006; Chin *et al.,* 2010).

Red tide is the common name for a harmful algal bloom (HAB) of marine algae (*Karenia brevis*) that can make the ocean appear red or brown. *Karenia brevis* is one of the first species ever reported to have caused a HAB and is principally distributed throughout the Gulf of Mexico, with occasional red tides in the mid- and south-Atlantic U.S. *Karenia brevis* naturally produces a brevetoxin that is absorbed directly across the gill membranes of fish or through ingestion of algal cells. While many HAB species are nontoxic to humans or small mammals, they can have significant effects on aquatic organisms. Fish mortalities associated with *K. brevis* events are very common and widespread. The mortalities affect hundreds of species during various stages of development. Red tide toxins can cause intoxication in fish, which may include violent twisting and corkscrew swimming, defecation and regurgitation, pectoral fin paralysis, caudal fin curvature, loss of equilibrium, quiescence, vasodilation, and convulsions, culminating in death. However, it is known that fish can die at lower cell concentrations and can also apparently survive in much higher concentrations. In some instances, mortality from red tide is not acute but may occur over a period of days or weeks of exposure to subacute toxin concentrations. There is no specific information on red tide effects to sawfish, but a report exists of a smalltooth sawfish that was found dead along the west coast of Florida, during a red tide event (National Sawfish Encounter Database, 2009). Therefore, we conclude red tide can affect all sawfish species (NMFS, 2010a).

Sawfishes have slow growth rates, late maturity, a long life span, and low fecundity rates which make them K-selected animals. K-selected animals can compete successfully in predictable or stable environments. K-selected characteristics do not enable them to respond rapidly to additional sources of mortality, such as overexploitation and habitat degradation. Collectively these other natural or manmade factors may be affecting the continued existence of the narrow, dwarf, largetooth, green, and the non-U.S. DPS of smalltooth sawfish. However, we are uncertain on the importance of these threats and additional studies are needed to determine the importance of other manmade and natural factors to the long-term survival of all five species of sawfishes.

Overall Risk Summary

After considering the extinction risks for each of the five species of sawfish, we have determined the narrow, dwarf, largetooth, green, and the non-U.S. DPS of smalltooth sawfish are in danger of extinction throughout all of their ranges due to (1) Present or threatened destruction, modification or curtailment

of habitat, (2) overutilization for commercial, recreational, scientific, or educational purposed, and (3) inadequacy of existing regulatory mechanisms.

Protective Efforts

Section 4(b)(1)(A) of the ESA requires the Secretary, when making a listing determination for a species, to take into consideration those efforts, if any, being made by any State or foreign nation to protect the species. In judging the efficacy of not yet implemented efforts, or those existing protective efforts that are not yet fully effective, we rely on the Services' joint ''Policy for Evaluation of Conservation Efforts When Making Listing Decisions'' (''PECE''; 68 FR 15100; March 28, 2003). The PECE policy is designed to ensure consistent and adequate evaluation on whether any conservation efforts that have been recently adopted or implemented, but not yet proven to be successful, will result in recovering the species to the point at which listing is not warranted or contribute to forming the basis for listing a species as threatened rather than endangered. The PECE policy is expected to facilitate the development of conservation efforts by states and other entities that sufficiently improve a species' status so as to make listing the species as threatened or endangered unnecessary.

The PECE policy establishes two basic criteria to use in evaluating efforts identified in conservations plans, conservation agreements, management plans or similar documents: (1) the certainty that the conservation efforts will be implemented; and (2) the certainty that the efforts will be effective. We evaluated conservation efforts to protect and recover sawfish that are either underway but not yet fully implemented, or are only planned.

All sawfishes in the family Pristidae were listed on Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) at the 14th Conference of the Parties meeting in 2007. An Appendix I listing bans all commercial trade in parts or derivatives of sawfish with trade in specimens of these species permitted only in exceptional circumstances (e.g., for research purposes). An annotation to the Appendix I listing allows the largetooth sawfish *P. microdon* (herein *P. pristis*) to be treated as Appendix II ''for the exclusive purpose of allowing international trade in live animals to appropriate and acceptable aquaria for primarily conservation purposes.'' The annotation was accepted on the basis that Australian populations of *P. microdon* are robust relative to other populations in the species' range; and that the capture of individuals for aquaria is not likely to be detrimental to the population. At the CITES 16th Annual Conference of the Parties (COP) in March of 2013 Australia's proposal to transfer *P. microdon* from Appendix II to Appendix I was adopted. While the recent banning of all trade of largetooth sawfish has the potential to reduce the number of live animals removed for aquaria trade, the potential effect of this effort is unknown, but not likely to significantly affect the species outside of the limited area where it had been harvested for this trade. Because trade is not a current threat placing the five species of sawfishes at risk of extinction, moving the largetooth sawfish from CITES Appendix II to Appendix I to further restrict trade cannot be considered as an effective measure in reducing the current extinction risk.

Proposed Determination

Section 4(b)(1) of the ESA requires that we make listing determinations based solely on the best scientific and commercial data available after conducting a review of the status of the species and taking into account those efforts, if any, being made by any state or foreign nation, or political subdivisions thereof, to protect and conserve the species. We have reviewed the best available scientific and commercial information including the petition, and the information in the review of the status of the five species of sawfishes, and we have consulted with species experts. We are responsible for determining whether narrow sawfish (*A. cuspidata*), dwarf sawfish (*P. clavata*), largetooth sawfish (*P. pristis*), green sawfish (*P. zijsron*), and all non-U.S. DPS of smalltooth sawfish (*P. pectinata*) are threatened or endangered under the ESA (16 U.S.C. 1531 *et seq.*). Accordingly, we have followed a stepwise approach as outlined above in making this listing determination for these five species of sawfish. We have determined that narrow sawfish (*A. cuspidata*); dwarf sawfish (*P. clavata*); largetooth sawfish (*P. pristis*); green sawfish (*P. zijsron*); and all non-U.S. DPS of smalltooth sawfish (*P. pectinata*) constitute species as defined by the ESA.

Based on the information presented, we find that all five species of sawfishes are in danger of extinction throughout all of their ranges. We assessed the ESA section 4(a)(1) factors and conclude the narrow, dwarf, largetooth, green, and the non-U.S. DPS of smalltooth sawfish face ongoing threats from habitat alteration, overutilization for commercial and recreational purposes, and the inadequacy of existing regulatory mechanisms throughout their ranges. All of the threats attributed to the species decline are ongoing except the fishery in Lake Nicaragua that collapsed, presumably with the largetooth sawfish population. After considering efforts being made to protect these sawfishes, we could not conclude the proposed conservation efforts would alter the extinction risk for any of these five sawfishes.

Effects of Listing

Conservation measures provided for species listed as endangered or threatened under the ESA include recovery actions (16 U.S.C. 1533(f)), concurrent designation of critical habitat if prudent and determinable (16 U.S.C. 1533(a)(3)(A)); Federal agency requirements to consult with NMFS and to ensure its actions do not jeopardize the species or result in adverse modification or destruction of critical habitat should it be designated (16 U.S.C. 1536); and prohibitions on taking (16 U.S.C. 1538). Recognition of the species' plight through listing promotes conservation actions by Federal and state agencies, foreign entities, private groups, and individuals. Should the proposed listing be made final, recovery plans may be developed, unless they would not promote the conservation of the species.

Identifying Section 7 Consultation Requirements

Section 7(a)(2) (16 U.S.C. 1536(a)(2)) of the ESA and NMFS/USFWS regulations require Federal agencies to consult with us to ensure that activities authorized, funded, or carried out are not likely to jeopardize the continued existence of listed species or destroy or adversely modify critical habitat. Section 7(a)(2) (16 U.S.C. 1536(a)(2)) of the ESA and NMFS/USFWS regulations also require Federal agencies to confer with us on actions likely to jeopardize the continued existence of species proposed for listing, or that result in the destruction or adverse modification of proposed critical habitat. It is possible, but highly unlikely, that the listing of the five species of sawfish under the ESA may create a minor increase in the number of section 7 consultations for high seas activities.

Critical Habitat

Critical habitat is defined in section 3 of the ESA (16 U.S.C. 1532(5)) as: (1) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the ESA,

on which are found those physical or biological features (a) essential to the conservation of the species and (b) that may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by a species at the time it is listed upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures needed to bring the species to the point at which listing under the ESA is no longer necessary. Section 4(a)(3)(A) of the ESA (16 U.S.C. 1533(a)(3)(A)) requires that, to the extent prudent and determinable, critical habitat be designated concurrently with the listing of a species. Critical habitat shall not be designated in foreign countries or other areas outside U.S. jurisdiction (50 CFR 424.12 (h)).

The best available scientific and commercial data as discussed above identify the geographical areas occupied by the narrow sawfish (*A. cuspidata*), dwarf sawfish (*P. clavata*), green sawfish (*P. zijsron*), largetooth sawfish (*P. pristis*), and the non-U.S. DPS of smalltooth sawfish (*P. pectinata*) are found entirely outside U.S. jurisdiction so we cannot designate critical habitat for these species. We can designate critical habitat in unoccupied areas if the area(s) are determined by the Secretary to be essential for the conservation of the species. Regulations at 50 CFR 424.12 (e) specify that we shall designate as critical habitat areas outside the geographical range presently occupied by the species only when the designation limited to its present range would be inadequate to ensure the conservation of the species.

The best available scientific and commercial information on the species does not indicate that U.S. waters provide any specific essential biological function other than general foraging opportunities for the largetooth sawfish (*P. pristis*). All records of *P. pristis* in U.S. waters were larger animals (adults). We are unaware of any record of a juvenile largetooth sawfish in U.S. waters, which suggest the species does not use the area for a nursery. The majority of reports for the largetooth sawfish in U.S. waters are during the summer months when water temperatures are warmer. We have no reports of the species that would suggest U.S. waters are used for breeding. Based on the best available information we have not identified unoccupied area(s) that are currently essential to the conservation of any of the sawfishes proposed for listing. Therefore, based on the available information we do not intend to designate critical habitat for the narrow, dwarf, largetooth, green, or the non-U.S. DPS of smalltooth sawfish.

Identification of Those Activities That Would Constitute a Violation of Section 9 of the ESA

On July 1, 1994, NMFS and FWS published a policy (59 FR 34272) that requires us to identify, to the maximum extent practicable at the time a species is listed, those activities that would or would not constitute a violation of section 9 of the ESA. Because we are proposing to list all six sawfishes as endangered, all of the prohibitions of Section 9(a)(10) of the ESA will apply to all six species. These include prohibitions against the import, export, use in foreign commerce, or ''take'' of the species. Take is defined as ''to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.'' These prohibitions apply to all persons subject to the jurisdiction of the United States, including in the U.S. or on the high seas. The intent of this policy is to increase public awareness of the effects of this listing on proposed and ongoing activities within the species' range. Activities that we believe could result in a violation of section 9 prohibitions of these six sawfishes include, but are not limited to, the following:

(1) Take within the U.S. or its territorial sea, or upon the high seas;

(2) Possessing, delivering, transporting, or shipping any sawfish part that was illegally taken;

(3) Delivering, receiving, carrying, transporting, or shipping in interstate or foreign commerce any sawfish or sawfish part, in the course of a commercial activity, even if the original taking of the sawfish was legal;

(4) Selling or offering for sale in interstate commerce any sawfish part, except antique articles at least 100 years old;

(5) Importing or exporting sawfish or any sawfish part to or from any country;

(6) Releasing captive sawfish into the wild. Although sawfish held non-commercially in captivity at the time of listing are exempt from certain prohibitions, the individual animals are considered listed and afforded most of the protections of the ESA, including most importantly, the prohibition against injuring or killing. Release of a captive animal has the potential to injure or kill the animal. Of an even greater conservation concern, the release of a captive animal has the potential to affect wild populations of sawfish through introduction of diseases or inappropriate genetic mixing. Depending on the circumstances of the case, NMFS may authorize the release of a captive animal through a section 10(a)(1)(a) permit;

(7) Harming captive sawfish by, among other things, injuring or killing a captive sawfish, through experimental or potentially injurious veterinary care of conducting research or breeding activities on captive sawfish, outside the bounds of normal animal husbandry practices. Captive breeding of sawfish is considered experimental and potentially injurious. Furthermore, the production of sawfish progeny has conservation implications (both positive and negative) for wild populations. Experimental or potentially injurious veterinary procedures and research or breeding activities of sawfish may, depending on the circumstances, be authorized under an ESA 10(a)(1)(a) permit for scientific research or the enhancement of the propagation or survival of the species.

We will identify, to the extent known at the time of the final rule, specific activities that will not be considered likely to result in a violation of section 9. Although not binding, we are considering the following actions, depending on the circumstances, as not being prohibited by ESA Section 9:

(1) Take of a sawfish authorized by a 10(a)(1)(a) permit authorized by, and carried out in accordance with the terms and conditions of an ESA section 10(a)(1)(a) permit issued by NMFS for purposes of scientific research or the enhancement of the propagation or survival of the species;

(2) Incidental take of a sawfish resulting from Federally authorized, funded, or conducted projects for which consultation under section 7 of the ESA has been completed, and when the otherwise lawful activity is conducted in accordance with any terms and conditions granted by NMFS in an incidental take statement in a biological opinion pursuant to section 7 of the ESA;

(3) Continued possession of sawfish parts that were in possession at the time of listing. Such parts may be non-commercially exported or imported; however the importer or exporter must be able to provide sufficient evidence to show that the parts meet the criteria of ESA section 9(b)(1) (i.e., held in a controlled environment at the time of listing, non-commercial activity).

(4) Continued possession of live sawfish that were in captivity or in a controlled environment (e.g., in aquaria) at the time of this listing, so long as the prohibitions under ESA section 9(a)(1) are not violated. Again, facilities should be able to provide evidence that the

sawfish were in captivity or in a controlled environment prior to listing. We suggest such facilities submit information to us on the sawfish in their possession (e.g., size, age, description of animals, and the source and date of acquisition) to establish their claim of possession (see For Further Information Contact); and

(5) Provision of care for live sawfish that were in captivity at the time of listing. These individuals are still protected under the ESA and may not be killed or injured, or otherwise harmed, and, therefore, must receive proper care. Normal care of captive animals necessarily entails handling or other manipulation of the animals, and we do not consider such activities to constitute take or harassment of the animals so long as adequate care, including adequate veterinary care is provided. Such veterinary care includes confining, tranquilizing, or anesthetizing sawfish when such practices, procedures, or provisions are not likely to result in injury; and

(6) Any interstate and foreign commerce trade of sawfishes already in captivity that is conducted under a CITES permit.

Section 11(f) of the ESA gives NMFS authority to promulgate regulations that may be appropriate to enforce the ESA. Future regulations may be promulgated to regulate trade or holding of sawfish, if necessary. The public will be given the opportunity to comment on future proposed regulations.

Role of Peer Review

In December 2004, the Office of Management and Budget (OMB) issued a Final Information Quality Bulletin for Peer Review establishing a minimum peer review standard. Similarly, a joint NMFS/FWS policy (59 FR 34270; July 1, 1994) requires us to solicit independent expert review from qualified specialists, concurrent with the public comment period. The intent of the peer review policy is to ensure that listings are based on the best scientific and commercial data available. We solicited peer review comments on this 12-month finding and proposed rule from three NMFS scientists familiar with elasmobranchs and their comments are incorporated into this document. All three peer reviewers supported our determinations. Prior to a final listing, we will solicit the expert opinions of several qualified specialists selected from the academic and scientific community, Federal and State agencies, and the private sector on listing recommendations to ensure the best biological and commercial information is being used in the decision-making process, as well as to ensure that reviews by recognized experts are incorporated into the review process of rulemakings developed in accordance with the requirements of the ESA.

We will consider peer review comments in making our determination, and include a summary of the comments and recommendations, if a final rule is published.

References

A complete list of the references used in this proposed rule is available upon request (see **ADDRESSES**).

Classification

National Environmental Policy Act

The 1982 amendments to the ESA, in section 4(b)(1)(A), restrict the information that may be considered when assessing species for listing. Based on this limitation of criteria for a listing decision and the opinion in *Pacific Legal Foundation* v. *Andrus,* 675 F. 2d 825 (6th Cir. 1981), NMFS has concluded that ESA listing actions are not subject to the environmental assessment requirements of the National Environmental Policy Act (NEPA) (See NOAA Administrative Order 216–6).

Executive Order 12866, Regulatory Flexibility Act, and Paperwork Reduction Act

As noted in the Conference Report on the 1982 amendments to the ESA, economic impacts cannot be considered when assessing the status of a species. Therefore, the economic analysis requirements of the Regulatory Flexibility Act are not applicable to the listing process. In addition, this proposed rule is exempt from review under Executive Order 12866. This proposed rule does not contain a collection-of-information requirement for the purposes of the Paperwork Reduction Act.

Executive Order 13132, Federalism

In accordance with E.O. 13132, we determined that this proposed rule does not have significant Federalism effects and that a Federalism assessment is not required. In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and Federal interest, this proposed rule will be given to the relevant governmental agencies in the countries in which the species occurs, and they will be invited to comment. NMFS will confer with U.S. Department of State to ensure appropriate notice is given to foreign nations within the range of all five species. As the process continues, NMFS intends to continue engaging in informal and formal contacts with the U.S. State Department, giving careful consideration to all written and oral comments received.

Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate as possible and informed by the best available scientific and commercial information. Therefore, we request comments or information from the public, other concerned governmental agencies, the scientific community, industry, environmental groups or any other interested party concerning this proposed rule. We particularly seek comments containing:

(1) Information concerning the location(s) of any sightings or captures of the species;

(2) Information concerning the threats to the species;

(3) Taxonomic information on the species;

(4) Information related to the determination of a non-U.S. DPS of smalltooth sawfish;

(5) Efforts being made to protect the species throughout their current range;

(6) Information on the aquaria trade of these species; and

(7) Information on the movement patterns of smalltooth sawfish.

Public hearing requests must be made by July 19, 2013.

List of Subjects in 50 CFR Part 224

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Dated: May 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 224 is proposed to be amended as follows:

PART 224—ENDANGERED MARINE AND ANADROMOUS SPECIES

■ 1. The authority citation for part 224 continues to read as follows:

Authority: 16 U.S.C. 1531–1543 and 16 U.S.C. 1361 *et seq.*

■ 2. In § 224.101, paragraph (a), revise the entries in the table for ''Smalltooth sawfish'' and ''Largetooth sawfish'', and add new entries for four new species the ''Narrow Sawfish'', ''Dwarf Sawfish'', ''Smalltooth Sawfish, Non-U.S. DPS'', and ''Green Sawfish'' at the end of the table to read as follows:

§ 224.101 Enumeration of endangered marine and anadromous species.

(a) * * *

* * * * *

Species		Where Listed	Citation(s) for listing determination(s)	Citation(s) for critical habitat designation(s)
Common name	Scientific name			
* *	*	* *	*	*
Smalltooth Sawfish, U.S. DPS	*Pristis pectinata*	Everywhere Found U.S.A.	68 FR 15674, Apr. 1, 2003	74 FR 45353, Sept. 2, 2009.
* *	*	* *	*	*
Largetooth sawfish	Pristis pristis (Pristis microdon) (Pristis perotteti).	Everywhere Found	76 FR 40835, July 12, 2011	NA.
* *	*	* *	*	*
Narrow Sawfish	*Anoxypristis cuspidata*	Everywhere Found	[**Federal Register** *citation and date when published as a final rule*].	NA.
Dwarf Sawfish	*Pristis clavata*	Everywhere Found	[**Federal Register** *citation and date when published as a final rule*].	NA.
Smalltooth Sawfish, Non-U.S. DPS.	*Pristis pectinata*	Everywhere Found Outside U.S. Waters.	[**Federal Register** *citation and date when published as a final rule*].	NA.
Green Sawfish	*Pristis zijsron*	Everywhere Found	[**Federal Register** *citation and date when published as a final rule*].	NA.

[1] Species includes taxonomic species, subspecies, distinct population segments (DPSs) (for a policy statement, see 61 FR 4722, February 7, 1996), and evolutionarily significant units (ESUs) (for a policy statement, see 56 FR 58612, November 20, 1991).

[FR Doc. 2013–13170 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 78, No. 107
Tuesday, June 4, 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

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 July 5, 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.

Animal and Plant Health Inspection Service

Title: Tuberculosis Testing for Imported Cattle from Mexico.

OMB Control Number: 0579–0224.

Summary of Collection: The Animal Health Protection Act (AHPA) of 2002 is the primary Federal law governing the protection of animal health. The law gives the Secretary of Agriculture broad authority to detect, control, or eradicate pest or diseases of livestock or poultry. Disease prevention is the most effective method for maintaining a healthy animal population and enhancing the Animal and Plant Health Inspection Service (APHIS) ability to compete in the global market of animal and animal product trade. APHIS will collect information using form VS 17–129, ''Application for Import or In Transit Permit'' and VS 17–29, ''Declaration of Importation.''

Need and Use of the Information: APHIS will collect information from the permit application regarding the type, number, and identification of the animals to be exported to the United States, as well as information concerning the origin, intended date and location of arrival, routes of travel, and destination of the animals. Cattle imported from Mexico must be accompanied by a Customer Declaration under APHIS import requirements. The information requested on this form facilitate the oversight necessary to ensure that all APHIS import requirements are met to mitigate the introduction of foreign and other animal diseases regulated by APHIS. APHIS will also collect information that certified that the herd in which the cattle was born and raised has tested TB-negative to a whole herd test.

Failure to collect this information would make it impossible for APHIS to effectively evaluate the TB risks associated with cattle importation from Mexico, thereby increasing the likelihood that healthy cattle and bison throughout the United States will be exposed to tuberculosis.

Description of Respondents: Business or other for-profit; farms.

Number of Respondents: 81,851.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 92,215.

Animal and Plant Health Inspection Service

Title: Cut Flowers from Countries with Chrysanthemum White Rust.

OMB Control Number: 0579–0271.

Summary of Collection: Under the Plant Protection Act (7 U.S.C. 7701—*et.seq.*), the Secretary of Agriculture is authorized to prohibit or restrict the importation, entry, or movement of plants and plant pests to prevent the introduction of plant pests into the United States or their dissemination within the United States. The regulations in 7 CFR Part 319 prohibits or restricts the importation of plants, plant parts, and related materials to prevent the introduction of foreign plant pests into the United States. Conditions governing the importation of cut flowers into the United States are contained in ''Subpart-Cut Flowers'' (§§ 319.74–1 through 319.74–4, referred to as the regulations). Through these regulations the Animal and Plant Health Inspection Service (APHIS) has established specific requirements for the importation of cut that are hosts of Chrysanthemum White Rust (CWR) from countries where the disease is known to occur and to make APHIS' cut flowers and nursery stock regulations consistent.

CWR is a serious disease in nurseries where it may cause complete loss of greenhouse chrysanthemum crops.

Need and Use of the Information: APHIS requires that some plants and plant products are accompanied by a phytosanitary inspection certificate that is completed by plant health officials in the originating or transiting country. APHIS uses the information on this certificate to determine the pest condition of the shipment at the time of inspection in the foreign country. APHIS also requires that flowers must be grown in a production site that is registered with the National Plant Protection Organization (NPPO) of the country in which the production site is located or with the NPPO's designee, and the NPPO or its designee must provide a list of registered sites to APHIS. The information is used as a guide to the intensity of the inspection that APHIS must conduct when the shipment arrives. Without this information, all shipments would need

to be inspected very thoroughly, thereby requiring considerably more time.

Description of Respondents: Business or other for-profit; Federal Government.

Number of Respondents: 1,045.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 646.

Ruth Brown,

Departmental Information Collection Clearance Officer.

[FR Doc. 2013–13130 Filed 6–3–13; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Forest Service

Big Horn County Resource Advisory Committee

AGENCY: Forest Service, USDA.

ACTION: Notice of meeting.

SUMMARY: The Big Horn County Resource Advisory Committee will meet in Greybull, Wyoming. The committee is authorized under the Secure Rural Schools and Community Self-Determination Act (Pub. L. 110–343) (the Act) and operates in compliance with the Federal Advisory Committee Act. The purpose of the committee is to improve collaborative relationships and to provide advice and recommendations to the Forest Service concerning projects and funding consistent with the Ttitle II of the Act. The meeting is open to the public. The purpose of the meeting is to report on monitoring of projects as well as to validate recommended projects for 2013.

DATES: The meeting will be held July 15, 2013 at 3:00 p.m.

ADDRESSES: The meeting will be held at Big Horn County Weed and Pest Building, 4782 Highway 310, Greybull, Wyoming. Written comments may be submitted as described under Supplementary Information. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received at Bighorn National Forest, 2013 Eastside 2nd Street, Sheridan, Wyoming 82801. Please call ahead to (307) 674–2600 to facilitate entry into the building to view comments.

FOR FURTHER INFORMATION CONTACT: Susan Douglas, Public Affairs Specialist, (307) 674–2658, *spdouglas@fs.fed.us.* Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The following business will be conducted: (1) Introductions, (2) Project monitoring information, (3) Public Comment, (4) Recommended project validation. Anyone who would like to bring related matters to the attention of the committee may file written statements with the committee staff before or after the meeting. The agenda will include time for people to make oral statements of three minutes or less. Individuals wishing to make an oral statement should request in writing by June 15, 2013 to be scheduled on the agenda. Written comments and requests for time for oral comments must be sent to Susan Douglas, 2013 Eastside 2nd Street, Sheridan, Wyoming 82801 or by email to *spdouglas@fs.fed.us* or via facsimile to (307) 674–2668. A summary of the meeting will be posted at *http://www.fs.usda.gov/main/bighorn/home* within 21 days of the meeting.

Meeting Accommodations: If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpreting, assistive listening devices or other reasonable accommodation for access to the facility for proceedings by contacting the person listed under For Further Information Contact. All reasonable accommodation requests are managed on a case by case basis.

Dated: May 29, 2013.

William T. Bass,

Forest Supervisor.

[FR Doc. 2013–13132 Filed 6–3–13; 8:45 am]

BILLING CODE 3410–11–P

DEPARTMENT OF AGRICULTURE

Rural Business-Cooperative Service

Intermediary Relending Program; Roundtable Meeting

AGENCY: Rural Business-Cooperative Service, USDA.

ACTION: Notice of Meeting.

SUMMARY: The Agency will hold a roundtable meeting on Wednesday, June 5, 2013, to discuss the Rural Business-Cooperative Service's relending programs. The primary purpose of this roundtable is to discuss recent enhancements to the Intermediary Relending Program (IRP) and fiscal year 2013 funding levels and application procedures.

DATES: The meeting will be held on Wednesday, June 5, 2013, at 1:00 p.m. EDT. To register, please email Deidra Garris at *Deidra.garris@wdc.usda.gov*.

ADDRESSES: The meeting will be held at 1:00 p.m. EDT on June 5, 2013, at the USDA Graduate School located at 600 Maryland Avenue SW., Washington, DC 20024–2520.

FOR FURTHER INFORMATION CONTACT: Mark Brodziski, Director, Specialty Program Division, USDA, Rural Development, Rural Business—Cooperative Service, Room 4206, South Agriculture Building, STOP 3226, 1400 Independence Avenue SW., Washington, DC 20250–3225, Telephone: (202) 720–1394, email: *Mark.Brodziski@wdc.usda.gov*.

SUPPLEMENTARY INFORMATION:

Meeting Registration. Anyone interested in the Agency's relending programs is encouraged to attend the meeting. Although registration is encouraged, anyone may attend without pre-registering. Walk-ins will be accommodated to the extent that space permits. To register email Deidra Garris at *Deidra.garris@wdc.usda.gov*.

Other information. Participants who need a sign language interpreter or other special accommodations should contact Mark Brodziski as identified in the **FOR FURTHER INFORMATION CONTACT** section of this Notice.

Non-Discrimination Statement

USDA prohibits discrimination in all its programs and activities on the basis of race, color, national origin, age, disability, and where applicable, sex, marital status, familial status, parental status, religion, sexual orientation, genetic information, political beliefs, reprisal, or because all or part of an individual's income is derived from any public assistance program. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at (202) 720–2600 (voice and TDD).

To file a complaint of discrimination, write to USDA, Director, Office of Adjudication and Compliance, 1400 Independence Avenue SW., Washington, DC 20250–9410, or call toll-free at (800) 795–3272 (voice) or (202) 720–6382 (TDD). USDA is an equal opportunity provider, employer, and lender.

Dated: May 10, 2013.

Lillian Salerno,

Administrator, Rural Business—Cooperative Service.

[FR Doc. 2013–12867 Filed 6–3–13; 8:45 am]

BILLING CODE 3410–XY–P

DEPARTMENT OF AGRICULTURE

Rural Utilities Service

Announcement of Grant and Loan Application Deadlines and Funding Levels

AGENCY: Rural Utilities Service, USDA.

ACTION: Notice of funding availability and solicitation of applications.

SUMMARY: The Rural Utilities Service (RUS) announces its Revolving Fund Program (RFP) application window for Fiscal Year (FY) 2013. In addition to announcing the application window, RUS announces the available funding of $923,686 and maximum amounts for RFP competitive grants for the fiscal year.

The RFP is authorized under section 306(a)(2)(B) of the Consolidated Farm and Rural Development Act (Con Act), 7 U.S.C. 1926 (a)(2)(B). Under the RFP, qualified private, non-profit organizations receive RFP grant funds to establish a lending program for eligible entities. Eligible entities for the revolving loan fund will be the same entities eligible, under paragraph 1 or 2 of Section 306(a) of the Con Act, 7 U.S.C. 1926(1) or (2), to obtain a loan, loan guarantee, or grant from the RUS Water, Waste Disposal and Wastewater loan and grant programs.

DATES: You may submit completed applications for grants on paper or electronically according to the following deadlines:

- Paper copies must be postmarked and mailed, shipped, or sent overnight no later than July 5, 2013 to be eligible for FY 2013 grant funding. Late or incomplete applications will not be eligible for FY 2013 grant funding.
- Electronic copies must be received by July 5, 2013 to be eligible for FY 2013 grant funding. Late or incomplete applications will not be eligible for FY 2013 grant funding.

ADDRESSES: You may obtain application guides and materials for the RFP program at the Water and Environmental Programs (WEP) Web site: *http://www.rurdev.usda.gov/UWP-revolvingfund.html.* You may also request application guides and materials by contacting Joyce M. Taylor at (202) 720–0499.

Submit completed paper applications for RFP grants to the Rural Utilities Service, U.S. Department of Agriculture, 1400 Independence Ave. SW., Room 2233, STOP 1570, Washington, DC 20250–1570. Applications should be marked Attention: Joyce M. Taylor, Water and Environmental Programs.

Submit electronic grant applications at *http://www.grants.gov* (*Grants.gov*) and follow the instructions you find on that Web site.

FOR FURTHER INFORMATION CONTACT: Joyce M. Taylor, Community Programs Specialist, Water Programs Division, U.S. Department of Agriculture, Rural Utilities Service, STOP 1570, Room 2233–S, 1400 Independence Ave. SW., Washington, DC 20250–1570; telephone: (202) 720–0499, fax: (202) 690–0649.

SUPPLEMENTARY INFORMATION:

Overview

Federal Agency: Rural Utilities Service (RUS).

Funding Opportunity Title: Grant Program to Establish a Fund for Financing Water and Wastewater Projects (Revolving Fund Program (RFP)).

Announcement Type: Funding Level Announcement, and Solicitation of Applications.

Catalog of Federal Domestic Assistance (CFDA) Number: 10.864.

Due Date for Applications: Applications must be mailed, shipped or submitted electronically through Grants.gov no later than July 5, 2013 to be eligible for FY 2013 grant funding.

Items in Supplementary Information

I. Funding Opportunity: Brief introduction to the RFP.

II. Award Information: Available funds, maximum amounts $923,686.

III. Eligibility Information: Who is eligible, what kinds of projects are eligible, what criteria determine basic eligibility.

IV. Application and Submission Information: Where to get application materials, what constitutes a completed application, how and where to submit applications, deadlines, items that are eligible.

V. Application Review Information: Considerations and preferences, scoring criteria, review standards, selection information.

VI. Award Administration Information: Award notice information, award recipient reporting requirements.

VII. Agency Contacts: Web, phone, fax, email, contact name.

I. Funding Opportunity

Drinking water systems are basic and vital to both health and economic development. With dependable water facilities, rural communities can attract families and businesses that will invest in the community and improve the quality of life for all residents. Without dependable water facilities, the communities cannot sustain economic development.

RUS provides financial and technical assistance to help communities bring safe drinking water and sanitary, environmentally sound waste disposal facilities to rural Americans. It supports the sound development of rural communities and the growth of our economy without endangering the environment.

The Revolving Fund Program (RFP) has been established to assist communities with water or wastewater systems. Qualified private, non-profit organizations, who are selected for funding, will receive RFP grant funds to establish a lending program for eligible entities. Eligible entities for the revolving loan fund will be the same entities eligible to obtain a loan, loan guarantee, or grant from the Water and Waste Disposal loan and grant programs administered by RUS, under 7 U.S.C. 1926(a)(1) and (2). As grant recipients, the non-profit organizations will set up a revolving loan fund to provide loans to finance predevelopment costs of water or wastewater projects, or short-term small capital projects not part of the regular operation and maintenance of current water and wastewater systems. The amount of financing to an eligible entity shall not exceed $100,000.00 and shall be repaid in a term not to exceed 10 years. The rate shall be determined in the approved grant work plan.

II. Award Information

Available funds: Rural Development is making available $923,686 for competitive grants in FY 2013.

III. Eligibility Information

A. Who is eligible to apply?

An applicant is eligible to apply for the RFP grant if it:

1. Is a private, non-profit organization;

2. Is legally established and located within one of the following:

(a) A state within the United States;

(b) The District of Columbia;

(c) The Commonwealth of Puerto Rico; or

(d) A United States territory;

3. Has the legal capacity and authority to carry out the grant purpose;

4. Has a proven record of successfully operating a revolving loan fund to rural areas;

5. Has capitalization acceptable to the Agency, and is composed of at least 51 percent of the outstanding interest or membership being citizens of the United States or individuals who reside in the United States after being legally admitted for permanent residence;

6. Has no delinquent debt to the Federal Government or no outstanding judgments to repay a Federal debt;

7. Demonstrates that it possesses the financial, technical, and managerial

capability to comply with Federal and State laws and requirements;

8. Corporations that have been convicted of a felony (or had an officer or agency acting on behalf of the corporation convicted of a felony) within the past 24 months are not eligible. Any Corporation that has any unpaid federal tax liability that has been assessed, for which all judicial and administrative remedies have been exhausted or have lapsed, and that is not being paid in a timely manner pursuant to an agreement with the authority responsible for collecting the tax liability is not eligible.

B. What are the basic eligibility requirements for a project?

1. The following activities are authorized under the RFP statute:

(a) Grant funds must be used to capitalize a revolving fund program for the purpose of providing direct loan financing to eligible entities for pre-development costs associated with proposed or with existing water and wastewater systems, or,

(b) Short-term costs incurred for equipment replacement, small-scale extension of services, or other small capital projects that are not part of the regular operations and maintenance activities of existing water and wastewater systems.

2. Grant funds may not be used to pay any of the following:

(a) Payment of the Grant Recipient's administrative costs or expenses, or,

(b) Delinquent debt owed to the Federal Government.

IV. Application and Submission Information

A. *The grant application guide, copies of necessary forms and samples, and the RFP regulation are available from these sources:*

1. The Internet::*http://www.rurdev.usda.gov/UWP-revolvingfund.html* or *http://www.grants.gov*.

2. For paper copies of these materials, you may call (202) 720–9589.

B. *You may file an application in either paper or electronic format.*

Whether you file a paper or an electronic application, you will need a DUNS number.

1. DUNS Number.

DUNS Number. The applicant for a grant must supply a Dun and Bradstreet Data Universal Numbering System (DUNS) number as part of an application. The Standard Form 424 (SF–424) contains a field for the DUNS number. The applicant can obtain the DUNS number free of charge by calling Dun and Bradstreet. Please see *http://fedgov.dnb.com/webform* for more information on how to obtain a DUNS number or how to verify your organization's number. Prior to submitting an application, the applicant must register in the System for Award Management (SAM) (formerly Central Contractor Registry, (CCR)). Applicants may register for the SAM at *https://www.sam.gov/portal/public/SAM/*. The SAM registration must remain active with current information at all times while RUS is considering an application or while a Federal Grant Award or loan is active. To maintain the registration in the SAM database the applicant must review and update the information in the SAM database annually from date of initial registration or from the date of the last update. The applicant must ensure that the information in the database is current, accurate, and complete.

2. Applications submitted by paper:

(a) Send or deliver paper applications by the U.S. Postal Service (USPS) or courier delivery services to: Water and Environmental Programs, Rural Utilities Service, 1400 Independence Avenue SW., Attention: Joyce M. Taylor, Mail STOP 1570, Room 2233–S, Washington, DC, 20250–1570.

(b) For paper applications mail or ensure delivery of an original paper application (no stamped, photocopied, or initialed signatures) and two copies by the deadline date. The application and any materials sent with it become Federal records by law and cannot be returned to you.

3. Electronically submitted applications:

(a) Applications will not be accepted by fax or electronic mail.

(b) Electronic applications for grants will be accepted if submitted through Grants.gov at *http://www.grants.gov*.

(c) Applicants must preregister successfully with Grants.gov to use the electronic applications option. Application information may be downloaded from Grants.gov without preregistration.

(d) Applicants who apply through Grants.gov should submit their electronic applications before the deadline.

(e) Grants.gov contains full instructions on all required passwords, credentialing, and software. Follow the instructions at Grants.gov for registering and submitting an electronic application.

(f) Grants.gov has two preregistration requirements: A DUNS number and an active registration in the SAM. See Items 1 above for instructions on obtaining a DUNS number and registering in the SAM.

C. *A complete application must meet the following requirements:*

1. To be considered for support, you must be an eligible entity and must submit a complete application by the deadline date. You should consult the cost principles and general administrative requirements for grants pertaining to their organizational type in order to prepare the budget and complete other parts of the application. You also must demonstrate compliance (or intent to comply), through certification or other means, with a number of public policy requirements.

2. Applicants must complete and submit the following forms to apply for a RFP grant:

(a) Standard Form 424, ''Application for Federal Assistance''

(b) Standard Form 424A, ''Budget Information—Non-Construction Programs''

(c) Standard Form 424B, ''Assurances—Non-Construction Programs''

(d) Standard Form LLL, ''Disclosure of Lobbying Activity''

(e) Form RD 400–1, ''Equal Opportunity Agreement''

(f) Form RD 400–4, ''Assurance Agreement (Under Title VI, Civil Rights Act of 1964)

3. The project proposal should outline the project in sufficient detail to provide a reader with a complete understanding of how the loan program will work. Explain what you will accomplish by lending funds to eligible entities. Demonstrate the feasibility of the proposed loan program in meeting the objectives of this grant program. The proposal should cover the following elements:

(a) Present a brief project overview. Explain the purpose of the project, how it relates to RUS's purposes, how you will carry out the project, what the project will produce, and who will direct it.

(b) Describe why the project is necessary. Demonstrate that eligible entities need loan funds. Quantify the number of prospective borrowers or provide statistical or narrative evidence that a sufficient number of borrowers will exist to justify the grant award. Describe the service area. Address community needs.

(c) Clearly state your project goals. Your objectives should clearly describe the goals and be concrete and specific enough to be quantitative or observable. They should also be feasible and relate to the purpose of the loan program.

(d) The narrative should cover in more detail the items briefly described in the Project Summary. It should establish the basis for any claims that

you have substantial expertise in promoting the safe and productive use of revolving funds. In describing what the project will achieve, you should tell the reader if it also will have broader influence. The narrative should address the following points:

(1) Document your ability to administer and service a revolving fund in accordance with the provisions of 7 CFR Part 1783.

(2) Document your ability to commit financial resources to establish the RFP with funds your organization controls. This documentation should describe the sources of funds other than the RFP grant that will be used to pay your operational costs and provide financial assistance for projects.

(3) Demonstrate that you have secured commitments of significant financial support from other funding sources, if appropriate.

(4) List the fees and charges that borrowers will be assessed.

(e) The work plan must describe the tasks and activities that will be accomplished with available resources during the grant period. It must show the work you plan to do to achieve the anticipated outcomes, goals, and objectives set out for the RFP. The plan must:

(1) Describe the work to be performed by each person.

(2) Give a schedule or timetable of work to be done.

(3) Show evidence of previous experience with the techniques to be used or their successful use by others.

(4) Outline the loan program to include the following: specific loan purposes, a loan application process; priorities, borrower eligibility criteria, limitations, fees, interest rates, terms, and collateral requirements.

(5) Provide a marketing plan.

(6) Explain the mechanics of how you will transfer loan funds to the borrowers.

(7) Describe follow-up or continuing activities that should occur after project completion such as monitoring and reporting borrowers' accomplishments.

(8) Describe how the results will be evaluated. The evaluation criteria should be in line with the project objectives.

(9) List all personnel responsible for administering this program along with a statement of their qualifications and experience.

(f) The written justification for projected costs should explain how budget figures were determined for each category. It should indicate which costs are to be covered by grant funds and which costs will be met by your organization or other organizations. The justification should account for all expenditures discussed in the narrative. It should reflect appropriate cost-sharing contributions. The budget justification should explain the budget and accounting system proposed or in place. The administrative costs for operating the budget should be expressed as a percentage of the overall budget. The budget justification should provide specific budget figures, rounding off figures to the nearest dollar. Applicants should consult OMB Circular A–122: ''Cost Principles for Non-Profit Organizations'' for information about appropriate costs for each budget category.

(g) In addition to completing the standard application forms, you must submit:

1. Supplementary material that demonstrate that your organization is legally recognized under state or Tribal and Federal law. Satisfactory documentation includes, but is not limited to, certificates from the Secretary of State, or copies of state statutes or laws establishing your organization. Letters from the IRS awarding tax-exempt status are not considered adequate evidence.

2. A certified list of directors and officers with their respective terms.

3. Evidence of tax exempt status from the IRS.

4. Debarment and suspension information required in accordance with 7 CFR, part 3017, subpart 3017.335, if it applies. The section heading is ''What information must I provide before entering into a covered transaction with the Department of Agriculture?'' It is part of the Department of Agriculture's rules on Government-wide Debarment and Suspension.

5. All of your organization's known workplaces by including the actual address of buildings (or parts of buildings) or other sites where work under the award takes place. Workplace identification is required under the drug-free workplace requirements in accordance with 7 CFR part 3021, subpart 3021.230. The section heading is ''How and when must I identify workplaces?'' It is part of the Department of Agriculture's rules on Government-wide Requirements for Drug-Free Workplace (Financial Assistance).

6. The most recent audit of your organization.

7. The following financial statements:

i. A pro forma balance sheet at start-up and for at least three additional years; Balance sheets, income statements, and cash flow statements for the last three years.

ii. If your organization has been formed less than three years, the financial statements should be submitted for the periods from inception to the present. Projected income and cash flow statements for at least three years supported by a list of assumptions showing the basis for the projections. The projected income statement and balance sheet must include one set of projections that shows the revolving loan fund only and a separate set of projections that shows your organization's total operations.

8. Additional information to support and describe your plan for achieving the grant objectives. The information may be regarded as essential for understanding and evaluating the project and may be found in letters of support, resolutions, policies, and other relevant documents. The supplements may be presented in appendices to the proposal.

V. Application Review Information

A. Within 30 days of receiving your application, RUS will send you a letter of acknowledgment. Your application will be reviewed for completeness to determine if you included all of the items required. If your application is incomplete or ineligible, RUS will return it to you with an explanation.

B. A review team, composed of at least two members, will evaluate all applications and proposals. They will make overall recommendations based on factors such as eligibility, application completeness, and conformity to application requirements. They will score the applications based on criteria in the next section.

C. All applications that are complete and eligible will be ranked competitively based on the following scoring criteria:

(1) Degree of expertise and successful experience in making and servicing commercial loans, with a successful record, for the following number of full years:

(a) At least 1 but less than 3 years—5 points

(b) At least 3 but less than 5 years—10 points

(c) At least 5 but less than 10 years—20 points

(d) 10 or more years—30 points

(2) Extent to which the work plan demonstrates a well thought out, comprehensive approach to accomplishing the objectives of this part, clearly defines who will be served by the project, clearly articulates the problem/issues to be addressed, identifies the service area to be covered by the RFP loans and appears likely to be sustainable; Up to 40 points

(3) Percentage of applicant contributions. Points allowed under this paragraph will be based on written evidence of the availability of funds from sources other than the proceeds of an RFP grant to pay part of the cost of a loan recipient's project. In-kind contributions will not be considered. Funds from other sources as a percentage of the RFP grant and points corresponding to such percentages are as follows:

(a) Less than 20%—ineligible
(b) At least 20% but less than 50%—10 points
(c) 50% or more—20 points

(4) Extent to which the goals and objectives are clearly defined, tied to the work plan, and are measurable; Up to 15 points

(5) Lowest ratio of projected administrative expenses to loans advanced; Up to 10 points

(6) The evaluation methods for considering loan applications and making RFP loans are specific to the program, clearly defined, measurable, and are consistent with program outcomes; Up to 20 points

(7) Administrator's discretion points may be awarded based on the following:

Emphasis on High Poverty Areas. To the maximum extent possible, high attention should be made on directing loans to rural communities and rural areas with the lowest incomes with emphasis to areas where at least 45% of children qualify for the National School Lunch Program. This emphasis will support Rural Development's goal of providing 15% of its funding by 2015 to these areas of need.

Factors include:

1. That loans are directed to Colonias or Substantially Underserved Trust Areas;

2. That loans are directed to the smallest communities with the lowest incomes emphasizing areas where school district data show that at least 45% of the children qualify for the National School Lunch Program; and/or

3. That loans are directed toward sustainable rural water and/or wastewater utility systems; Up to 10 points.

VI. Award Administration Information

A. RUS will rank all qualifying applications by their final score. Applications will be selected for funding, based on the highest scores and the availability of funding for RFP grants. Each applicant will be notified in writing of the score its application receives.

B. In making its decision about your application, RUS may determine that your application is:

1. Eligible and selected for funding,

2. Eligible but offered fewer funds than requested,

3. Eligible but not selected for funding, or

4. Ineligible for the grant.

C. In accordance with 7 CFR Part 1900, subpart B, you generally have the right to appeal adverse decisions. Some adverse decisions cannot be appealed. For example, if you are denied RUS funding due to a lack of funds available for the grant program, this decision cannot be appealed. However, you may make a request to the National Appeals Division (NAD) to review the accuracy of our finding that the decision cannot be appealed. The appeal must be in writing and filed at the appropriate Regional Office, which can be found at *http://www.nad.usda.gov/or* by calling (703) 305–1166.

D. Applicants selected for funding will complete a grant agreement, which outlines the terms and conditions of the grant award.

E. Grantees will be reimbursed as follows:

1. SF–270, ''Request for Advance or Reimbursement,'' will be completed by the grantee and submitted to either the State or National Office not more frequently than monthly.

2. Upon receipt of a properly completed SF–270, the funds will be requested through the field office terminal system. Ordinarily, payment will be made within 30 days after receipt of a proper request for reimbursement.

3. Grantees are encouraged to use women- and minority-owned banks (a bank which is owned at least 50 percent by women or minority group members) for the deposit and disbursement of funds.

F. Any change in the scope of the project, budget adjustments of more than 10 percent of the total budget, or any other significant change in the project must be reported to and approved by the approval official by written amendment to the grant agreement. Any change not approved may be cause for termination of the grant.

G. Grantees shall constantly monitor performance to ensure that time schedules are being met, projected work by time periods is being accomplished, and other performance objectives are being achieved. The Grantee will provide project reports as follows:

1. SF–269, ''Financial Status Report (short form),'' and a project performance activity report will be required of all grantees on a quarterly basis, due 30 days after the end of each quarter.

2. A final project performance report will be required with the last SF–269 due 90 days after the end of the last quarter in which the project is completed. The final report may serve as the last quarterly report.

3. All multi-State grantees are to submit an original of each report to the National Office. Grantees serving only one State are to submit an original of each report to the State Office. The project performance reports should detail, preferably in a narrative format, activities that have transpired for the specific time period.

H. The grantee will provide an audit report or financial statements as follows:

1. Grantees expending $500,000 or more Federal funds per fiscal year will submit an audit conducted in accordance with OMB Circular A–133. The audit will be submitted within 9 months after the grantee's fiscal year. Additional audits may be required if the project period covers more than one fiscal year.

2. Grantees expending less than $500,000 will provide annual financial statements covering the grant period, consisting of the organization's statement of income and expense and balance sheet signed by an appropriate official of the organization. Financial statements will be submitted within 90 days after the grantee's fiscal year.

3. Recipient and Subrecipient Reporting.

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 part 170, § 170.110(b). The reporting requirements under the Transparency Act pursuant to 2 CFR part 170 are as follows:

a. 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. Please note that currently underway is a consolidation of eight federal procurement systems, including the Sub-award Reporting System (FSRS), into one system, the System for Award Management (SAM). As a result the FSRS will soon be consolidated into and accessed through *https://www.sam.gov/portal/public/SAM/*.

b. 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 *https://www.sam.gov/portal/public/SAM/by* the end of the month following the month in which the award was made.

c. 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.

VII. Agency Contacts

A. *Web site: http://www.usda.gov/rus/water.* The Rural Utilities Service Web site maintains up-to-date resources and contact information for the RFP.

B. *Phone*: (202) 720–9589.

C. *Fax:* (202) 690–0649.

D. *Email: mailto:JoyceM.Taylor@wdc.usda.gov.*

E. *Main point of contact:* Joyce M. Taylor, Community Programs Specialist, Water and Environmental Programs, Water Programs Division, Rural Utilities Service, U.S. Department of Agriculture.

Dated: May 10, 2013.

John Charles Padalino,

Acting Administrator, Rural Utilities Service

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[FR Doc. 2013–13069 Filed 6–3–13; 8:45 am]

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DEPARTMENT OF COMMERCE

Submission for OMB Review; Comment Request

The Department of Commerce will submit to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Agency: National Telecommunications and Information Administration (NTIA).

Title: State and Local Implementation Grant Program Application Requirements.

OMB Control Number: 0660–0038.

Form Number(s): None.

Type of Request: Regular submission (extension of a currently approved information collection).

Number of Respondents: 56.

Average Hours per Response: Application, 10 hours; Quarterly reports, 4 hours.

Burden Hours: 1,456.

Needs and Uses: The Middle Class Tax Relief and Job Creation Act of 2012 (Act, Pub. L. 112–96, 126 Stat. 156 (2012).) was signed by the President on February 22, 2012. The Act meets a long-standing priority of the Administration, as well as a critical national infrastructure need, to create a single, nationwide interoperable public safety broadband network (PSBN) that will, for the first time, allow police officers, fire fighters, emergency medical service professionals, and other public safety officials to effectively communicate with each other across agencies and jurisdictions. Public safety workers have long been hindered in their ability to respond in a crisis situation because of incompatible communications networks and often outdated communications equipment.

The Act establishes the First Responder Network Authority (FirstNet) as an independent authority within NTIA and authorizes it to take all actions necessary to ensure the design, construction, and operation of a nationwide PSBN, based on a single, national network architecture.

The Act also charges NTIA with establishing a grant program to assist state, regional, tribal, and local jurisdictions with identifying, planning, and implementing the most efficient and effective means to use and integrate the infrastructure, equipment, and other architecture associated with the nationwide PSBN to satisfy the wireless broadband and data services needs of their jurisdictions. NTIA will use the collection of information to ensure that States applying for SLIGP grants meet eligibility and programmatic requirements as well as to monitor and evaluate how SLIGP recipients are achieving the core purposes of the program established by the Act.

NTIA sought emergency review of the SLIGP request to begin the application process in the first quarter of calendar year 2013 and awarding grants was estimated no later than June 1, 2013. In order to meet this deadline, NTIA requested clearance for the application and reporting requirements by December 31, 2012 in order to: (1) Ensure applicants have reasonable notice of the federal funding opportunity; (2) provide applicants sufficient time to complete and submit their applications; and (3) allow NTIA adequate time to properly execute the application review process and make the awards.

This request was approved on January 7, 2013; approval ends on July 31, 2013. The publication of this notice allows NTIA to begin the process to extend the approval for the standard three years.

Affected Public: Business or other for-profit organizations.

Frequency: Annually and quarterly.

Respondent's Obligation:

Copies of the above information collection proposal can be obtained by calling or writing Jennifer Jessup, Departmental Paperwork Clearance Officer, (202) 482–0336, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *jjessup@doc.gov*).

Written comments and recommendations for the proposed information collection should be sent within 30 days of the publication to Nicholas Fraser, OMB Desk Officer, FAX number (202) 395–5167, or via the Internet at *Nicholas_A._Fraser@omb.eop.gov.*

Dated: May 29, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–13118 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–06–P

DEPARTMENT OF COMMERCE

[Docket Number: 120530127–2127–02]

Tribal Consultation and Coordination Policy for the U.S. Department of Commerce

AGENCY: Department of Commerce.

ACTION: Notice of Final Policy Statement.

SUMMARY: In compliance with Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments'' (November 6, 2000), the Department of Commerce (Department) adopts the following Tribal Consultation and Coordination policy statement. This policy establishes the manner in which the Department works with federally-recognized Indian tribes when developing Department policies that have tribal implications. The policy reaffirms the unique government-to-government relationship that exists between Indian tribes and the Department. The Department continues its commitment to support tribes in the development of strong and stable economies able to participate in today's national and global marketplace. The notice also summarizes comments received on the draft Tribal Consultation and Coordination policy statement published in the **Federal Register** on July 3, 2012 (77 FR 39464) and the Department's response to these comments.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or an electronic copy of the final policy should be directed to Dee Alexander,

Senior Advisor on Native American Affairs, Office of Legislative and Intergovernmental Affairs, U.S. Department of Commerce Room 5422, 1401 Constitution Ave. NW., Washington, DC 20233, telephone (202) 482–0789.

SUPPLEMENTARY INFORMATION:

Background

E.O. 13175, ''requires Federal agencies to have an accountable process to ensure meaningful and timely input by tribal officials in developing policies that have tribal implications, and are responsible for strengthening the government-to-government relationship between the United States and Indian tribes.''

On November 5, 2009, President Barack Obama reaffirmed the government-to-government relationship between the Federal Government and Indian tribal governments in a White House memorandum. Among other things, this memorandum acknowledges that Indian tribes exercise inherent sovereign powers over their members and territory. The memorandum also acknowledges that the United States continues to work with Indian tribes on a government-to-government basis to address issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights.

This final policy statement is intended only for internal management purposes and does not create any right, benefit, or responsibility enforceable against the United States, its agencies, entities, or instrumentalities, its officers or employees, or any other person. The Department believes this policy responds to President Obama's memorandum and builds upon and expands the principles expressed in the Department's previous policy, ''American Indian and Alaska Native Policy of the Department of Commerce,'' promulgated on March 30, 1995. The Policy incorporates the requirements of E.O. No. 13175, and the Office of Management and Budget Memorandum, ''Guidance for Implementing E.O. 13175, 'Consultation and Coordination with Indian Tribal Governments.'''

Summary of Comments Received in Response to the Draft Consultation and Coordination Policy

On July 3, 2012, the Department published a notice and request for comments on a draft ''Consultation and Coordination Policy for the U.S. Department of Commerce'' policy statement in the **Federal Register** (77 FR 39464). The Department received letters from 15 different entities, with approximately 48 unique comments in response to the draft policy statement. A summary of comments received and the Department's responses to these comments are presented below. The Department also received seven comments and recommendations not specific to the policy principles. The notice also includes comments and the Department's responses to those comments received from two national webinars held on September 12, 2012 and September 19, 2012.

General Comments and Recommendations

Comment 1: The broad statement in the background section of the July 3 notice, that the policy ''may not apply to a particular situation based upon the circumstances,'' should be replaced with a narrow description of the situations to which the policy would apply.

Response: Because the statement was included in the general background information in the **Federal Register** notice, it is not a part of the Department's policy request for comments. Therefore, no changes to the policy have been made in response to this comment.

Comment 2: Include in the final tribal consultation policy and supporting information a (1) description of efforts made to coordinate and consult with tribal officials on the draft policy; (2) complete summary of public comments, especially from tribal members; and (3) description of how the Department has addressed or incorporated comments into the final policy.

Response: The Department included the requested information in this notice.

Comment 3: The comprehensive Consultation and Coordination Policy should include overseeing consultation efforts between state, tribal and local entities and independent entities, such as the First Responder Network Authority (FirstNet).

Response: The Department will not implement this policy in such a manner as to conflict with statutory requirements. The Middle Class Tax Relief Act and Job Creation Act of 2012, which establishes FirstNet, describes a statutory method for consultation between FirstNet and State, local, and tribal entities. The Department, in coordination with FirstNet, will determine the policy's applicability to other similar authorities as necessary.

Comment 4: Clarify the Department's role in coordinating with other federal agencies, and increase interagency coordination and collaboration to increase government efficiency and accountability.

Response: The Department will determine the scope and timing of any required interagency coordination as circumstances indicate.

Comment 5: Amend the policy to apply to Fishery Management Councils.

Response: Council meetings are a critical part of the fishery management planning process and are the first and earliest point of development for fishery management policy. It is most beneficial to Tribes, Councils and National Oceanic and Atmospheric Administration (NOAA) if there is early and active participation by Indian Tribes and Alaska Natives in these fora. NOAA strongly encourages Councils to discuss and work with Tribes to address their concerns while developing fishery conservation and management measures under the Magnuson Stevens Act, (MSA) 16 U.S.C. 1800 et seq. Thus, while it is NOAA's—and not the Councils'—responsibility to consult with federally recognized tribes under E.O. 13175, the Councils' current and future early engagement will facilitate and enhance tribal input into NOAA's rulemaking processes.

Comment 6: The policy should clarify that the Department's agency research activities are subject to the policy.

Response: Research activities conducted by a Department's bureau or agency are subject to this Policy and E.O. 13175 whenever such activities involve actions or policies that have tribal implications. The Department complies with existing statutory and regulatory consultation obligations.

Comment 7: How will the new policy affect the status of existing co-management agreements with the National Marine Fisheries Service (NMFS)?

Response: The new policy has no effect on co-management agreements established under section 119 of the Marine Mammal Protection Act. NMFS will continue to work with Alaska Native organizations under co-management agreements. Such co-management does not constitute, nor is it a substitute for, government-to-government consultation as required by E.O. 13175.

Comments to Section 1: Introduction

Comment 8: Add more language to the Introduction Section of the policy statement that reflects tribal sovereignty and tribes' rights to self-determination and self-government.

Response: The Department adopts the recommendation and has added the sentence to Section 1.01 stating, ''The Department recognizes Indian tribal self-government and supports tribal sovereignty and self-determination.''

Comment 9: Include the term ''on a pre-decisional basis'' in Section 1.01. The term will ensure that the consultation occurs before a policy is changed.

Response: The Department does not adopt this recommendation. The term ''pre-decisional'' is a term of art, and is not appropriate for this policy. The Department adheres to Section 3 of E.O. 13175, which includes the timing of consultation with the Department or its operating units, as stated in Section 7.02 of this policy.

Comment 10: Reference Executive Orders and Secretarial Orders in the Introduction Section of the policy.

Response: The Department refers to E.O. 13175 in Section 1.04 of this final policy. This policy does not refer to Secretarial Orders because the Department has joint Secretarial Orders with the Department of the Interior to implement provisions of the Endangered Species Act which only applies to specific Department components. It is not appropriate to include existing Secretarial Orders as part of this policy.

Comment 11: Include the relevant ''regulations, statutes, Presidential memoranda, and Executive Orders'' in the Introduction section of the policy statement.

Response: The Department adopts this comment and has added the following sentence to the end of Section 1.04: ''This Policy is to be construed consistent with Federal statutes, regulations, Presidential memoranda, Executive Orders, and other relevant Federal legal authorities.''

Comment 12: Substitute the word ''input'' in the first sentence of Section 1.04 with ''participation.''

Response: The Department does not adopt the recommendation. The term ''input'' is consistent with Section 5(a) of E.O. 13175.

Comment 13: Include a new sub-section in the Introduction Section of the policy with the following wording; ''The Department recognizes and respects the diversity of Indian tribes and understands that they are culturally, traditionally, and administratively different. This diversity makes it impossible for any federal agency to make the sole decision regarding whether or in what manner it is appropriate to consult with tribes. The only entities that know enough about individual tribes to make that determination are the tribes themselves. Therefore, consultation can be initiated by either the Tribes or the Department.''

Response: Section 7.01 of this policy provides for consultation initiated by either a Tribe or the Department.

Comments to Section 2: Background

Comment 14: The policy should clarify whether it replaces the 1995 policy. If it does not, then include the 10 enumerated principles and expand the principles in the new policy.

Response: To be clear, this new policy replaces the 1995 policy and builds and expands upon the principles in the 1995 policy, and it incorporates the requirements of E.O. 13175 and Presidential Memorandum, ''Tribal Consultation,'' 2009 Daily Comp. Pres. Docs. 887 (November 5, 2009). The Department also references the *1995 American Indian and Alaska Native Policy of the Department of Commerce* in Section 2.01 of this policy.

Comment 15: Include E.O. 13175's policymaking criteria with explanation of how DOC will apply them when ''formulating and implementing policies that have tribal implications.''

Response: This recommendation is addressed in Section 2.01 of the policy, which incorporates E.O. 13175, Presidential Memorandum, ''Tribal Consultation,'' and the Office of Management and Budget's implementing guidance of July 30, 2010.

Comment 16: Provide additional guidance on the Department's process for determining whether policies have tribal implications, including examples of past Department actions that were subject to consultations. Provide detailed guidance on how the Department will conduct consultations and prepare tribal impact statements for regulations with tribal impacts that impose costs, are not required by legislation, and preempt tribal law.

Response: The Department does not adopt this recommendation. This policy is intended to provide high-level guidance to operating units to implement depending on their circumstances and governing legal authorities. The policy also provides the Department with the necessary flexibility to ensure its consultations are as effective as possible.

Comments to Section 3: Authority

The Department received no comments to Section 3.

Comments to Section 4: Definitions

Comment 17: Amend the definition 4.01, ''Consultation'' to include an accountable process, which enables Tribal officials to participate in Federal decision-making before an agency takes an action, or commits to a decision to consider an action or policy with Tribal implications. Note that consultation is not a single act of communication, but consists of multiple steps which culminate in an outcome that reflects the views, needs and objectives of both Federal and Tribal participants.

Response: The Department does not adopt the recommendation. The definition in this final policy is consistent with E.O. 13175. Section 7 of this policy also addresses the elements of consultation including means of communication, exchange of information, and notice.

Comment 18: Amend the definition of ''Consultation'' to incorporate the following key principles: Consultation is a process which enables the tribes to participate in federal decision making before an agency takes an action, or commits to a decision to consider an action or policy with tribal implications. Consultation is not a single act of communication but rather a process involving multiple steps which culminate in an outcome that reflects the views, needs and objectives of both federal and tribal participants. Consultation may be initiated by tribal governments to discuss and exchange information on a government-to-government basis. Consultation can be formal with established time lines and required publications, or less formal through means such as teleconferencing. Consultation is triggered when the Department considers ''Policies that have tribal implications,'' as that term is defined in E.O. 13175, or when the Department considers proposals for regulations, rulemaking, legislation, guidance, policy formulation or actions that may have a substantial direct effect on one or more tribes, on the relationship between tribes and the federal government, or on the distribution of power and responsibilities between the tribes and federal government.

Response: The Department does not adopt the recommendation. The final policy's definition is consistent with E.O. 13175; moreover, Section 7 of this policy addresses the elements of consultation including means of communication, exchange of information, and notice.

Comment 19: Add to the definition of ''consultation'' the term ''actions'' in addition to ''policies.''

Response: The Department does not adopt the recommendation. The term ''policies that have tribal implications'' is the term for actions requiring the procedures described in the E.O. 13175 and therefore, this Department policy implements E.O. 13175.

Comment 20: The policy should include Alaska Native Corporation in the definition of ''Indian Tribe,'' or adopt a parallel formal consultation policy for Alaska Native Corporations,

per the Congressional direction to Federal Agencies in the Consolidated Appropriations Act of 2004, Pub. L. 108–199, Div. H, Section 161, which is codified as a note to 25 U.S.C. § 450.

Response: The Department has added the following definition for Alaska Native Corporations and will include ANCs in the policy consistent with 25 U.S.C. § 450 note on ''Consultation with Alaska Native Corporations: 07. *''Alaska Native Corporation,'' pursuant to 43 U.S.C. §§ 1602 et seq., any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act.*

The Department also added a new Section 8. ''Consultation with Alaska Native Corporations,'' to the Policy, which reads as follows:

01. In 2004, through two consolidated appropriations acts, Congress required federal agencies to consult with Alaska Native Corporations on the same basis as federally recognized Indian Tribes under E.O. 13175 (Public Law 108–199, 118 Stat. 452, as amended by Pub. L. 108–447, 118 Stat. 3267).

02. The Department interprets the term ''Alaska Native Corporations'' in this requirement to mean ''Native Corporations'' as that term is defined under the Alaska Native Claims Settlement Act (ANCSA) of 1971. Congress created regional, village, and urban corporations to manage the lands, funds, and other assets conveyed to Alaska Natives by ANCSA. There are 13 regional corporations and over 200 village corporations in Alaska. The village corporations generally represent shareholders in villages associated with the 229 federally recognized tribes in Alaska. Most Alaska Native Corporation shareholders also are members of a federally recognized tribe in Alaska.

03. The Department will implement the requirement to consult with Alaska Native Corporations in a manner as close as possible to consultations with federally recognized tribes in Alaska, while recognizing the important differences between sovereign tribal governments and the federal trust responsibility to those tribal governments and corporations obligated to maximize financial returns to shareholders. Alaska Native Corporations were established to operate as for-profit enterprises, and may not necessarily represent the same perspective or interests as the tribes. Consultation and coordination with the corporations will follow the same process as described in this Policy for tribes, with the following exceptions:

a. Consultations with Alaska Native Corporations will occur on a ''government-to-corporation'' basis, rather than ''government-to-government'' basis to reflect the distinction between sovereign governments and corporate entities.

b. Government-to-corporation consultations will occur with appropriate adjustments given the unique status, structure, and interests of Alaska Native Corporations.

Comment 21: Clarify whether the policy applies to the Office of the Secretary as well as to its operating units, and identify the organizations to which the policy does not apply. Also, require the implementation of procedures at each bureau and agency level to allow the bureaus/agencies to determine when a policy has tribal implications, and allow the Tribes to consult on the various agency-level policies.

Response: The Department does not adopt the recommendation. This policy is intended to provide high-level guidance to the Department's bureaus to allow them to implement the policy depending on their circumstances and governing legal authorities. Section 6 of the policy allows, but does not require, the development of operating level, bureau and agency, procedures. The policy applies to the Office of the Secretary, as implemented by the Tribal Consultation Official, see Section 5.01.

Comment 22: On definition 4.04, ''policies that have tribal implications'':

a. Tribal consultation officials should interpret the term ''policies that have tribal implications'' broadly so that the term applies to more than just regulations and legislative action. The policy should clarify that the phrase in section 7.02.a ''other policy statements and actions'' is intended to apply broadly to include all written statements of policy or actions that have the potential to affect tribal rights and interests.

b. Tribal consultations should also be triggered by any Department action that affects American Indian, Alaska Native and Native American tribes, not just formal Department policies.

c. Include language about the timing of consultation. Amend the policy to include the following or similar language from the 1995 policy: ''work with tribal governments prior to implementing any action.''

Response: The subject phrase is a term defined in E.O. 13175 and applies to ''actions'' as well as policies and regulations.

Comment 23: Amend definition 4.05 ''Tribal Officials,'' to read as follows: '''Tribal officials' means an elected or duly appointed Tribal leader or official delegate, designated in writing by a Tribe, or a duly authorized representative of an authorized intertribal organization.'' Also, include official delegates who are designated as such by their tribes to ensure that individuals who have been authorized to consult on behalf of their tribe will be accorded the same status as elected or duly appointed officials.

Response: The Department used the definition from E.O. 13175 for ''Tribal officials,'' which includes ''duly appointed officials,'' meaning that a delegated representative of a tribal government will be recognized as an appropriate ''tribal official.''

Comments to Section 5: Roles and Responsibilities

Comment 24: The tribal consultation official should develop protocols, SOPs and, as appropriate, a Memorandum of Understanding (MOU) for formal and informal consultations. These documents would establish the means for providing and exchanging information between the Department and tribal governments.

Response: The Department does not adopt this recommendation. This policy is intended to provide high-level guidance to the Department's bureaus and agencies to allow them to implement the policy depending on their circumstances and governing legal authorities. The Department intends that operating units address such procedures in their handbooks or other guidance as appropriate.

Comment 25: The Department should encourage each of its bureaus and agencies to allocate funding toward Tribal consultation activities, including consultation itself, staff training, and other associated activities.

Response: The Department does not adopt the recommendation. The Department will encourage the operating units to work within existing resources to comply with E.O. 13175.

Comment 26: Tribal officials situated at headquarters are poorly positioned to implement the meaningful and timely consultation process anticipated by E.O. 13175. National consultation officials have little experience on the regional issues and insufficient time to focus on the issues to effectively monitor and coordinate. A regional consultation official would have more regular contact with the tribes and would be able to screen issues and provide advance notice of impending issues. Therefore, change Section 5.02.b to require the designation of consultation coordinators at the regional level, particularly within operating units such as NOAA. Also,

give the tribes significant input into the selection process for the designated national and regional consultation officials.

Response: The Department does not adopt the recommendation. Section 5.02.b of this policy allows operating units to delegate authority.

Comment 27: The Department's tribal consultation official or designee should certify to the Office of Management and Budget (OMB) that draft final regulations or proposed regulations with tribal implications comply with EO 13175. A tribal consultation summary report is part of the required annual update to OMB that each agency must provide.

Response: The Department added a paragraph under Section 5.01; the new paragraph reads: *d. The Tribal Consultation Official has the responsibility for submitting an annual report to OMB pursuant section 7(a) of E.O. 13175.*

Comment 28: Make it clear how, and when, each operating unit designates officials to consult with the tribes. Explain how tribes can open lines of communication with the designated officials.

Response: Pursuant to Section 5.02.a of the policy, each operating unit is responsible for designating an official at the operating unit level and for the timing of that designation.

Comment 29: Clarify the term ''periodic dialogue'' in Section 5.01.c, or replace that phrase with the term ''meaningful dialogue'' or ''biannually'' to give more guidance on what the term means in the context of the policy.

Response: The Department does not adopt the recommendation. The phrase ''periodic dialogue'' is intended to allow flexibility in the regular review of this policy's implementation.

Comment 30: Section 5.02.a. of the Policy states that the head of each operating unit within the Department will designate an official to ensure compliance with the Policy. As written, there is no timeframe for this designation in the policy. Institute a timeframe for this process. Additionally, some units already have an experienced designated official, while other units' designated officials may have little to no experience in tribal consultation. Increase interdepartmental cooperation, in addition to providing a timeline for designating the officials, to provide certainty and continuity for Tribes as they navigate the new policy and interact with federal officials across the Department.

Response: The Department does not adopt the recommendation. The Department determined that these responsibilities are best addressed at the operating unit level to allow each operating unit to assess its needs to support interactions and relationships with tribes.

Comment 31: Add the following responsibilities to the tribal consultation official or designated officials in the operating units Section: Responding to inquiries from tribes about a specific consultation—past, ongoing, or proposed; responding to inquiries about the consultation process in general; receiving requests from tribes seeking to initiate consultation; coordinating to identify and screen for potential consultation issues; preserving and maintaining complete consultation records; assisting tribal governments seeking to access consultation records; and receiving post-consultation complaints, objections, and alleged inconsistencies.

Response: The Department does not adopt the recommendation. This policy is intended to provide high-level guidance to the Department's bureaus and agencies to allow them to implement the policy depending on their circumstances and governing legal authorities. The Department intends that operating units address this matter in their handbooks or other guidance as appropriate.

Comment 32: Establish tribal liaison positions to implement the consultation policy, and to encourage agencies to allocate funding for tribal consultations.

Response: The Department does not adopt the recommendation, and encourages operating units to work with existing resources and staff to comply with E.O. 13175.

Comments to Section 6: Training and Guidance

Comment 33: The focus of the consultation in most cases should be at the local level; however, it is critical that bureau or agency officials at the headquarters level with no background in tribal relations be properly trained in the consultation process.

Response: This policy provides for training in Section 6.01.

Comment 34: Section 6.02 provides that ''each operating unit may develop and issue tribal consultation guidance.'' Agencies should be required to develop Tribal consultation guidance. This guidance should be developed under supervision of the Tribal Consultation Official to ensure that its content is uniform across the Department's operating units.

Response: The Department addresses this recommendation in Section 6.02 of the Policy which permits operating units to develop tribal consultation guidance provided that the guidance is consistent with DAO 218–8 and is reviewed by the Tribal Consultation Official.

Comments to Section 7: Consultation

Comment 35: The term ''reasonable effort'' in Section 7 is unclear. Clarify that the Department will confirm receipt of a tribal request for consultation within 30 days, or even 45 days. Tribes believe that there are few circumstances where the Department would not be able to accommodate a request, and urge the Department to conduct face-to-face consultations with tribes.

Response: The Department does not adopt the recommendations. Operating units may have specific time constraints imposed by statute or circumstances, and this policy is intended to provide them with the flexibility to accommodate those constraints.

Comment 36: It is important for the consultation process to retain the requirement that it is a government-to-government interaction. The consultation process must also involve elected tribal officials unless otherwise approved by the tribe.

Response: This comment is addressed in the policy definition of ''Tribal officials,'' adopted from Section 1(d) of E.O. 13175.

Comment 37: The Department should include in the policy further guidance indicating standards for determining which forms of consultation are appropriate in various circumstances, and allow the tribes to consult on these standards.

Response: The Department does not adopt the recommendation. This policy is intended to provide high-level guidance to allow operating units to implement the policy depending on their circumstances and governing legal authorities. The Department intends that operating units address details of their respective consultation process in their handbooks or other guidance as appropriate.

Comment 38: Coordination with the tribes should not be limited to formal consultation, and a variety of consultation types should be further defined in sub-section 01. Consultation types could include informal discussions with tribal leaders, meetings with individual tribes, listening sessions, and formal consultations. Add as the last section to sub-section 01: ''Ultimately the consultation process is to entail an informed discussion of the proposed federal policy and associated tribal concerns between the designated Tribal Consultation Official and tribal officials.''

Response: The Department adopts this recommendation and has added the following language to the end of Section 7.01: Ultimately, the consultation process is to entail an informed discussion of the proposed federal policy and associated tribal concerns between the designated Tribal Consultation Official and tribal officials.

Comment 39: Develop a tribal liaison position for the Alaska region. Tribal liaisons should be trained in how to conduct tribal consultations to help facilitate tribal-agency relationships.

Response: The Department does not adopt the recommendation to develop a tribal liaison position for the Alaska region. This comment has been forwarded to NOAA for its consideration.

Comment 40: The phrase ''reasonable effort'' in Section 7.02.b. is unclear, and should either be removed and replaced with language clarifying the specific time frame that the Department considers reasonable.

Response: The Department does not adopt the recommendation to remove the term ''reasonable effort'' because consultations are intended to reflect a relationship between the operating unit and the tribe, taking into account the resources and mission of the operating unit. Some operating units have specific time constraints imposed by statute or other circumstances, and this policy is intended to provide those units with sufficient flexibility to accommodate those parameters.

Comment 41: Add to end of last sentence in Section 7.02.b. the following language: ''prior to substantive decision points and/or final action'' and include that ''the timing of consultation is to allow for the substantive consideration of tribal input and concerns before finalizing a decision on federal policies, regulations, or legislation.''

Response: The Department adopts the recommendation in part and has added the following language to the end of subsection b.: Exchange of Information. The Department and operating units will make a reasonable effort to identify and provide timely and accurate information for consultation prior to substantive decision or final action.

Comment 42: Section 7.02.c. should include a statement that the Department will clearly notify tribes of events such as meetings that it considers to be consultations, and that the Department will do so within 45 or 90 days prior to the consultation. The Department should seek tribal participation in its deliberative process about the necessity of a proposed action.

Response: The Department will advise its operating units to provide 45 days advanced notice of any invitation to conduct a consultation, or to provide notice at the earliest time practicable. Such notices will include any relevant materials to facilitate discussion. This response does not supersede any existing legal authorities or responsibilities of the operating units.

Comment 43: Communication to and from rural Alaska can be difficult, and the Department should follow up on correspondence to Tribes and Tribal entities. *Response:* The final policy addresses follow-up notices to tribal officials in Section 7.02.

Comment 44: The phrase ''when practical'' in Sections 7.01, 7.02.b and 7.02.d is unclear, and the Department should amend the section to clarify that the Department will provide tribes with a specific amount of time to prepare for consultations and submit views, and will be flexible about the time allowed.

Response: The Department agrees with the recommendation to provide Tribes adequate time to prepare for consultation as well as relevant materials to facilitate and submit their views, and will advise its operating units to develop consultation materials, as appropriate. In addition, the Department has added the following language to Section 7.01 *Consultation/Consultation Process:* ''The Tribal Consultation Official or the head of each operating unit, as applicable, will treat a request for consultation from a tribal official in an expedited fashion and provide a written response confirming receipt of the request.''

Comment 45: For Section 7.e., when a consultation occurs between the Department or its operating units and Tribal officials, the Department or operating unit should provide the Tribal officials with a formal, written communication that summarizes the consultation, and responds to the issues and concerns, if any, identified during consultation. Tribes should be able to agree to the accuracy of the summaries of the tribes' position in the consultation. The follow-up communications should be transmitted within 30 days of the consultation. They should also specifically indicate whether the Department accepts the tribes' position, or include an explanation of the Department's position. The Tribal Consultation Official or head of each operating unit conducting a consultation should also maintain documentation addressing the consultation, tribal concerns, and recommendations in conformance with applicable records retention schedules. Additionally, the policy should acknowledge that Tribes are more familiar with their local environment and, thus, the policy should clarify that the Tribes possess unique knowledge. The policy should also allow the Tribes to initiate consultations whenever there is a potential for their rights and interests to be affected. The consultation process should also be timely and initiated early in the decision making process to allow the tribe to have access to information about the proposed regulation or policy. Regular communication between the Department and a Tribe is an essential precursor to the consultation process; consultation should be as a matter of course and not just when ''practical.'' The policy should also distinguish between regular communications, calls, site visits, and participation in events and informal meetings, which are not intended to serve as the formal negotiation component of the government-to-government consultation process.

Response: The Department does not adopt the recommendation for a specified timeframe to submit a written summary of the consultation. Section 7.2.e. of the policy states that ''the Department or operating unit will provide the Tribal officials with a formal, written communication that summarizes the consultation, and responds to the issues and concerns, if any, identified during consultation.'' The Department expects operating units to address written consultation summaries in their handbooks or other guidance, as appropriate. Written summaries are not intended to be used to document regular communications and interactions between Department employees and Tribes; rather, these written communications are part of the consultation process.

Comment 46: A written summary of consultation should include the Tribe's responses and should become part of the official record on consultation activities maintained by the operating unit and the Department, and should form the basis for a tribal impact summary.

Response: E.O. 13175 requires a tribal summary impact statement when an agency (1) promulgates regulations that have tribal implications, that impose substantial direct compliance costs on Indian tribal governments, and are not required by statute, or (2) promulgates regulations that have tribal implications and that preempt tribal law.

The Department intends consultation reporting to be a separate component of all consultations, regardless of whether they involve regulations. In response to this comment, the Department has added the following language as a new subparagraph to 5.02.*c.* The head of

each operating unit will consult with Tribes and prepare tribal summary impact statements when promulgating any regulations that have tribal implications, that impose substantial direct compliance costs on Indian tribal governments, and that are not required by statute; and when promulgating any regulation that has tribal implications and that preempts tribal law.

Comment 47: The Department should distribute a follow-up report detailing immediate and long-term actions to be taken after consultations, and should add language in Section 7.02.e. to the effect that documentation includes any proposal for Departmental follow-up actions.

Response: The Department does not adopt the recommendation. Section 7.02.e. sufficiently addresses this request by requiring the Department or operating unit to provide tribal officials with ''a formal written communication that summarizes the consultation, and responds to the issues and concerns, if any, identified during the consultation.''

Changes to the Proposed Policy

The policy statement adopted in this Notice differs from the proposed policy statement as follows:

(a) Proposed policy Section No. 1, ''Introduction,'' subparagraphs 01. and 04. were modified in response to comments.

(b) Proposed policy Section No. 2, ''Background,'' subparagraph 01. was modified to include wording on consultation with Alaska Native Corporations in compliance with existing law.

(c) Proposed policy Section No. 4, ''Definitions,'' subparagraph 03. was modified to expressly state that the definition of operating units includes all bureaus and agencies in response to comments.

(d) Proposed policy Section No. 4, ''Definitions,'' was modified to include a definition for ''Alaska Native Corporation'' in response to comments.

(e) Proposed policy Section No 5, ''Roles and Responsibilities for Consultation,'' subsection 01. was modified to include additional reporting language in response to comments.

(f) Proposed policy Section No. 5, ''Roles and Responsibilities for Consultation,'' subsection 02. was modified in response to comments to include additional responsibilities language for the heads of operating units.

(g) Proposed policy Consultation Process Section No. 7, ''Consultation Process,'' subparagraph 01. was modified and includes additional language relating to the purpose of consultation.

(h) Proposed policy Consultation Process Section No. 7, ''Consultation Process,'' subparagraph 02 was modified in response to comments received to include additional language relating to responses to requests for tribal consultations.

(i) Proposed policy Section No. 8, ''Implementation,'' was renumbered to Section No. 9.

(j) A new Section No. 8, ''Consultation with Alaska Native Corporations,'' was added to address the consultation with Alaska Native Corporations.

The final Consultation and Coordination Policy of the U.S. Department of Commerce now reads as follows:

Tribal Consultation and Coordination Policy of the U.S. Department of Commerce

Section 1. Introduction

01. This ''Tribal Consultation and Coordination Policy of the U.S. Department of Commerce'' (''Tribal Consultation Policy'' or ''Policy'') establishes the manner in which the Department of Commerce (''Department'') works with Indian tribes on a government-to-government basis to build a durable relationship and address issues concerning tribal self-government, tribal trust resources, and tribal treaty and other rights, as well as support tribes in developing strong and stable economies able to participate in the national and global marketplace. The Department recognizes Indian tribal self-government and supports tribal sovereignty and self-determination.

02. The Department recognizes the Federal Government's unique legal relationship, as established in the Constitution, statutes, treaties and federal court decisions, between Tribal governments and the Federal Government.

03. The Department and operating units will seek and promote cooperation within the Department and with other agencies that have related responsibilities. The Department's mission encompasses many complex issues where cooperation and mutual consideration among governments (federal, state, tribal, and local) are essential. The Department and operating units will promote intradepartmental and interagency coordination and cooperation to assist Tribal governments in resolving issues requiring mutual effort.

04. Executive Order (E.O.) No. 13175, ''Consultation and Coordination with Indian Tribal Governments,'' requires federal agencies to have an accountable process to ensure meaningful and timely input by tribal officials in developing policies that have tribal implications. This Policy provides uniform standards and methodology outlining consultation procedures for all Department personnel working with Tribal governments regarding policies that have tribal implications. This Policy is to be construed consistent with Federal statutes, regulations, Presidential memoranda, Executive Orders, and other relevant Federal legal authorities.

Section 2. Background

01. This Policy builds upon and expands the principles expressed in the ''American Indian and Alaska Native Policy of the Department of Commerce,'' promulgated by the Department on March 30, 1995. The Tribal Consultation Policy incorporates the requirements of E.O. No. 13175; Presidential Memorandum, ''Tribal Consultation,'' 2009 Daily Comp. Pres. Docs. 887 (November 5, 2009); the Office of Management and Budget Memorandum, ''Guidance for Implementing E.O. 13175, 'Consultation and Coordination with Indian tribal Governments;' '' and the Consolidated Appropriations Act, 2004, Pub. L. 108–199, Div. H § 161, 118 Stat. 3, 452 (2004), as amended by Consolidated Appropriations Act, 2005, Pub. L. 108–447, Div. H., Title V § 518, 118 Stat. 2809, 3267, relating to consultation with Alaska Native Corporations.

02. This Policy is for internal management only and shall not be construed to grant or vest any right to any party not otherwise granted or vested by existing law or regulations.

Section 3. Authority

01. This Tribal Consultation Policy is issued pursuant to the authority of 5 U.S.C. 301 and Department Administrative Order (DAO) 218–8, ''Consultation and Coordination with Indian Tribal Governments.'' This Policy shall have the same force and effect as a DAO. Amendments (substantive changes) or revisions (corrections or updates) to this Policy may be developed and issued by the Department of Commerce Tribal Consultation Official or the Secretary's designee in consultation with Tribal governments.

Section 4. Definitions

01. ''Consultation,'' as defined in Section 5 of E.O. No. 13175, refers to an accountable process ensuring meaningful and timely input from tribal officials on Department policies that have tribal implications.

02. ''Indian tribe (or Tribe),'' as defined in Section 1(b) of E.O. No. 13175, means an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of the Interior acknowledges to exist as an Indian tribe pursuant to the Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a.

03. ''Operating units,'' as defined in Section 3.c.1 of Department Organization Order 1–1, are organizational entities outside the Office of the Secretary charged with carrying out specified substantive functions (i.e., programs) of the Department. The operating units are the components of the Department through which most of its substantive functions are carried out. ''Operating units'' includes all Department bureaus and agencies.

04. ''Policies that have tribal implications,'' as defined in Section 1(a) of E.O. No. 13175, refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

05. ''Tribal Consultation Official,'' as defined in Section 5(a) of E.O. No. 13175, means the designee of the Secretary with principal responsibility for the implementation of this Policy.

06. ''Tribal officials,'' as defined in Section 1(d) of E.O. No. 13175, means elected or duly appointed officials of Indian tribal governments or authorized intertribal organizations.

07. ''Alaska Native Corporation,'' pursuant to 43 U.S.C. 1602 *et seq.,* any Regional Corporation, any Village Corporation, any Urban Corporation, and any Group Corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act.

Section 5. Roles and Responsibilities for Consultations

01. Department of Commerce Tribal Consultation Official

a. The Tribal Consultation Official is an individual in the Office of Legislative and Intergovernmental Affairs (OLIA) within the Office of the Secretary who is duly appointed to act as a liaison between the Secretary of Commerce and Tribal officials. The Tribal Consultation Official may delegate authority, as necessary, to the head of each operating unit. The Tribal Consultation Official has primary responsibility for ensuring compliance with DAO 218–8, this Policy, and E.O. No. 13175, and is responsible for tribal consultations and coordination for the Office of the Secretary programs.

b. The Tribal Consultation Official has responsibility for coordinating the implementation of this Policy and DAO 218–8 within the Department and all operating units.

c. The Tribal Consultation Official will engage tribal officials in periodic dialogue to discuss the Department's implementation of this Policy. The dialogue will provide an opportunity for tribal officials to assess policy implementation, program delivery, and discuss outreach and communication efforts, and other issues.

d. The Tribal Consultation Official is responsible for submitting an annual report to OMB pursuant section 7(a) of E.O. No. 13175.

02. Head of operating unit Responsibilities

a. The head of each operating unit will designate an official in the headquarters office who has primary responsibility for ensuring compliance with this Policy within the operating unit. Each operating unit's designated official will work with the Department Tribal Consultation Official to ensure coordination of tribal consultations, as necessary. The designated official is responsible for the development, maintenance and internal distribution of any guidance produced by the operating unit in compliance with the requirements of this Policy.

b. The head of each operating unit or the designated official may delegate authority to appropriate individuals within the operating unit.

c. The head of each operating unit will consult with Tribes and prepare tribal summary impact statements when promulgating any regulations that have tribal implications, that impose substantial direct compliance costs on Indian tribal governments, and that are not required by statute; and when promulgating any regulations that have tribal implications and that preempt tribal law.

Section 6. Training and Guidance

01. The Tribal Consultation Official and the head of each operating unit will ensure that personnel assisting with tribal consultations have appropriate training.

02. Each operating unit may develop and issue tribal consultation guidance to assist staff in preparing, reviewing and managing the consultation process within their respective operating units, so long as:

a. The guidance is consistent with DAO 218–8, and

b. The Department's Tribal Consultation Official reviews the guidance.

Section 7. Consultation

01. The Consultation Process. Consultation may take a variety of forms. Implementing this Policy may require a range of formal and informal planning activities. The Department and operating units' consultation processes may include one or more of the following: meetings, letters, conference calls, webinars, on-site visits, or participation in regional and national events. The Tribal Consultation Official or the head of each operating unit, as applicable, will make a reasonable effort to accommodate a tribal request for consultation. Ultimately, the consultation process is to entail an informed discussion of the proposed federal policy and associated tribal concerns between the designated Tribal Consultation Official and tribal officials.

02. Elements of the Consultation Process.

a. Ongoing communication shall be a regular part of the government-to-government relationship with tribal governments. The Department and operating units will engage in meaningful dialogue with Tribes regarding all policies that have tribal implications.

b. Exchange of Information. The Department and operating units will make a reasonable effort to identify and provide timely and accurate information for consultation.

c. Notification. The Department and operating units will notify Tribes of policies that have tribal implications. Follow-up may be necessary to ensure the appropriate tribal official has received the consultation notification and accompanying documents. These notifications do not replace or supersede any notifications that are required by statute or E.O. regarding tribal consultations.

d. Consultation Planning. The Department or operating units will coordinate with tribal officials to plan logistical considerations for the consultation. The Department or operating units will, when practical, allow Tribes a reasonable amount of time to prepare for consultation and submit their views on policies that have tribal implications. The Tribal Consultation Official or the head of each operating unit, as applicable, will treat a request for consultation from a tribal official in an expedited fashion and provide a written response confirming receipt of the request.

e. Written Communication and Record-Keeping. When a consultation

occurs between the Department or its operating units and Tribal officials, the Department or operating unit will provide the Tribal officials with a formal, written communication that summarizes the consultation, and responds to the issues and concerns, if any, identified during consultation. The Tribal Consultation Official or head of each operating unit conducting a consultation will maintain documentation addressing the consultation, tribal concerns, and recommendations in conformance with applicable records retention schedules.

Section 8. Consultation With Alaska Native Corporations

01. In 2004, through two consolidated appropriations acts, Congress required federal agencies to consult with Alaska Native Corporations on the same basis as federally recognized Indian Tribes under E.O. 13175 (Pub. L. 108–199, 118 Stat. 452, as amended by Pub. L. 108–447, 118 Stat. 3267).

02. The Department interprets the term ''Alaska Native Corporations'' in this requirement to mean ''Native Corporations'' as that term is defined under the Alaska Native Claims Settlement Act (ANCSA) of 1971. Congress created regional, village, and urban corporations to manage the lands, funds, and other assets conveyed to Alaska Natives by ANCSA. There are 13 regional corporations and over 200 village corporations in Alaska. The village corporations generally represent shareholders in villages associated with the 229 federally recognized tribes in Alaska. Most Alaska Native Corporation shareholders also are members of a federally recognized tribe in Alaska.

03. The Department will implement the requirement to consult with Alaska Native Corporations in a manner as close as possible to consultations with federally recognized tribes in Alaska, while recognizing the important differences between sovereign tribal governments and the federal trust responsibility to those tribal governments and corporations obligated to maximize financial returns to shareholders. Alaska Native Corporations were established to operate as for-profit enterprises, and may not necessarily represent the same perspective or interests as the tribes. Consultation and coordination with the corporations will follow the same process as described in this Policy for tribes, with the following exceptions:

a. Consultations with Alaska Native Corporations will occur on a ''government-to-corporation'' basis, rather than ''government-to-government'' basis to reflect the distinction between sovereign governments and corporate entities.

b. Government-to-corporations consultations will occur with appropriate adjustments given the unique status, structure, and interests of Alaska Native Corporations.

Section 9. Implementation

01. The Tribal Consultation Official, located in OLIA within the Office of the Secretary, is responsible for ensuring implementation of this Policy. This responsibility may be delegated as appropriate. This Policy does not alter or affect any existing duty or authority of any individual operating unit.

02. This Policy is not intended to, and does not, grant, expand, create or diminish any legally enforceable rights, benefits, or trust responsibilities, substantive or procedural, not otherwise granted or created under existing law. Nor shall this Policy be construed to alter, amend, repeal, interpret, or modify tribal sovereignty, any treaty rights of any Indian tribes, or to preempt, modify, or limit the exercise of any such rights.

03. This Policy is intended to improve the Department's management of its relations and cooperative activities with Indian tribes. The Department and operating units have no obligation to engage in any consultation activities under this policy unless they are practicable and permitted by law. Nothing in this policy requires any budgetary obligation or creates a right of action against the Department for failure to comply with this policy nor creates any right, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

04. This Policy shall be updated as necessary.

Section 10. Effective Date

01. This Policy is effective beginning with the date of this memorandum and will remain in effect until it is amended, superseded by a Departmental Administrative Order, or revoked.

Dated: May 21, 2013.

Rebecca M. Blank,

Acting Secretary of Commerce.

[FR Doc. 2013–13052 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–17–P

DEPARTMENT OF COMMERCE

Economic Development Administration

Notice of Petitions by Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance

AGENCY: Economic Development Administration, Department of Commerce.

ACTION: Notice and Opportunity for Public Comment.

Pursuant to Section 251 of the Trade Act 1974, as amended (19 U.S.C. 2341 et seq.), the Economic Development Administration (EDA) has received petitions for certification of eligibility to apply for Trade Adjustment Assistance from the firms listed below. Accordingly, EDA has initiated investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each of these firms contributed importantly to the total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT ASSISTANCE

[5/23/2013 through 5/29/2013]

Firm name	Firm address	Date accepted for investigation	Product(s)
7 Mile Solutions, Inc.	7540 Caldwell Avenue, Niles, IL 60714.	5/22/2013	Firm manufactures electromechanical assemblies for the medical and industrial industries.
R&R Tool & Manufacturing, Inc.	1540 Lake St, LaPorte, IN 46350.	5/22/2013	Firm manufacturers metal parts for air compressors from sheet metal, aluminum and stainless steel.
SAY Plastics, Inc.	165 Oak Lane, McSherrystown, PA 17344.	5/24/2013	Firm manufactures thermoformed plastic components and assemblies for various industries that include medical, transportation and recreation.

LIST OF PETITIONS RECEIVED BY EDA FOR CERTIFICATION ELIGIBILITY TO APPLY FOR TRADE ADJUSTMENT ASSISTANCE—Continued

[5/23/2013 through 5/29/2013]

Firm name	Firm address	Date accepted for investigation	Product(s)
AMMAC, Inc.	3405 Board Road, York, PA 17406.	5/24/2013	The firm produces metal parts such as spacers, washers, bushings and pins on multi-spindle automatic screw machines.
K&F Electronics, Inc.	33041 Groesbeck Highway, Fraser, MI 48026.	5/24/2013	Firm manufacturers printed circuit boards.
Jasper Rubber Products, Inc.	1010 1st Ave W, Jasper, IN 47546.	5/28/2013	Firm manufactures molded, extruded and lathe-cut rubber gaskets, washers and other seals.
Weaver Manufacturing, Inc	1812 Nelwood Drive, Columbia, MO 65202.	5/28/2013	Firm manufactures respirator mask assemblies.
Integrated Process Systems, Inc.	2183 W. Park Avenue, Cedar City, UT 84721.	5/24/2013	Firm manufactures industrial machinery, specifically wet process equipment for the printed circuit board industry.

Any party having a substantial interest in these proceedings may request a public hearing on the matter. A written request for a hearing must be submitted to the Trade Adjustment Assistance for Firms Division, Room 71030, Economic Development Administration, U.S. Department of Commerce, Washington, DC 20230, no later than ten (10) calendar days following publication of this notice.

Please follow the requirements set forth in EDA's regulations at 13 CFR 315.9 for procedures to request a public hearing. The Catalog of Federal Domestic Assistance official number and title for the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance for Firms.

Dated: May 29, 2013.

Michael DeVillo,

Eligibility Examiner.

[FR Doc. 2013–13150 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–WH–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1900]

Expansion of Foreign-Trade Zone 158; Vicksburg/Jackson, Mississippi

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Greater Mississippi Foreign-Trade Zone, Inc., grantee of Foreign-Trade Zone (FTZ) 158, submitted an application to the Board for authority to expand FTZ 158 to include a site in Gluckstadt and Madison, Mississippi, and to restore zone status to 52 acres at existing Site 2, adjacent to the Vicksburg Customs and Border Protection port of entry (Docket 21–2012, filed March 23, 2012);

Whereas, notice inviting public comment has been given in the **Federal Register** (77 FR 19002–19003, 3/29/2012) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations would be satisfied, and that the proposal would be in the public interest if subject to specific conditions;

Now, therefore, the Board hereby orders:

The application to expand FTZ 158 is approved, subject to the FTZ Act and the Board's regulations, including Section 400.13, to the Board's standard 2,000-acre activation limit for the overall general-purpose zone, to a sunset provision that would terminate authority on May 31, 2018, for Site 18 if no activity has occurred under FTZ procedures before that date and to Site 2's existing sunset date of October 31, 2017, for the restored acreage at Site 2.

Signed at Washington, DC, this 23rd day of May 2013.

Paul Piquado,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

ATTEST:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–13250 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Order No. 1901]

Reorganization of Foreign-Trade Zone 139 Under Alternative Site Framework Sierra Vista, Arizona

Pursuant to its authority under the Foreign-Trade Zones Act of June 18, 1934, as amended (19 U.S.C. 81a–81u), the Foreign-Trade Zones Board (the Board) adopts the following Order:

Whereas, the Board adopted the alternative site framework (ASF) (15 CFR 400.2(c)) as an option for the establishment or reorganization of zones;

Whereas, the Sierra Vista Economic Development Foundation, Inc., grantee of Foreign-Trade Zone 139, submitted an application to the Board (FTZ Docket B–43–2012, docketed 06/05/2012) for authority to reorganize under the ASF with a service area which includes a portion of Cochise County, Arizona, as described in the amended application, in and adjacent to the Naco, Arizona U.S Customs and Border Protection port of entry, and FTZ 139's existing Site 1 would be categorized as a magnet site;

Whereas, notice inviting public comment was given in the **Federal Register** (77 FR 34935–34936, 06/12/2012) and the application has been processed pursuant to the FTZ Act and the Board's regulations; and,

Whereas, the Board adopts the findings and recommendations of the examiner's report, and finds that the requirements of the FTZ Act and the Board's regulations are satisfied;

Now, therefore, the Board hereby orders:

The application to reorganize FTZ 139 under the ASF is approved, subject to the FTZ Act and the Board's regulations, including Section 400.13, to the Board's

standard 2,000-acre activation limit for the zone, and to a five-year ASF sunset provision for magnet sites that would terminate authority for Site 1 if not activated by May 31, 2018.

Signed at Washington, DC, this 23rd day of May 2013.

Paul Piquado,

Assistant Secretary of Commerce for Import Administration, Alternate Chairman, Foreign-Trade Zones Board.

Attest:

Andrew McGilvray,

Executive Secretary.

[FR Doc. 2013–13251 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–912]

Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Final Results of Antidumping Duty New Shipper Review; 2011–2012

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* June 4, 2013.

SUMMARY: On March 5, 2013, the Department of Commerce (''Department'') published the preliminary results of an antidumping duty new shipper review of certain new pneumatic off-the-road tires (''OTR tires'') from the People's Republic of China (''PRC'').[1] We invited interested parties to comment on our preliminary results. Based on our analysis of the comments we received, we have made changes to our margin calculations for the new shipper, Trelleborg Wheel Systems (Xingtai) China, Co. Ltd. (''Trelleborg Wheel Systems China''). We continue to find that Trelleborg Wheel Systems China did not make a sale of subject merchandise at less than normal value.

FOR FURTHER INFORMATION CONTACT: Raquel Silva or Eugene Degnan, AD/CVD Operations, Office 8, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–6475 or (202) 482–0414, respectively.

SUPPLEMENTARY INFORMATION:

Case History

The Department published the *Preliminary Results* on March 5, 2013.[2] On March 14, 2013, the Department issued a supplemental questionnaire, in which we requested further information from Trelleborg Wheel Systems China.[3] On March 22, 2013, Trelleborg Wheel Systems China submitted its response.[4]

On March 14, 2013, Trelleborg Wheel Systems China submitted surrogate value (''SV'') information,[5] and on March 25, 2013, Titan Tire Corporation (''Petitioner'') submitted its SV information.[6] On April 4, 2013, Petitioner submitted a case brief,[7] and on April 9, 2013, Trelleborg Wheel Systems China submitted a rebuttal brief.[8]

Period of Review

The period of review (''POR'') is September 1, 2011, through February 29, 2012. This POR corresponds to the six-month period immediately preceding the semiannual anniversary month pursuant to section 751(a)(2)(B)(ii) of the Tariff Act of 1930, as amended (''the Act''), and 19 CFR 351.214(g)(1)(i)(B).

Scope of the Order

The merchandise covered by this order includes new pneumatic tires designed for off-the-road and off-highway use, subject to certain exceptions.[9] The subject merchandise is currently classifiable under Harmonized Tariff Schedule of the United States (''HTSUS'') subheadings: 4011.20.10.25, 4011.20.10.35, 4011.20.50.30, 4011.20.50.50, 4011.61.00.00, 4011.62.00.00, 4011.63.00.00, 4011.69.00.00, 4011.92.00.00, 4011.93.40.00, 4011.93.80.00, 4011.94.40.00, and 4011.94.80.00. The HTSUS subheadings are provided for convenience and customs purposes only; the written product description of the scope of the order is dispositive.[10]

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to this review are addressed in the Issues and Decision Memorandum, which is hereby adopted by this notice. A list of the issues which parties raised and to which we respond in the Issues and Decision Memorandum is attached to this notice as an Appendix. The Issues and Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). Access to IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit (CRU), Room 7046 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the internet at *http://www.trade.gov/ia/.* The signed Issues and Decision Memorandum and the electronic versions of the Issues and Decision Memorandum are identical in content.

Changes Since the Preliminary Results

Based on a review of the record and comments received from interested parties regarding the *Preliminary Results,* we have made the following revisions to the margin calculations for Trelleborg Wheel Systems China: [11]

[1] *See Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Review; 2011–2012,* 78 FR 14267 (March 5, 2013) (''*Preliminary Results*'').

[2] Also adopted as part of the *Preliminary Results* was the Memorandum to Paul Piquado entitled ''Decision Memorandum for Preliminary Results of Antidumping Duty New Shipper Review Pertaining to Trelleborg Wheel Systems (Xingtai) China, Co. Ltd.: Certain New Pneumatic Off-the-Road Tires from the People's Republic of China,'' dated February 26, 2013 (''Preliminary Decision Memorandum'').

[3] *See* Letter from the Department entitled ''Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: New Shipper Review Post-Preliminary Results Supplemental Questionnaire,'' dated March 14, 2013.

[4] *See* Letter from Trelleborg Wheel Systems China entitled ''Trelleborg Wheel Systems (Xingtai) China, Co. Ltd.'s Third Sales Supplemental Questionnaire Response for the New Shipper Review of New Pneumatic Off-The-Road Tires from the People's Republic of China,'' dated March 22, 2013.

[5] *See* Letter from Trelleborg Wheel Systems China entitled ''Re-Submission of 2011 Goodyear Indonesia Financial Statements for Possible Use as Surrogate Value: New Pneumatic Off-The-Road Tires from the People's Republic of China,'' dated March 14, 2013.

[6] *See* Letter from Petitioner entitled ''New Pneumatic Off-The Road Tires from the People's Republic of China (New Shipper Review): Petitioner's 20-Day SV Submission,'' dated March 25, 2013.

[7] *See* Letter from Petitioner entitled ''Case Brief of Titan Tire Corporation, Petitioner,'' dated April 4, 2013.

[8] *See* Letter from Trelleborg Wheel Systems China entitled ''Trelleborg Wheel Systems (Xingtai) China, Co. Ltd.'s Second Supplemental Section D Questionnaire Response for the New Shipper Review of New Pneumatic Off-The-Road Tires from the People's Republic of China,'' dated April 9, 2013.

[9] For a complete description of the Scope of the Order, *see* Memorandum to Ronald K. Lorentzen entitled ''Issues and Decision Memorandum for the Final Results in the Antidumping Duty New Shipper Review of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China,'' dated May 28, 2013 (''Issues and Decision Memorandum'').

[10] *See Certain New Pneumatic Off-the-Road Tires From the People's Republic of China: Notice of Amended Final Affirmative Determination of Sales at Less Than Fair Value and Antidumping Duty Order,* 73 FR 51624 (September 4, 2008).

[11] For detailed information concerning all of the changes made, including those listed above, *see* Memorandum from the Department entitled ''New Shipper Review of Antidumping Duty Order on

Continued

• Revised the indirect selling expense ratio to include additional indirect selling expenses not substantiated to be unrelated to the sale of subject merchandise.[12]

• Eliminated the facts available plugs used to calculate ocean freight expense for Trelleborg Wheel Systems China's raw materials purchased in market economies, and replaced them with the market-economy purchase prices inclusive of ocean freight, which were submitted by Trelleborg Wheel Systems China after the *Preliminary Results.* However, we note that due to a miscalculation in the prices submitted, the Department corrected these values for the final results.[13]

• Adjusted the domestic inland truck freight distances for market economy purchases, per information Trelleborg Wheel Systems China submitted after the *Preliminary Results.*[14]

Final Results Margin

The Department finds that the following weighted-average dumping margin exists:

Exporter	Weighted-average dumping margin (percent)
Trelleborg Wheel Systems (Xingtai) China, Co. Ltd.	0.0

Disclosure

We intend to disclose to parties the calculations performed in this proceeding within five days of the date of publication of this notice in accordance with 19 CFR 351.224(b).

Assessment

Upon issuance of the final results, the Department will determine, and U.S. Customs and Border Protection (''CBP'') shall assess, antidumping duties on all appropriate entries. The Department intends to issue assessment instructions to CBP 15 days after the date of publication of the final results of review. Where either the respondent's weighted-average dumping margin is zero or *de minimis,* or an importer-specific assessment rate is zero or *de minimis,* we will instruct CBP to liquidate the appropriate entries without regard to antidumping duties. The Department recently announced a refinement to its assessment practice in NME cases.[15] Pursuant to this refinement in practice, for entries that were not reported in the U.S. sales databases submitted by the company individually examined during this review, the Department will instruct CBP to liquidate such entries at the NME-wide rate. In addition, if the Department determines that the exporter under review had no shipments of the subject merchandise, any suspended entries that entered under that exporter's case number (*i.e.,* at that exporter's rate) will be liquidated at the NME-wide rate.[16]

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this new shipper review for all shipments of the subject merchandise from Trelleborg Wheel Systems China entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(2)(C) of the Act: (1) For subject merchandise produced and exported by Trelleborg Wheel Systems China, the cash deposit rate will be 0.00 percent; (2) for subject merchandise exported by Trelleborg Wheel Systems China but not manufactured by Trelleborg Wheel Systems China, the cash deposit rate will be the PRC-wide rate of 210.48 percent ; and (3) for subject merchandise manufactured by Trelleborg Wheel Systems China, but exported by any other party, the cash deposit rate will be the rate applicable to the exporter. These cash deposit requirements, when imposed, shall remain in effect until further notice.

Notification to Importers

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f)(2) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this POR. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of the antidumping duties occurred and the subsequent assessment of double antidumping duties.

Notification Regarding APO

This notice also serves as a reminder to the parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of BPI disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 751(a)(2)(B) and 777(i) of the Act.

Dated: May 28, 2013.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix—Issues for Final Results

Issue 1: Whether to Rescind the Review for non- *Bona Fide* sale

Issue 2: Whether to change the surrogate country from Indonesia to Thailand

Issue 3: Whether to revise the indirect selling expense ratio

Issue 4: Whether to continue to deny scrap tire and steel wire offsets

[FR Doc. 2013–13215 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–DS–P

Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Analysis of the Final Results Margin Calculation for Trelleborg Wheel Systems (Xingtai) China, Co. Ltd. (''TWS China''),'' dated concurrently with this memorandum (''Final Results Analysis Memo''), and Memorandum from the Department entitled ''New Shipper Review of Antidumping Duty Order on Certain New Pneumatic Off-the-Road Tires from the People's Republic of China: Surrogate Value Memorandum,'' dated concurrently with this memorandum (''Final Results Surrogate Value Memo'').

[12] *See* Issues and Decision Memorandum at Comment 3; *see* also Final Results Analysis Memo at 2–3.

[13] *See* Final Results Analysis Memo at 2–3.

[14] *See id.*

[15] *See Non-Market Economy Antidumping Proceedings: Assessment of Antidumping Duties,* 76 FR 65694 (October 24, 2011).

[16] *See id.*

DEPARTMENT OF COMMERCE

International Trade Administration

[C–552–815]

Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Preliminary Countervailing Duty Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) preliminarily determines that countervailable subsidies are being provided to producers and exporters of certain frozen warmwater shrimp (frozen shrimp) from the Socialist Republic of Vietnam (Vietnam). The period of investigation is January 1, 2011, through December 31, 2011. Pursuant to section 705(a)(1) of the Tariff Act of 1930, as amended (the Act), the final determination will be issued 75 days after the date that the Department makes this preliminary determination.

DATES: *Effective Date:* June 4, 2013.

FOR FURTHER INFORMATION CONTACT: Dustin Ross or Michael Romani, AD/CVD Operations, Import

Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0747 and (202) 482–0198, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Investigation

The products covered by this investigation are certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off, deveined or not deveined, cooked or raw, or otherwise processed in frozen form, regardless of size. For a complete description of the scope of the investigation, *see* Appendix 1 to this notice.

Methodology

The Department is conducting this countervailing duty (CVD) investigation in accordance with section 701 of the Act. For a full description of the methodology underlying our preliminary conclusions, *see* the Preliminary Decision Memorandum.[1] The Preliminary Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov,* and is available to all parties in the Central Records Unit, Room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly 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.

In accordance with section 703(d)(1)(A)(i) of the Act, we calculated a CVD rate for each individually investigated producer/exporter of the subject merchandise. For companies not individually investigated, we have calculated an average rate as described in the Preliminary Decision Memorandum.

[1] *See* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration regarding ''Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam,'' dated concurrently with this notice (Preliminary Decision Memorandum).

Preliminary Determination and Suspension of Liquidation

We preliminarily determine the countervailable subsidy rates to be:

Company	Subsidy rate (percent)
Minh Qui Seafoods Co. Ltd	5.08
Nha Trang Seaproduct Company	7.05
All Others	6.07

In accordance with sections 703(d)(1)(B) and (2) of the Act, we are directing U.S. Customs and Border Protection to suspend liquidation of all entries of frozen shrimp from Vietnam that are entered, or withdrawn from warehouse, for consumption on or after the date of the publication of this notice in the **Federal Register**, and to require a cash deposit for such entries of merchandise in the amounts indicated above.

Disclosure and Public Comment

The Department intends to disclose to interested parties the calculations performed in connection with this preliminary determination within five days of announcement of its public announcement.[2] Interested parties may submit case and rebuttal briefs. For a schedule of the deadlines for filing case briefs, rebuttal briefs, and hearing requests, *see* the Preliminary Decision Memorandum.

This determination is issued and published pursuant to sections 703(f) and 777(i) of the Act.

Dated: May 28, 2013.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix 1

Scope of the Investigation

The products covered by this investigation are certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[3] deveined or not deveined, cooked or raw, or otherwise processed in frozen form, regardless of size.

The frozen warmwater shrimp and prawn products included in the scope, regardless of definitions in the Harmonized Tariff Schedule of the United States (''HTSUS''), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope. In addition, food preparations (including dusted shrimp), which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope.

Excluded from the scope are: (1) Breaded shrimp and prawns; (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled; (4) shrimp and prawns in prepared meals; (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns; and (7) certain ''battered shrimp'' (see below).

''Battered shrimp'' is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a ''dusting''' layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to individually quick frozen (''IQF'') freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products included in the scope of this investigation are currently classified under the following HTSUS subheadings: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30 and 1605.29.10.10. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope is dispositive.

Appendix 2

List of Topics Discussed in the Preliminary Decision Memorandum

1. Scope Comments
2. Scope of the Investigation
3. Injury Test
4. Application of Countervailing Duty Law to Imports from the Vietnam
5. Subsidies Valuation

[2] *See* 19 CFR 351.224(b).

[3] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

6. Analysis of Programs
7. Calculation of the All Others Rate
8. ITC Notification
9. Disclosure and Public Comment
10. Verification

[FR Doc. 2013–13237 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–533–854]

Certain Frozen Warmwater Shrimp From India: Preliminary Countervailing Duty Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) preliminarily determines that countervailable subsidies are being provided to producers and exporters of certain frozen warmwater shrimp (frozen shrimp) from India. The period of investigation is April 1, 2011, through March 31, 2012. Pursuant to section 705(a)(1) of the Tariff Act of 1930, as amended (the Act), the final determination will be issued 75 days after the date that the Department makes this preliminary determination.

DATES: *Effective Date:* June 4, 2013.

FOR FURTHER INFORMATION CONTACT: Thomas Schauer or Shane Subler, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0410 and (202) 482–0189, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Investigation

The products covered by this investigation are certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off, deveined or not deveined, cooked or raw, or otherwise processed in frozen form, regardless of size. For a complete description of the scope of the investigation, *see* Appendix 1 to this notice.

Methodology

The Department is conducting this countervailing duty investigation in accordance with section 701 of the Act. For a full description of the methodology underlying our preliminary conclusions, *see* the Preliminary Decision Memorandum.[1] The Preliminary Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov,* and is available to all parties in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly 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.

In accordance with section 703(d)(1)(A)(i) of the Act, we calculated a countervailing duty rate for each individually investigated producer/exporter of the subject merchandise. For companies not individually investigated, we calculated an average rate as described in the Preliminary Decision Memorandum.

Preliminary Determination and Suspension of Liquidation

We preliminarily determine the countervailable subsidy rates to be:

Company	Subsidy rate (percent)
Devi Fisheries Limited	10.41
Devi Seafoods Ltd	11.32
All Others	10.87

In accordance with sections 703(d)(1)(B) and (2) of the Act, we are directing U.S. Customs and Border Protection (CBP) to suspend liquidation of all entries of frozen shrimp from India that are entered, or withdrawn from warehouse, for consumption on or after the date of the publication of this notice in the **Federal Register**, and to require a cash deposit for such entries. As discussed in the Preliminary Decision Memorandum, we are preliminarily adjusting the cash deposit rates to account for program-wide changes described under 19 CFR 351.526.[2] Therefore, we are directing CBP to require a cash deposit for entries of subject merchandise in the amounts indicated below.

Company	Cash deposit rate (percent)
Devi Fisheries Limited	6.10
Devi Seafoods Ltd	5.72
All Others	5.91

Disclosure and Public Comment

The Department intends to disclose to interested parties the calculations performed in connection with this preliminary determination within five days of announcement of its public announcement.[3] Interested parties may submit case and rebuttal briefs. For a schedule of the deadlines for filing case briefs, rebuttal briefs, and hearing requests, *see* the Preliminary Decision Memorandum.

This determination is issued and published pursuant to sections 703(f) and 777(i) of the Act.

Dated: May 28, 2013.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix 1

Scope of the Investigation

The products covered by this investigation are certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[4] deveined or not deveined, cooked or raw, or otherwise processed in frozen form, regardless of size.

The frozen warmwater shrimp and prawn products included in the scope, regardless of definitions in the Harmonized Tariff Schedule of the United States (''HTSUS''), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western

[1] *See* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, regarding ''Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from India,'' dated concurrently with this notice (Preliminary Decision Memorandum).

[2] *See* Preliminary Decision Memorandum at 13 and 23.

[3] *See* 19 CFR 351.224(b).

[4] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope. In addition, food preparations (including dusted shrimp), which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope.

Excluded from the scope are: (1) Breaded shrimp and prawns; (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled; (4) shrimp and prawns in prepared meals; (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns; and (7) certain ''battered shrimp'' (see below).

''Battered shrimp'' is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a ''dusting''' layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to individually quick frozen (''IQF'') freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products included in the scope of this investigation are currently classified under the following HTSUS subheadings: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, and 1605.29.10.10. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope is dispositive.

Appendix 2

List of Topics Discussed in the Preliminary Decision Memorandum

1. Scope Comments
2. Scope of the Investigation
3. Injury Test
4. Subsidies Valuation
5. Analysis of Programs
6. Calculation of the All Others Rate
7. ITC Notification
8. Disclosure and Public Comment
9. Verification

[FR Doc. 2013–13205 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–557–814]

Certain Frozen Warmwater Shrimp From Malaysia: Preliminary Countervailing Duty Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) preliminarily determines that countervailable subsidies are being provided to producers and exporters of certain frozen warmwater shrimp (frozen shrimp) from Malaysia. The period of investigation (POI) is January 1, 2011, through December 31, 2011. Pursuant to section 705(a)(1) of the Tariff Act of 1930, as amended (the Act), the final determination will be issued 75 days after the date that the Department makes this preliminary determination.

DATES: *Effective Date:* June 4, 2013.

FOR FURTHER INFORMATION CONTACT: Kristen Johnson and Christopher Hargett, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4793 and (202) 482–4161, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Investigation

The products covered by this investigation are certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off, deveined or not deveined, cooked or raw, or otherwise processed in frozen form, regardless of size. For a complete description of the scope of the investigation, *see* Appendix 1 to this notice.

Methodology

The Department is conducting this CVD investigation in accordance with section 701 of the Tariff Act of 1930, as amended (the Act). For a full description of the methodology underlying our preliminary conclusions, *see* the Preliminary Decision Memorandum.[1] The Preliminary Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov,* and is available to all parties in the Central Records Unit, Room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly 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.

For this preliminary determination, we have relied on facts available for Kian Huat Aquaculture Sdn. Bhd. (Kian Huat), the mandatory respondent, because the company did not act to the best of its ability and respond to the Department's requests for information. Further, we have drawn an adverse inference in selecting from among the facts otherwise available to calculate the *ad valorem* rate for Kian Huat.[2] For further information, *see* ''Use of Facts Otherwise Available and Adverse Inferences'' in the Preliminary Decision Memorandum.

The Department's analysis of program usage by Asia Aquaculture (M) Sdn. Bhd. (Asia Aquaculture), a voluntary respondent, is also contained in the Preliminary Decision Memorandum.

In accordance with section 703(d)(1)(A)(i) of the Act, we calculated a countervailing duty rate for each individually investigated producer/exporter of the subject merchandise. For companies not individually investigated, we have calculated an all others rate as described in the Preliminary Decision Memorandum.

Preliminary Determination and Suspension of Liquidation

We preliminarily determine the countervailable subsidy rates to be:

Company	Subsidy rate (percent)
Asia Aquaculture (M) Sdn. Bhd. (Asia Aquaculture)	10.80
Kian Huat Aquaculture Sdn. Bhd. (Kian Huat)	62.74
All Others	62.74

[1] *See* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, regarding ''Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Malaysia,'' dated concurrently with this notice (Preliminary Decision Memorandum).

[2] *See* sections 776(a) and (b) of the Act.

In accordance with sections 703(d)(1)(B) and (2) of the Act, we are directing U.S. Customs and Border Protection to suspend liquidation of all entries of frozen shrimp from Malaysia that are entered, or withdrawn from warehouse, for consumption on or after the date of the publication of this notice in the **Federal Register,** and to require a cash deposit for such entries of the merchandise in the amounts indicated above.

Disclosure and Public Comment

The Department intends to disclose to interested parties the calculations performed in connection with this preliminary determination within five days of public announcement of this determination.[3] Interested parties may submit case and rebuttals briefs.[4] For a schedule of the deadlines for filing case briefs, rebuttal briefs, and hearing request, *see* the Preliminary Determination Memorandum.

This determination is issued and published pursuant to sections 703(f) and 777(i) of the Act.

Dated: May 28, 2013.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix 1

Scope of the Investigation

The products covered by this investigation are certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[5] deveined or not deveined, cooked or raw, or otherwise processed in frozen form, regardless of size.

The frozen warmwater shrimp and prawn products included in the scope, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope. In addition, food preparations (including dusted shrimp), which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope.

Excluded from the scope are: (1) Breaded shrimp and prawns; (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled; (4) shrimp and prawns in prepared meals; (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns; and (7) certain ''battered shrimp'' (see below).

''Battered shrimp'' is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a ''dusting''' layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to individually quick frozen (IQF) freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products included in the scope of this investigation are currently classified under the following HTSUS subheadings: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, and 1605.29.10.10. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope is dispositive.

Appendix 2

List of Topics Discussed in the Preliminary Decision Memorandum

1. Scope Comments
2. Scope of the Investigation
3. Injury Test
4. Subsidies Valuation
5. Use of Facts Otherwise Available and Adverse Inferences
6. Analysis of Programs
7. Calculation of the All Others Rate
8. Disclosure and Public Comment
9. Verification

[FR Doc. 2013–13229 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–DS–P

[3] *See* 19 CFR 351.224(b).

[4] *See* 19 CFR 351.309.

[5] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–989]

Certain Frozen Warmwater Shrimp From the People's Republic of China: Preliminary Countervailing Duty Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) preliminarily determines that countervailable subsidies are being provided to producers and exporters of certain frozen warmwater shrimp (frozen shrimp) from the People's Republic of China (PRC). The period of investigation (POI) is January 1, 2011, through December 31, 2011. Pursuant to section 705(a)(1) of the Tariff Act of 1930, as amended (the Act), the final determination will be issued 75 days after the date that the Department makes this preliminary determination.

DATES: *Effective Date:* June 4, 2013.

FOR FURTHER INFORMATION CONTACT: John Conniff, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1009.

SUPPLEMENTARY INFORMATION:

Scope of the Investigation

The products covered by this investigation are certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off, deveined or not deveined, cooked or raw, or otherwise processed in frozen form, regardless of size. For a complete description of the scope of the investigation, *see* Appendix 1 to this notice.

Methodology

The Department is conducting this CVD investigation in accordance with section 701 of the Tariff Act of 1930, as amended (the Act). For a full description of the methodology underlying our preliminary conclusions, *see* the Preliminary Decision Memorandum.[1] The Preliminary

[1] *See* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, regarding ''Decision Memorandum for the Preliminary Determination in the

Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov,* and is available to all parties in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly 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.

In accordance with section 703(d)(1)(A)(i) of the Act, we calculated a countervailing duty rate for each individually investigated producer/exporter of the subject merchandise. For companies not individually investigated, we have calculated an all others rate as described in the Preliminary Decision Memorandum.

Preliminary Determination and Suspension of Liquidation

We preliminarily determine the countervailable subsidy rates to be:

Company	Subsidy rate (percent)
Zhanjiang Guolian Aquatic Products, Co., Ltd. (Guolian), Zhanjiang Guolian Feed Co., Ltd. (Guolian Feed), Zhanjiang Guolian Aquatic Fry Technology Co., Ltd. (Guolian Fry), Zhanjiang Guotong Aquatic Co., Ltd. (Guotong) (collectively, the Guolian Companies)	5.76
All Others	5.76

In accordance with sections 703(d)(1)(B) and (2) of the Act, we are directing U.S. Customs and Border Protection to suspend liquidation of all entries of frozen shrimp from the PRC that are entered, or withdrawn from warehouse, for consumption on or after the date of the publication of this notice in the **Federal Register**, and to require a cash deposit for such entries of the merchandise in the amounts indicated above.

Disclosure and Public Comment

The Department intends to disclose to interested parties the calculations performed in connection with this preliminary determination within five days of public announcement of this determination.[2] Interested parties may submit case and rebuttals briefs.[3] For a schedule of the deadlines for filing case briefs, rebuttal briefs, and hearing request, *see* the Preliminary Determination Memorandum.

This determination is issued and published pursuant to sections 703(f) and 777(i) of the Act.

Dated: May 28, 2013.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix 1

Scope of the Investigation

The products covered by this investigation are certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[4] deveined or not deveined, cooked or raw, or otherwise processed in frozen form, regardless of size.

The frozen warmwater shrimp and prawn products included in the scope, regardless of definitions in the Harmonized Tariff Schedule of the United States (HTSUS), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope. In addition, food preparations (including dusted shrimp), which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope.

Excluded from the scope are: (1) Breaded shrimp and prawns; (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled; (4) shrimp and prawns in prepared meals; (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns; and (7) certain ''battered shrimp'' (see below).

''Battered shrimp'' is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a ''dusting''' layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to individually quick frozen (IQF) freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products included in the scope of this investigation are currently classified under the following HTSUS subheadings: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, and 1605.29.10.10. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope is dispositive.

Appendix 2

List of Topics Discussed in the Preliminary Decision Memorandum

1. Scope Comments
2. Scope of the Investigation
3. Injury Test
4. Subsidies Valuation
5. Use of Facts Otherwise Available and Adverse Inferences
6. Analysis of Programs
7. Calculation of the All Others Rate
8. Disclosure and Public Comment
9. Verification

[FR Doc. 2013–13231 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–331–803]

Certain Frozen Warmwater Shrimp From Ecuador: Preliminary Negative Countervailing Duty Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (''the Department'') preliminarily determines that countervailable

Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from the People's Republic of China,'' dated concurrently with this notice (Preliminary Decision Memorandum).

[2] *See* 19 CFR 351.224(b).

[3] *See* 19 CFR 351.309.

[4] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

subsidies are not being provided to producers and exporters of certain frozen warmwater shrimp from Ecuador. The period of investigation is January 1, 2011, through December 31, 2011. Pursuant to section 705(a)(1) of the Tariff Act of 1930, as amended (the Act), the final determination will be issued 75 days after the date that the Department makes this preliminary determination.

DATES: *Effective Date:* June 4, 2013.

FOR FURTHER INFORMATION CONTACT: Joshua Morris or Austin Redington, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–1779 and (202) 482–1664, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Investigation

The products covered by this investigation are certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off, deveined or not deveined, cooked or raw, or otherwise processed in frozen form, regardless of size. For a complete description of the scope of the investigation, *see* Appendix 1 to this notice.

Methodology

The Department is conducting this countervailing duty (''CVD'') investigation in accordance with section 701 of the Act. For a full description of the methodology underlying our preliminary conclusions, *see* the Preliminary Decision Memorandum, which is hereby adopted by this notice.[1] The Preliminary Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). IA ACCESS is available to registered users at *http://iaaccess.trade.gov,* and is available to all parties in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly 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.

We calculated *de minimis* CVD rates for each individually investigated producer/exporter of the subject merchandise. Consistent with section 703(b)(4)(A) of the Act, we have disregarded these rates and preliminarily determine that no countervailable subsides are being provided to the production or exportation of the subject merchandise in Ecuador. For companies not individually investigated, we have calculated an average rate as described in the Preliminary Decision Memorandum. The ''all others'' rate is also *de minimis.* Consequently, consistent with section 703(b)(4)(A) of the Act, we similarly have disregarded this rate.

Preliminary Determination and Suspension of Liquidation

We preliminarily determine the countervailable subsidy rates to be:

Company	Subsidy rate (percent)
Promarisco S.A.	*0.39
Sociedad Nacional de Galapagos C.A.	*0.70
All Others	*0.56

De minimis.

Because we have preliminarily determined that the CVD rates in this investigation are *de minimis,* we will not direct U.S. Customs and Border Protection to suspend liquidation of entries of subject merchandise.

Disclosure and Public Comment

The Department intends to disclose to interested parties the calculations performed in connection with this preliminary determination within five days of announcement of its public announcement.[2] Interested parties may submit case and rebuttal briefs, as well as request a hearing.[3] For a schedule of the deadlines for filing case briefs, rebuttal briefs, and hearing requests, *see* the Preliminary Decision Memorandum.

This determination is issued and published pursuant to sections 703(f) and 777(i) of the Act.

Dated: May 28, 2013.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix 1

Scope of the Investigation

The products covered by this investigation are certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[4] deveined or not deveined, cooked or raw, or otherwise processed in frozen form, regardless of size.

The frozen warmwater shrimp and prawn products included in the scope, regardless of definitions in the Harmonized Tariff Schedule of the United States (''HTSUS''), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope. In addition, food preparations (including dusted shrimp), which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope.

Excluded from the scope are: (1) Breaded shrimp and prawns; (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled; (4) shrimp and prawns in prepared meals; (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns; and (7) certain ''battered shrimp'' (see below).

''Battered shrimp'' is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a ''dusting'' layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between 4 and 10 percent of the product's total weight after being dusted, but prior to

[1] *See* Memorandum from Gary Taverman, Senior Advisor for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration regarding ''Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Ecuador,'' dated concurrently with this notice (''Preliminary Decision Memorandum'').

[2] *See* 19 CFR 351.224(b).

[3] *See* 19 CFR 351.309(c)–(d), 19 CFR 351.310(c).

[4] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

being frozen; and (5) that is subjected to individually quick frozen (''IQF'') freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products included in the scope of this investigation are currently classified under the following HTSUS subheadings: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30, and 1605.29.10.10. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope is dispositive.

Appendix 2

List of Topics Discussed in the Preliminary Decision Memorandum

1. Scope Comments
2. Scope of the Investigation
3. Injury Test
4. Subsidies Valuation
5. Analysis of Programs
6. Disclosure and Public Comment
7. Verification

[FR Doc. 2013–13235 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–560–825]

Certain Frozen Warmwater Shrimp From Indonesia: Negative Preliminary Countervailing Duty Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) preliminarily determines that countervailable subsidies are not being provided to producers and exporters of certain frozen warmwater shrimp (frozen shrimp) from Indonesia. The period of investigation is January 1, 2011, through December 31, 2011. Pursuant to section 705(a)(1) of the Tariff Act of 1930, as amended (the Act), the final determination will be issued 75 days after the date that the Department makes this preliminary determination.

DATES: *Effective Date:* June 4, 2013

FOR FURTHER INFORMATION CONTACT: Gene Calvert, Jun Jack Zhao, or Emily Halle, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–3586, (202) 482–1396, or (202) 482–0176, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Investigation

The products covered by this investigation are certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off, deveined or not deveined, cooked or raw, or otherwise processed in frozen form, regardless of size. For a complete description of the scope of the investigation, *see* Appendix 1 to this notice.

Methodology

The Department is conducting this countervailing duty (CVD) investigation in accordance with section 701 of the Act. For a full description of the methodology underlying our preliminary conclusions, *see* the Preliminary Decision Memorandum.[1] The Preliminary Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov,* and is available to all parties in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly 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.

We have calculated *de minimis* CVD rates for each individually investigated producer/exporter of the subject merchandise. Consistent with section 703(b)(4)(A) of the Act, we have disregarded these rates and preliminarily determined that no countervailable subsides are being provided to the production or exportation of the subject merchandise in Indonesia. The ''all others'' rate is also *de minimis.* Consequently, consistent with section 703(b)(4)(A) of the Act, we similarly have disregarded this rate.

[1] *See* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration regarding ''Negative Preliminary Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from the Republic of Indonesia,'' dated concurrently with this notice (Preliminary Decision Memorandum).

Negative Preliminary Determination and Suspension of Liquidation

We preliminarily determine the countervailable subsidy rates to be the following:

Company	Subsidy rate (percent)
PT. Central Pertiwi Bahari	
PT. Central Proteinaprima Tbk	*0.81
PT. First Marine Seafoods ...	
PT. Khom Foods	*1.22
All Others	*0.99

*De minimis.

Because we have preliminarily determined that the CVD rates in this investigation are *de minimis,* we will not direct U.S. Customs and Border Protection to suspend liquidation of entries of the subject merchandise.

Disclosure and Public Comment

The Department intends to disclose to interested parties the calculations performed in connection with this preliminary determination within five days of its public announcement.[2] Interested parties may submit case and rebuttal briefs, as well as request a hearing.[3] For a schedule of the deadlines for filing case briefs, rebuttal briefs, and hearing requests, *see* the Preliminary Decision Memorandum.

This determination is issued and published pursuant to sections 703(f) and 777(i) of the Act.

Dated: May 28, 2013.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix 1

Scope of the Investigation

The products covered by this investigation are certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[1] deveined or not deveined, cooked or raw, or otherwise processed in frozen form, regardless of size.

The frozen warmwater shrimp and prawn products included in the scope, regardless of definitions in the Harmonized Tariff Schedule of the United States (''HTSUS''), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not

[2] *See* 19 CFR 351.224(b).

[3] *See* 19 CFR 351.309(c)–(d), 19 CFR 351.310(c).

[1] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope. In addition, food preparations (including dusted shrimp), which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope.

Excluded from the scope are: (1) Breaded shrimp and prawns; (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled; (4) shrimp and prawns in prepared meals; (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns; and (7) certain ''battered shrimp'' (see below).

''Battered shrimp'' is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a ''dusting''' layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to individually quick frozen (''IQF'') freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products included in the scope of this investigation are currently classified under the following HTSUS subheadings: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30 and 1605.29.10.10. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope is dispositive.

Appendix 2

List of Topics Discussed in the Preliminary Decision Memorandum

1. Scope Comments
2. Scope of the Investigation
3. Injury Test
4. Subsidies Valuation
5. Voluntary Respondents
6. Use of Facts Otherwise Available and Adverse Inferences
7. Analysis of Programs
8. ITC Notification
9. Disclosure and Public Comment
10. Verification

[FR Doc. 2013–13234 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–549–828]

Certain Frozen Warmwater Shrimp From Thailand: Preliminary Countervailing Duty Determination

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

SUMMARY: The Department of Commerce (the Department) preliminarily determines that countervailable subsidies are being provided to producers and exporters of certain frozen warmwater shrimp (frozen shrimp) from Thailand. The period of investigation is January 1, 2011, through December 31, 2011. Pursuant to section 705(a)(1) of the Tariff Act of 1930, as amended (the Act), the final determination will be issued 75 days after the date that the Department makes this preliminary determination.

DATES: *Effective Date:* June 4, 2013.

FOR FURTHER INFORMATION CONTACT: Myrna Lobo or Justin Neuman, AD/CVD Operations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–2371 and (202) 482–0486, respectively.

SUPPLEMENTARY INFORMATION:

Scope of the Investigation

The products covered by this investigation are certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off, deveined or not deveined, cooked or raw, or otherwise processed in frozen form, regardless of size. For a complete description of the scope of the investigation, *see* Appendix 1 to this notice.

Methodology

The Department is conducting this countervailing duty investigation in accordance with section 701 of the Act. For a full description of the methodology underlying our preliminary conclusions, *see* the Preliminary Decision Memorandum.[1] The Preliminary Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov,* and is available to all parties in the Central Records Unit, room 7046 of the main Department of Commerce building. In addition, a complete version of the Preliminary Decision Memorandum can be accessed directly 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.

In accordance with section 703(d)(1)(A)(i) of the Act, we calculated a countervailing duty rate for each individually investigated producer/exporter of the subject merchandise. We have also calculated an all-others rate. Sections 703(d) and 705(c)(5)(A) of the Act state that for companies not investigated, we will determine an all-others rate by weighting the individual company subsidy rate of each of the companies investigated by each company's exports of subject merchandise to the United States. However, the all-others rate may not include zero and *de minimis* rates or any rates based solely on the facts available. In this investigation, the only rate that is not *de minimis* or based entirely on facts available is the rate calculated for Thai Union Frozen Products Public Co., Ltd./Thai Union Seafood Co., Ltd. (TUF/TUS). Consequently, the rate calculated for TUF/TUS is also assigned as the ''all others'' rate.

Preliminary Determination and Suspension of Liquidation

We preliminarily determine the countervailable subsidy rates to be:

Company	Subsidy rate (percent)
Thai Union Frozen Products Public Co., Ltd./Thai Union Seafood Co., Ltd.	2.09.
Marine Gold Products Limited	*1.75

[1] *See* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration regarding ''Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Frozen Warmwater Shrimp from Thailand,'' dated concurrently with this notice (Preliminary Decision Memorandum).

Company	Subsidy rate (percent)
All Others	2.09.

* De minimis.

In accordance with sections 703(d)(1)(B) and (2) of the Act, we are directing U.S. Customs and Border Protection to suspend liquidation of all entries of frozen shrimp from Thailand that are entered, or withdrawn from warehouse, for consumption on or after the date of the publication of this notice in the **Federal Register**, and to require a cash deposit for such entries of merchandise in the amounts indicated above. We are not, however, ordering suspension of liquidation or the collection of cash deposits, on entries by Marine Gold Products Limited because its countervailing duty rate is *de minimis.*

Disclosure and Public Comment

The Department intends to disclose to interested parties the calculations performed in connection with this preliminary determination within five days of announcement of its public announcement.[2] Interested parties may submit case and rebuttal briefs, as well as request a hearing.[3] For a schedule of the deadlines for filing case briefs, rebuttal briefs, and hearing requests, *see* the Preliminary Decision Memorandum.

This determination is issued and published pursuant to sections 703(f) and 777(i) of the Act.

Dated: May 28, 2013.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix 1

Scope of the Investigation

The products covered by this investigation are certain frozen warmwater shrimp and prawns, whether wild-caught (ocean harvested) or farm-raised (produced by aquaculture), head-on or head-off, shell-on or peeled, tail-on or tail-off,[4] deveined or not deveined, cooked or raw, or otherwise processed in frozen form, regardless of size.

The frozen warmwater shrimp and prawn products included in the scope, regardless of definitions in the Harmonized Tariff Schedule of the United States (''HTSUS''), are products which are processed from warmwater shrimp and prawns through freezing and which are sold in any count size.

The products described above may be processed from any species of warmwater shrimp and prawns. Warmwater shrimp and prawns are generally classified in, but are not limited to, the *Penaeidae* family. Some examples of the farmed and wild-caught warmwater species include, but are not limited to, whiteleg shrimp (*Penaeus vannemei*), banana prawn (*Penaeus merguiensis*), fleshy prawn (*Penaeus chinensis*), giant river prawn (*Macrobrachium rosenbergii*), giant tiger prawn (*Penaeus monodon*), redspotted shrimp (*Penaeus brasiliensis*), southern brown shrimp (*Penaeus subtilis*), southern pink shrimp (*Penaeus notialis*), southern rough shrimp (*Trachypenaeus curvirostris*), southern white shrimp (*Penaeus schmitti*), blue shrimp (*Penaeus stylirostris*), western white shrimp (*Penaeus occidentalis*), and Indian white prawn (*Penaeus indicus*).

Frozen shrimp and prawns that are packed with marinade, spices or sauce are included in the scope. In addition, food preparations (including dusted shrimp), which are not ''prepared meals,'' that contain more than 20 percent by weight of shrimp or prawn are also included in the scope.

Excluded from the scope are: (1) Breaded shrimp and prawns; (2) shrimp and prawns generally classified in the *Pandalidae* family and commonly referred to as coldwater shrimp, in any state of processing; (3) fresh shrimp and prawns whether shell-on or peeled; (4) shrimp and prawns in prepared meals; (5) dried shrimp and prawns; (6) canned warmwater shrimp and prawns; and (7) certain ''battered shrimp'' (see below).

''Battered shrimp'' is a shrimp-based product: (1) That is produced from fresh (or thawed-from-frozen) and peeled shrimp; (2) to which a ''dusting''' layer of rice or wheat flour of at least 95 percent purity has been applied; (3) with the entire surface of the shrimp flesh thoroughly and evenly coated with the flour; (4) with the non-shrimp content of the end product constituting between four and 10 percent of the product's total weight after being dusted, but prior to being frozen; and (5) that is subjected to individually quick frozen (''IQF'') freezing immediately after application of the dusting layer. When dusted in accordance with the definition of dusting above, the battered shrimp product is also coated with a wet viscous layer containing egg and/or milk, and par-fried.

The products included in the scope of this investigation are currently classified under the following HTSUS subheadings: 0306.17.00.03, 0306.17.00.06, 0306.17.00.09, 0306.17.00.12, 0306.17.00.15, 0306.17.00.18, 0306.17.00.21, 0306.17.00.24, 0306.17.00.27, 0306.17.00.40, 1605.21.10.30 and 1605.29.10.10. These HTSUS subheadings are provided for convenience and for customs purposes only and are not dispositive, but rather the written description of the scope is dispositive.

Appendix 2

List of Topics Discussed in the Preliminary Decision Memorandum

1. Scope Comments
2. Scope of the Investigation
3. Injury Test
4. Subsidies Valuation
5. Analysis of Programs
6. ITC Notification
7. Disclosure and Public Comment
8. Verification

[FR Doc. 2013–13202 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–DS–P

[2] *See* 19 CFR 351.224(b).

[3] *See* 19 CFR 351.309(c)–(d), 19 CFR 351.310(c).

[4] ''Tails'' in this context means the tail fan, which includes the telson and the uropods.

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–985]

Xanthan Gum From the People's Republic of China: Final Determination of Sales at Less Than Fair Value

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* June 4, 2013.

SUMMARY: On January 10, 2013, the Department of Commerce (''Department'') published its preliminary determination of sales at less than fair value (''LTFV'') and postponement of final determination in the antidumping (''AD'') investigation of xanthan gum from the People's Republic of China (''PRC'').[1] On March 4, 2013, the Department released its post-preliminary differential pricing analysis.[2] The Department invited interested parties to comment on the *Preliminary Determination* and post-preliminary analysis. Based on an analysis of the comments received, the Department has made changes from the *Preliminary Determination.* The Department has determined that xanthan gum from the PRC is being, or is likely to be, sold in the United States at LTFV, as provided in section 735 of the Tariff Act of 1930, as amended (''the Act''). The final weighted-average dumping margins for this investigation are listed in the ''Final Determination'' section below.

FOR FURTHER INFORMATION CONTACT: Brandon Farlander or Erin Kearney, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–0182 or (202) 482–0167, respectively.

[1] *See Xanthan Gum from the People's Republic of China: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 77 FR 2252 (January 10, 2013) (''*Preliminary Determination*'').

[2] *See* ''Less Than Fair Value Investigation of Xanthan Gum from the People's Republic of China: Post-Preliminary Analysis and Calculation Memorandum for Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.) and Shandong Fufeng Fermentation Co., Ltd.,'' dated March 4, 2013; *see also* ''Less Than Fair Value Investigation of Xanthan Gum from the People's Republic of China: Post-Preliminary Analysis and Calculation Memorandum for Deosen Biochemical Ltd.,'' dated March 4, 2013.

SUPPLEMENTARY INFORMATION:

Background

The Department published its *Preliminary Determination* on January 10, 2013.[3] At the Department's request, Fufeng and Deosen submitted supplemental questionnaire responses on February 25 and February 26, 2013, respectively. On February 15, 2013, in response to a request filed by Deosen, the Department extended the deadline for submission of publicly available information to February 22, 2013, and the due date for rebuttal information to March 4, 2013. On February 22, 2013, Petitioner, Deosen, and Fufeng submitted surrogate value (''SV'') information, and Petitioner, Deosen, and Fufeng submitted rebuttal comments to this information on March 4, 2013. Also on March 4, 2013, the Department released its post-preliminary differential pricing analysis and extended the deadline for submission of case briefs to March 12, 2013, and the due date for rebuttal briefs to March 18, 2013.[4] On March 15, 2013, in response to a request from Fufeng, the Department extended the deadline for submission of rebuttal briefs to March 19, 2013.

Petitioner, Deosen, and Fufeng submitted case briefs on March 12, 2013,[5] and rebuttal briefs on March 19, 2013.[6] On March 27, 2013, the Department rejected Deosen's rebuttal brief. Deosen resubmitted its rebuttal brief, at the Department's request, on March 29, 2013.[7] We did not receive briefs or rebuttal briefs from any other interested party to the investigation. At the request of Deosen, Fufeng, and Petitioner, the Department held a public hearing on April 11, 2013.

Period of Investigation

The period of investigation (''POI'') is October 1, 2011, through March 31, 2012. This period corresponds to the two most recent fiscal quarters prior to the month of the filing of the petition, which was June 2012.[8]

Verification

As provided in section 782(i) of the Act, between January 14 and January 29, 2013, the Department verified the information submitted by Deosen and Fufeng for use in the final determination.[9] Verification reports were issued on February 20, 2013. The Department used standard verification procedures, including examination of relevant accounting and production records and original source documents provided by respondents.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties in this investigation are addressed in the Issues and Decision Memorandum.[10] A list of the issues which parties raised and to which we respond in the Issues and Decision Memorandum is attached to this notice as an Appendix. The Issues and Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). Access to IA ACCESS is available to registered users at *http://iaaccess.trade.gov*, and is available to all parties in the Central Records Unit, which is in room 7046 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the internet at *www.trade.gov/ia*. The signed Issues and Decision Memorandum and the electronic versions of the Issues and Decision Memorandum are identical in content.

Changes Since the ***Preliminary Determination***

Changes Applicable to Multiple Companies

- We applied a differential pricing analysis to determine the comparison method, rather than the targeted dumping test.[11]
- We valued truck freight using the World Bank's *Doing Business 2013: Thailand* report.[12]
- We valued brokerage and handling using the World Bank's *Doing Business 2013: Thailand* report.[13]
- We valued labor using Thai National Statistics Office 2007 data.[14]
- We valued electricity using the Electricity Generating Authority of Thailand's 2011 Annual Report.[15]
- We revised the SV used to value hydrochloric acid.[16]

Changes Specific to Fufeng

- We declined to grant Fufeng's by-product offsets for clinker and corn rejects.[17]
- We revised Fufeng's FOP allocation methodology for its energy FOPs and did not grant Fufeng's steam by-product offset.[18]
- We revised the SV used to value Fufeng's corn protein powder by-product.[19]
- We revised the SV used to value Fufeng's caustic soda.[20]
- We revised the SV used to value Fufeng's corn embryo by-product.[21]
- We revised Fufeng's corn embryo, corn protein powder, and protein feed by-products to include packing materials.[22]

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[3] The Department postponed the deadline for the final determination to not later than 135 days after publication of the *Preliminary Determination* (*i.e.,* January 10, 2013). *See Preliminary Determination,* 78 FR at 2254. However, because May 25, 2013, falls on a non-business day, the revised deadline for this final determination is now May 28, 2013. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

[4] *See* ''Less Than Fair Value Investigation of Xanthan Gum from the People's Republic of China: Post-Preliminary Analysis and Calculation Memorandum for Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.) and Shandong Fufeng Fermentation Co., Ltd.,'' dated March 4, 2013; *see also* ''Less Than Fair Value Investigation of Xanthan Gum from the People's Republic of China: Post-Preliminary Analysis and Calculation Memorandum for Deosen Biochemical Ltd.,'' dated March 4, 2013.

[5] *See* ''Xanthan Gum from the People's Republic of China: Petitioner's Case Brief,'' dated March 12, 2013 (''Petitioner Case Brief''); *see also* ''Neimenggu Fufeng's Administrative Case Brief,'' dated March 12, 2013 (''Fufeng Case Brief''); ''Case Brief of Deosen Biochemical and Deosen USA: Xanthan Gum from China,'' dated March 13, 2013 (''Deosen Case Brief'').

[6] *See* ''Xanthan Gum from the People's Republic of China: Petitioner's Rebuttal Case Brief,'' dated March 19, 2013 (''Petitioner Rebuttal Brief''); *see also* ''Neimenggu Fufeng Biotechnologies Co., Ltd. Rebuttal Case Brief,'' dated March 20, 2013 (''Fufeng Rebuttal Brief'').

[7] *See* ''Rebuttal Brief of Deosen Biochemical and Deosen USA,'' dated March 29, 2013 (''Deosen Rebuttal Brief'').

[8] *See* 19 CFR 351.204(b)(1).

[9] *See* the Department's Memoranda to the File, entitled ''Verification of the Sales and Factors Responses of Neimenggu Fufeng Biotechnologies Co., Ltd. and its affiliate Shandong Fufeng Fermentation Co., Ltd. in the Investigation of Xanthan Gum from the People's Republic of China,'' dated February 20, 2013, ''Verification of the Questionnaire Responses of Deosen Biochemical Ltd.,'' dated February 20, 2013, and ''Verification of the Questionnaire Responses of Deosen USA Inc.,'' dated February 20, 2013, on the record of this investigation on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS). IA ACCESS is available to registered users at *http://iaaccess.trade.gov* and in the Central Records Unit (''CRU''), room 7046 of the main Department of Commerce, with respect to these entities.

[10] *See* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, ''Issues and Decision Memorandum for the Final Determination of the Antidumping Duty Investigation of Xanthan Gum from the People's Republic of China'' (May 28, 2013) (''Issues and Decision Memorandum'').

[11] *See* Issues and Decision Memorandum.

[12] *See id.* at Comment 6–A.

[13] *See id.* at Comment 6–B.

[14] *See id.* at Comment 6–C.

[15] *See id.* at Comment 6–D.

[16] *See id.* at Comment 6–F.

[17] *See id.* at Comment 12–C.

[18] *See id.* at Comment 9.

[19] *See id.* at Comment 12–A.

[20] *See id.* at Comment 11–C.

[21] *See id.* at Comment 12–B.

[22] *See* the Department's Memorandum entitled, ''Antidumping Duty Investigation of Xanthan Gum

• We revised Fufeng's marine insurance calculation.[23]

Changes Specific to Deosen

• We valued the water FOP for Deosen's Ordos factory.[24]

• We revised the SV used to value Deosen's metal buckle input.[25]

• We revised Deosen's calculations for certain U.S. expenses.[26]

• We revised Deosen's calculations for certain U.S. indirect selling expenses.[27]

• We corrected the ministerial error identified in the *Preliminary Determination*.[28]

For detailed information concerning all of the changes made, including those listed above, *see* the company-specific analysis and SV memoranda.

Scope of the Investigation

The scope of this investigation covers dry xanthan gum, whether or not coated or blended with other products. Further, xanthan gum is included in this investigation regardless of physical form, including, but not limited to, solutions, slurries, dry powders of any particle size, or unground fiber.

Xanthan gum that has been blended with other product(s) is included in this scope when the resulting mix contains 15 percent or more of xanthan gum by dry weight. Other products with which xanthan gum may be blended include, but are not limited to, sugars, minerals, and salts.

Xanthan gum is a polysaccharide produced by aerobic fermentation of *Xanthomonas campestris.* The chemical structure of the repeating pentasaccharide monomer unit consists of a backbone of two P-1,4-D-Glucose monosaccharide units, the second with a trisaccharide side chain consisting of P-D-Mannose-(1,4)- P-DGlucuronic acid-(1,2)-a-D-Mannose monosaccharide units. The terminal mannose may be pyruvylated and the internal mannose unit may be acetylated.

Merchandise covered by the scope of this investigation is classified in the Harmonized Tariff Schedule (''HTS'') of the United States at subheading 3913.90.20. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope is dispositive.

Combination Rates

In the *Initiation Notice,* the Department stated that it would calculate combination rates for respondents that are eligible for a separate rate in this investigation.[29] This practice is described in Policy Bulletin 05.1, available at *http://www.trade.gov/ia/*.

Final Determination

Because the PRC-wide entity did not provide the Department with requested information, pursuant to section 776(a)(2)(A) of the Act, the Department continues to find it appropriate to base the PRC-wide rate on facts available.[30] The Department determines that the following weighted-average dumping margins exist for the period October 1, 2011, through March 31, 2012.

Exporter	Producer	Weighted-average dumping margin (percent)
Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.)/Shandong Fufeng Fermentation Co., Ltd.	Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.)/Shandong Fufeng Fermentation Co., Ltd.	15.09
Deosen Biochemical Ltd	Deosen Biochemical Ltd./Deosen Biochemical (Ordos) Ltd	128.32
A.H.A. International Co., Ltd	Shandong Fufeng Fermentation Co., Ltd	71.71
A.H.A. International Co., Ltd	Deosen Biochemical Ltd	71.71
CP Kelco (Shandong) Biological Company Limited	CP Kelco (Shandong) Biological Company Limited	71.71
Hebei Xinhe Biochemical Co. Ltd	Hebei Xinhe Biochemical Co. Ltd	71.71
Shanghai Smart Chemicals Co. Ltd	Deosen Biochemical Ltd	71.71
PRC-Wide Entity *		154.07

* The PRC-wide entity includes Shandong Yi Lian Cosmetics Co., Ltd., Shanghai Echem Fine Chemicals Co., Ltd., Sinotrans Xiamen Logistics Co., Ltd., and Zibo Cargill HuangHelong Bioengineering Co., Ltd.

Disclosure

In accordance with 19 CFR 351.224(b), the Department will disclose the calculations performed in this investigation to parties within five days of the date of publication of this notice in the **Federal Register**.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, the Department will instruct U.S. Customs and Border Protection (''CBP'') to continue to suspend liquidation of all appropriate entries of xanthan gum from the PRC as described in the ''Scope of the Investigation'' section, which were entered, or withdrawn from warehouse, for consumption on or after January 10, 2013, the date of publication of the *Preliminary Determination* in the **Federal Register**. Further, the Department will instruct CBP to require a cash deposit equal to the weighted-average amount by which the normal value exceeds U.S. price as follows: (1) For the exporter/producer combinations listed in the table above, the cash deposit rate will be equal to the weighted-average dumping margin which the Department has determined in this final determination; (2) for all combinations of PRC exporters/producers of merchandise under consideration which have not received their own separate rate above, the cash deposit rate will be equal to the weighted-average dumping margin 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 equal to the cash deposit rate applicable to the PRC exporter/producer combination that supplied that non-PRC exporter.

from the People's Republic of China: Final Determination Analysis Memorandum for Neimenggu Fufeng Biotechnologies Co., Ltd. (aka Inner Mongolia Fufeng Biotechnologies Co., Ltd.) and Shandong Fufeng Fermentation Co., Ltd.,'' dated May 28, 2013.

[23] *See id.*

[24] *See* Issues and Decision Memorandum at Comment 18.

[25] *See id.* at Comment 19–C.

[26] *See id.* at Comment 21.

[27] *See id.* at Comment 22.

[28] *See id.* at Comment 23.

[29] *See Xanthan Gum From Austria and the People's Republic of China: Initiation of Antidumping Duty Investigations,* 77 FR 39210 (July 2, 2012) (''*Initiation Notice*'').

[30] *See* Issues and Decision Memorandum.

These suspension-of-liquidation instructions will remain in effect until further notice.

International Trade Commission Notification

In accordance with section 735(d) of the Act, the Department has notified the International Trade Commission (''ITC'') of the final affirmative determination of sales at LTFV. In accordance with section 735(b)(2) of the Act, the ITC will determine, within 45 days, whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise under consideration. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess, upon further instruction by the Department, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to the parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of propriety information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: May 28, 2013.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix—Issues for the Final Determination

Comment 1: Surrogate Country
Comment 2: Surrogate Financial Statements
Comment 3: Comparison Methodology
Comment 4: Use of Indonesian Export Data
Comment 5: Valuation of Bacteria
Comment 6: General Surrogate Values
  Comment 6–A: Truck Freight
  Comment 6–B: Brokerage and Handling
  Comment 6–C: Labor
  Comment 6–D: Electricity
  Comment 6–E: Sodium Hypochlorite
  Comment 6–F: Hydrochloric Acid
Comment 7: Discrepancy in Respondents' Preliminary Weighted-Average Dumping Margins

Fufeng-Specific Issues:

Comment 8: Cornstarch Intermediate Input
Comment 9: FOP Allocation Methodology and Steam By-Product Offset
Comment 10: Packing FOP for Raw Xanthan Gum
Comment 11: Fufeng Surrogate Values
  Comment 11–A: Corn
  Comment 11–B: Decoking Agent
  Comment 11–C: Caustic Soda
Comment 12: Fufeng By-Products
  Comment 12–A: Corn Protein Powder
  Comment 12–B: Corn Embryo
  Comment 12–C: Corn Rejects, Coal Ash, and Clinker
  Comment 12–D: Soybean Dregs

Deosen-Specific Issues:

Comment 13: Energy Intermediate Input
Comment 14: Compressed Air
Comment 15: Deosen Ordos Water Consumption
Comment 16: Deosen Surrogate Values
  Comment 16–A: Cornstarch
  Comment 16–B: Soy Powder
  Comment 16–C: Metal Buckle
  Comment 16–D: Coal
Comment 17: Power Plant By-Products
Comment 18: U.S. Expenses
Comment 19: U.S. Indirect Selling Expenses
Comment 20: Ministerial and Other Claimed Errors

[FR Doc. 2013–13220 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–433–811]

Xanthan Gum From Austria: Final Determination of Sales at Less Than Fair Value

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

DATES: *Effective Date:* June 4, 2013.

SUMMARY: On January 10, 2013, the Department of Commerce (''Department'') published its preliminary determination of sales at less than fair value (''LTFV'') and postponement of final determination in the antidumping (''AD'') investigation of xanthan gum from Austria.[1] On March 4, 2013, the Department released its post-preliminary differential pricing analysis.[2] The Department invited interested parties to comment on the *Preliminary Determination* and Post-Preliminary Analysis and Calculation Memorandum. Based on an analysis of the comments received, the Department has made changes from the *Preliminary Determination.* The Department has determined that xanthan gum from Austria is being, or is likely to be, sold in the United States at LTFV, as provided in section 735 of the Tariff Act of 1930, as amended (the ''Act''). The final weighted-average dumping margins for this investigation are listed in the ''Final Determination'' section below.

FOR FURTHER INFORMATION CONTACT: Drew Jackson or Karine Gziryan, AD/CVD Operations, Office 4, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230; telephone: (202) 482–4406 or (202) 482–4081, respectively.

SUPPLEMENTARY INFORMATION:

Background

The Department published its *Preliminary Determination* on January 10, 2013.[3] On March 4, 2013, the Department issued its Post-Preliminary Analysis and Calculation Memorandum to determine whether an alternative comparison methodology should be used. Based on this analysis, the Department determined that application of an alternative calculation methodology was not appropriate for Jungbunzlauer Austria AG (''JBL Austria'') and, accordingly, continued to apply the average-to-average method.[4]

On March 12, 2013, JBL Austria and Petitioner[5] submitted case briefs. On March 18, 2013, JBL Austria and Petitioner submitted rebuttal briefs. Subsequently, the Department rejected JBL Austria's March 18, 2013 rebuttal brief because it contained new factual information.[6] On April 9, 2013, JBL

[1] *See Xanthan Gum from Austria: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination,* 78 FR 2251 (January 10, 2013) (''*Preliminary Determination*'').

[2] *See* Memorandum from Christian Marsh, Deputy Assistant Secretary Antidumping and Countervailing Duty Operations, to Paul Piquado, Assistant Secretary for Import Administration, concerning, Less Than Fair Value Investigation of Xanthan Gum from Austria: Post-Preliminary Analysis and Calculation Memorandum, dated March 4, 2013 (''Post-Preliminary Analysis and Calculation Memorandum'').

[3] The Department postponed the deadline for the final determination to not later than 135 days after publication of the *Preliminary Determination* (*i.e.,* January 10, 2013). *See Preliminary Determination,* 78 FR at 2254. However, because May 25, 2013, falls on a non-business day, the revised deadline for this final determination is now May 28, 2013. *See Notice of Clarification: Application of ''Next Business Day'' Rule for Administrative Determination Deadlines Pursuant to the Tariff Act of 1930, As Amended,* 70 FR 24533 (May 10, 2005).

[4] *See id.*

[5] Petitioner in this investigation is CP Kelco U.S.

[6] *See* Letter from Abdelali Elouaradia, Director, AD/CVD Operations Office 4, to JBL Austria, concerning, Antidumping Investigation of Xanthan Gum from Austria: New Factual Information in Jungbunzlauer Austria Rebuttal Brief, dated April 15, 2013.

Austria resubmitted a redacted version of its rebuttal brief.

On April 10, 2013, the Department held a hearing, which was requested by Petitioner and JBL Austria.

Period of Investigation

The period of investigation is April 1, 2011, through March 31, 2012. This period corresponds to the four most recent fiscal quarters prior to the month of the filing of the petition, which was June 2012.

Verification

As provided in section 782(i) of the Act, between January 14, 2013, and February 7, 2013, the Department verified the information submitted by JBL Austria for use in the final determination.[7] Verification reports were issued between February 21, 2013, and March 4, 2013. The Department used standard verification procedures, including examination of relevant accounting and production records and original source documents provided by these respondents.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties in this investigation are addressed in the Issues and Decision Memorandum.[8] A list of the issues which the parties raised and to which the Department responded in the Issues and Decision Memorandum is attached to this notice as an Appendix. The Issues and Decision Memorandum is a public document and is on file electronically via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (''IA ACCESS''). Access to IA ACCESS is available to registered users at *http://iaaccess.trade.gov,* and is available to all parties in the Central Records Unit, which is in room 7046 of the main Department of Commerce building. In addition, a complete version of the Issues and Decision Memorandum can be accessed directly on the Internet at *www.trade.gov/ia.* The signed Issues and Decision Memorandum and the electronic versions of the Issues and Decision Memorandum are identical in content.

Changes Since the Preliminary Determination

- We applied partial adverse facts available with respect to the material codes for which JBL Austria did not report its grade characteristic in accordance with the Department's reporting requirements.[9]
- We applied partial adverse facts available to the reported inland freight expense from warehouse to the customer in the United States according to the Department's findings at the sales verification.[10]
- We adjusted the reported freight expense incurred on transporting xanthan gum to and from the further manufacturing locations according to the Department's findings at the sales verification.[11]
- We applied a differential pricing analysis to determine the appropriate comparison method, rather than the targeted dumping test. *See* Issues and Decision Memorandum.

Scope of the Investigation

The scope of this investigation covers dry xanthan gum, whether or not coated or blended with other products. Further, xanthan gum is included in this investigation regardless of physical form, including, but not limited to, solutions, slurries, dry powders of any particle size, or unground fiber.

Xanthan gum that has been blended with other product(s) is included in this scope when the resulting mix contains 15 percent or more of xanthan gum by dry weight. Other products with which xanthan gum may be blended include, but are not limited to, sugars, minerals, and salts.

Xanthan gum is a polysaccharide produced by aerobic fermentation of Xanthomonas campestris. The chemical structure of the repeating pentasaccharide monomer unit consists of a backbone of two P-1,4-D-Glucose monosaccharide units, the second with a trisaccharide side chain consisting of P-D-Mannose-(1,4)-P-DGlucuronic acid-(1,2)-a-D-Mannose monosaccharide units. The terminal mannose may be pyruvylated and the internal mannose unit may be acetylated.

Merchandise covered by the scope of this investigation is classified in the Harmonized Tariff Schedule of the United States at subheading 3913.90.20. This tariff classification is provided for convenience and customs purposes; however, the written description of the scope is dispositive.

Final Determination

The Department determines that the following weighted-average dumping margins exist for the period April 1, 2011, through March 31, 2012:

Exporter/manufacturer	Weighted-average dumping margin (percent)
Jungbunzlauer Austria AG	29.98
All Others	29.98

The ''All Others'' rate is based on the weighted-average dumping margin calculated for JBL Austria, the only company for which the Department calculated a rate.[12]

Disclosure

In accordance with 19 CFR 351.224(b), the Department will disclose the calculations performed in this investigation to parties within five days of the date of publication of this notice in the **Federal Register**.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, the Department will instruct U.S. Customs and Border Protection (''CBP'') to continue to suspend liquidation of all appropriate entries of xanthan gum from Austria as described in the ''Scope of the Investigation'' section, which were entered, or withdrawn from warehouse, for consumption on or after January 10, 2013, the date of publication of the *Preliminary Determination* in the **Federal Register**. CBP shall require a cash deposit equal to the estimated amount by which the normal value exceeds the U.S. price as shown above. These instructions suspending

[7] *See* Memorandum to the File through Neal Halper, Director, Office of Accounting, concerning, Verification of the Cost Response of Jungbunzlauer Austria in the Antidumping Duty Investigation of Xanthan Gum from Austria, dated February 20, 2013. *See also* Memorandum to the File through Robert Bolling, Program Manager, AD/CVD Operations, Office 4, concerning, Verification of the Questionnaire Responses of Jungbunzlauer Austria AG, dated February 19, 2013. *See also* Memorandum to the File through Robert Bolling, Program Manager, AD/CVD Operations, Office 4, concerning, Verification of the Questionnaire Responses of Jungbunzlauer Ladenburg GmbH, dated February 19, 2013. *See also* Memorandum to the File through Robert Bolling, Program Manager, AD/CVD Operations, Office 4, concerning, Verification of the Sales Response of Jungbunzlauer Inc. in the Antidumping Investigation of Xanthan Gum from Austria, dated March 4, 2013 (''CEP Sales Verification Report'').

[8] *See* Memorandum from Christian Marsh, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations, to Ronald K. Lorentzen, Acting Assistant Secretary for Import Administration, ''Issues and Decision Memorandum for the Final Determination in the Antidumping Duty Investigation of Xanthan Gum from Austria'' (May 28, 2013) (''Issues and Decision Memorandum'').

[9] *See* Issues and Decision Memorandum at Comment 1.

[10] *See* Memorandum to the File, concerning ''Final Determination Margin Calculation for Jungbunzlauer Austria AG'' dated May 28, 2013; *see also* CEP Sales Verification Report at 2. *See* Issues and Decision Memorandum at Comment 2.

[11] *See* Issues and Decision Memorandum at Comment 3.

[12] *See* section 735(c)(5)(A) of the Act.

liquidation will remain in effect until further notice.

International Trade Commission Notification

In accordance with section 735(d) of the Act, the Department has notified the International Trade Commission (''ITC'') of the final affirmative determination of sales at LTFV. In accordance with section 735(b)(2) of the Act, the ITC will determine, within 45 days, whether the domestic industry in the United States is materially injured, or threatened with material injury, by reason of imports, or sales (or the likelihood of sales) for importation, of the merchandise under consideration. If the ITC determines that material injury or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing CBP to assess, upon further instruction by the Department, antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

Notification Regarding Administrative Protective Orders

This notice also serves as a reminder to the parties subject to administrative protective order (''APO'') of their responsibility concerning the disposition of propriety information disclosed under APO in accordance with 19 CFR 351.305. Timely written notification of return or destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a sanctionable violation.

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: May 28, 2013.

Ronald K. Lorentzen,

Acting Assistant Secretary for Import Administration.

Appendix

Issues for the Final Determination

Comment 1: Whether the Department should apply total adverse facts available (''AFA'') to JBL Austria because it misreported the grade for the majority of its U.S. and comparison market sales

Comment 2: Whether the Department should apply AFA because JBL Austria withheld information regarding its possible affiliations

Comment 3: Repacking Costs

[FR Doc. 2013–13218 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Proposed Information Collection; Comment Request; Papahānaumokuākea Marine National Monument Permit Application and Reports for Permits (Formerly Known as Northwestern Hawaiian Islands Marine National Monument)

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995.

DATES: Written comments must be submitted on or before August 5, 2013.

ADDRESSES: Direct all written comments to Jennifer Jessup, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6616, 14th and Constitution Avenue NW., Washington, DC 20230 (or via the Internet at *JJessup@doc.gov).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Tia Brown, (808) 397–2660 or *Tia.Brown@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

On June 15, 2006, President Bush established the Papahānaumokuākea Marine National Monument by issuing Presidential Proclamation 8031 (71 FR 36443, June 26, 2006) under the authority of the Antiquities Act (16 U.S.C. 431). The proclamation includes restrictions and prohibitions regarding activities in the monument consistent with the authority provided by the act. Specifically, the proclamation prohibits access to the monument except when passing through without interruption or as allowed under a permit issued by NOAA and the Department of the Interior's U.S. Fish and Wildlife Service (FWS). Vessels passing through the monument without interruption are required to notify NOAA and FWS upon entering into and leaving the monument. Individuals wishing to access the monument to conduct certain regulated activities must first apply for and be granted a permit issued by NOAA and FWS to certify compliance with vessel monitoring system requirements, monument regulations and best management practices. On August 29, 2006, NOAA and FWS published a final rule codifying the provisions of the proclamation (71 FR 51134).

II. Method of Collection

Respondents have a choice of either electronic or paper forms. Methods of submittal include email of electronic forms, and mail and facsimile transmission of paper forms.

III. Data

OMB Control Number: 0648–0548.

Form Number: None.

Type of Review: Regular submission (extension of a current information collection).

Affected Public: Individuals, non-profit institutions; Federal, State, local, government, Native Hawaiian organizations; business or other for-profit organizations.

Estimated Number of Respondents: 411.

Estimated Time per Response: Research, Conservation and Management and Education (''general'' permits), 5 hours; Special Ocean Use permits, 10 hours; Native Hawaiian Practices permits, 8 hours; Recreation permits, 6 hours; permit modification requests and final reports, 1o hours; and annual reports, 5 hours.

Estimated Total Annual Burden Hours: 1,794.

Estimated Total Annual Cost to Public: $26,280 in recordkeeping/reporting costs and vessel monitoring system installation and maintenance.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: May 30, 2013.

Gwellnar Banks,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 2013–13184 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC713

Caribbean Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The Caribbean Fishery Management Council (Council) will hold a meeting.

DATES: The meeting will be held on Monday, June 24, 2013, from 9:00: a.m. to 5 p.m.

ADDRESSES: The meeting will be held at the Verdanza Hotel, 8020 Tartak St. Isla Verde, Puerto Rico 00909.

FOR FURTHER INFORMATION CONTACT: Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico 00918; telephone: (787) 766–5926.

SUPPLEMENTARY INFORMATION: The Council will hold its 146th regular Council Meeting to discuss the items contained in the following agenda:

June 24, 2013, 9 a.m.–5 p.m.

- Call to Order
- Adoption of Agenda
- Consideration of 145th Council Meeting Verbatim Transcriptions
- Executive Director's Report
- SSC Report on:
  - —Review and comment on the final stock assessment reports for SEDAR 30 U.S. Caribbean Queen triggerfish.
  - —Review SEFSC re-analysis of queen and silk snapper based on SEDAR 26 data, including reviewing the assumptions of the new analysis and the most appropriate application of a control rule that would allow the estimation of quantitative ACL advice.
- Final action by CFMC on any changes to the 2013 queen snapper closed season.
- MONF3 Findings.

PUBLIC COMMENT PERIOD (5-minute presentations)

- Other Business
- Next Council Meeting

The established times for addressing items on the agenda may be adjusted as necessary to accommodate the timely completion of discussion relevant to the agenda items. To further accommodate discussion and completion of all items on the agenda, the meeting may be extended from, or completed prior to the date established in this notice.

The meeting is open to the public, and will be conducted in English. Fishers and other interested persons are invited to attend and participate with oral or written statements regarding agenda issues.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be subjects for formal action during this meeting. Actions will be restricted to those issues specifically identified in this notice, and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided that 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. For more information or request for sign language interpretation and/other auxiliary aids, please contact Mr. Miguel A. Rolón, Executive Director, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico, 00918, telephone: (787) 766–5926, at least 5 days prior to the meeting date.

Dated: May 30, 2013.

William D. Chappell,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2013–13143 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC561

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Conducting Maritime Strike Operations by Eglin Air Force Base in the Gulf of Mexico

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

ACTION: Notice; proposed incidental harassment authorization; request for comments.

SUMMARY: NMFS received an application from the U.S. Air Force (USAF), Eglin Air Force Base (Eglin AFB), for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to Maritime Strike Operations in the Gulf of Mexico (GOM). The USAF's activities are considered military readiness activities. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS requests comments on its proposal to issue an IHA to Eglin AFB to take, by harassment, several species of marine mammal during the specified activity for a period of 1 year.

DATES: Comments and information must be received no later than July 5, 2013.

ADDRESSES: Comments on the application should be addressed to 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.Hopper@noaa.gov.* 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.

Instructions: 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.

An electronic copy of the application containing a list of the references used in this document and Eglin AFB's Draft Environmental Assessment (DEA) 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 may also be viewed, by appointment, during regular business hours, at the aforementioned address.

FOR FURTHER INFORMATION CONTACT: Brian D. Hopper, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct

the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings 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), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. 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 U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

The National Defense Authorization Act (NDAA) (Pub. L. 108–136) removed the ''small numbers'' and ''specified geographical region'' provisions and amended the definition of ''harassment'' as it applies to a ''military readiness activity'' to read as follows (section 3(18)(B) of the MMPA): (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Summary of Request

NMFS received an application on December 11, 2012, from Eglin AFB for the taking, by harassment, of marine mammals incidental to Maritime Strike Operations within the Eglin Gulf Test and Training Range (EGTTR). A revised application was submitted on January 22, 2013, which provided updated marine mammal information. The EGTTR is described as the airspace over the Gulf of Mexico (GOM) that is controlled by Eglin AFB. The planned test location in the EGTTR is Warning Area 151 (W–151), which is located approximately 17 miles offshore from Santa Rosa Island, specifically sub-area W–151A.

The Maritime Strike operations may potentially impact marine mammals at or near the water surface. Marine mammals could potentially be harassed, injured, or killed by exploding and non-exploding projectiles, and falling debris. However, based on analyses provided in the USAF's Draft Environmental Assessment (DEA), Eglin's IHA application, including the required mitigation, and for reasons discussed later in this document, NMFS does not anticipate that Eglin's Maritime Strike exercises will result in any serious injury or mortality to marine mammals. Eglin AFB has requested authorization to take two cetacean species by Level A and Level B harassment. The requested species include: Atlantic bottlenose dolphin (*Tursiops truncatus*) and Atlantic spotted dolphin (*Stenella frontalis*).

Description of the Specified Activity

This section describes the Maritime Strike missions that have the potential to affect marine mammals present within the test area. Maritime Strike operations, a ''military readiness activity'' as defined under 16 U.S.C. 703 note, involve detonations above the water, near the water surface, and under water within the EGTTR. These missions involve multiple types of live munitions identified in Tables 1 and 2 below. The Maritime Strike operations are described in more detail in the following paragraphs.

The Maritime Strike program was developed in response to the increasing threats at sea posed by operations conducted from small boats. The first phase of the Maritime Strike program focused on detecting and tracking boats using various sensors, simulated weapons engagements, and testing with inert munitions. The final phase, and the subject of this notice, consists of testing the effectiveness of live munitions on small boat threats. The proposed Maritime Strike activities would involve the use of multiple types of live munitions in the EGTTR against small boat targets, at all desired surface and water depth scenarios (maximum depth of 10 feet below the surface) necessary to carry out the Tactics Development and Evaluation (TD&E) Program. Multiple munitions (bombs, missiles, and gunner rounds) and aircraft would be used to meet the objectives of the Maritime Strike program (Table 1). Because the tests focus on weapon/target interaction, particular aircraft are not specified for a given test as long as it meets the delivery parameters. The munitions would be deployed against static, towed, and remotely controlled boat targets. Static and controlled targets consist of stripped boat hulls with plywood simulated crews and systems. Damaged boats would be recovered for data collection. Test data collection and operation of remotely controlled boats would be conducted from an instrumentation barge anchored on-site, which would also provide a platform for cameras and weapon-tracking equipment. Target boats would be positioned 300 to 600 feet from the instrument barge, depending on the munition.

TABLE 1—LIVE MUNITIONS AND AIRCRAFT

Munitions	Aircraft (not associated with specific munitions)
GBU–10 laser-guided Mk-84 bomb	F–16C fighter aircraft.
GBU–24 laser-guided Mk-84 bomb	F–16C+ fighter aircraft.
GBU–31 Joint Direct Attack Munition, global positioning system guided Mk-84 bomb	F–15E fighter aircraft.
GBU–12 laser-guided Mk-82 bomb	A–10 fighter aircraft.
GBU–38 Joint Direct Attack Munition, global positioning system guided Mk-82 bomb	B–1B bomber aircraft.
GBU–54 Laser Joint Direct Attack Munition, laser-guided Mk-82 bomb	B–52H bomber aircraft.
CBU–103/B bomb	MQ–1/9 unmanned aerial vehicle.
AGM–65E/L/K/G2 Maverick air-to-surface missile.	

TABLE 1—LIVE MUNITIONS AND AIRCRAFT—Continued

Munitions	Aircraft (not associated with specific munitions)
AGM–114 Hellfire air-to-surface missile. M–117 bomb. PGU–12 high explosive incendiary 30 mm rounds. M56/PGU–28 high explosive incendiary 20mm rounds.	

Live testing would include three detonation options: (1) Above the water surface; (2) at the water surface; and (3) below the water surface (two depths). The number of each type of munition, height or depth of detonation, explosive material, and net explosive weight (NEW) of each munition is provided in Table 2.

TABLE 2—MARITIME STRIKE MUNITIONS

Type of munition	Total # of live munitions	# of detonations by height/depth	Warhead—explosive material	Net explosive weight per munition
GBU–10	1	Water Surface: all	MK–84—Tritonal	945 lbs.
GBU–24	1	Water Surface: all	MK–84—Tritonal	945 lbs.
GBU–31 (JDAM)	13	Water Surface: 4 20 feet AGL: 3 5 feet underwater: 3 10 feet underwater: 3	MK–84—Tritonal	945 lbs (MK–84).
GBU–12	1	Water Surface: all	MK–82—Tritonal	192 lbs.
GBU–38 (JDAM)	13	Water Surface: 4 20 feet AGL: 3 5 feet underwater: 3 10 feet underwater: 3	MK–82—Tritonal	192 lbs (MK–82).
GBU–54 (LJDAM)	1	Water Surface: all	MK–82—Tritonal	192 lbs (MK–82).
AGM–65E/L/K/G2 (Maverick)	2 each (8 total)	Water Surface: all	WDU–24/B penetrating blast-fragmentation warhead.	86 lbs.
CBU–103	4	Water Surface: all	202 Blu-97/B Combined Effects Bomblets (0.63 lbs each).	127 lbs.
AGM–114 (Hellfire)	4	Water Surface: all	High Explosive Anti-Tank (HEAT) tandem anti-armor metal augmented charge.	20 lbs.
M–117	6	20 feet AGL: 3 Water Surface: 3	750 lb blast/fragmentation bomb, used the same way as MK–82—Tritonal.	386 lbs (Tritonal).
PGU–12 HEI 30 mm	1,000	Water Surface: all	30 × 173 mm caliber with aluminized RDX explosive. Designed for GAU–8/A Gun System.	0.1 lbs.
M56/PGU–28 HEI 20 mm	1,500	Water Surface: all	20 × 120 mm caliber with aluminized Comp A–4 HEI. Designed for M61 and M197 Gun System.	0.02 lbs (Comp A–4 HEI).

Maritime Strike missions are scheduled to occur over an approximate two- to three-week period in June 2013. Missions would occur on weekdays during daytime hours only, with one or two missions occurring per day. All activities would take place within the EGTTR. Activities would occur only in Warning Area W–151, and specifically in sub-area W–151A. W–151A extends approximately 60 nm offshore and has a surface area of 2,565 nm^2 (8,797 km^2). Water depths range from about 30 to 350 m and include continental shelf and slope zones; however, most of W–151A occurs over the continental shelf, in water depths less than 250 m. Maritime Strike operations would occur in the shallower, northern inshore portion of W–151A, in water depth of about 35 m (see Figure 2–1 in Eglin's IHA application for a map of the test area).

To ensure safety, prior to conducting Maritime Strike exercises, Eglin would conduct a pre-test target area clearance procedure for people and protected species. Support vessels would be deployed around a defined safety zone to ensure that commercial and recreational boats do not accidentally enter the area. Before delivering the ordnance, mission aircraft would make a dry run over the target area to ensure that it is clear of commercial and recreational boats (at least two aircraft would participate in each test). Due to the limited duration of the flyover and potentially high speed and altitude, pilots would not be able to survey for marine species. In addition, an E–9A surveillance aircraft would survey the target area for nonparticipating vessels and other objects on the water surface. Based on the results from an acoustic impacts analysis for live ordnance detonations, a separate disturbance zone around the target would be established for the protection of marine species. The size of the zone would be based on the distance to which energy- and pressure-related impacts would extend for the various type of ordnance listed in Table 2 and would not necessarily be the same size as the human safety zone. Based on the acoustic modeling result, the largest possible distance from the target would be 3,526 m (2.2 miles), which corresponds to the 177 dB Level B harassment threshold for 945 lb NEW munitions detonated at 10 ft underwater

(Table 5). At least two of the support vessels would monitor for marine mammals around the target area. Maritime Strike missions would not proceed until the target area is determined to be clear of unauthorized personnel and protected species.

In addition to vessel-based monitoring, one to three video cameras would be positioned on an instrumentation barge anchored on-site. The camera configuration and actual number of cameras used would depend on the specific test being conducted. The cameras are typically used for situational awareness of the target area and surrounding area, and could also be used for monitoring the test site for the presence of marine species. A marine species observer would be located in the Eglin control tower, along with mission personnel, to monitor the video feed before and during test activities.

After each test, floating targets would be inspected to identify and render safe any unexploded ordnance (UXO), including fuzes or intact munitions. The Eglin Air Force Explosive Disposal Team would be on hand for each test. UXO that cannot be removed would be detonated in place, which could result in the sinking of the target vessel. Once the area has been cleared for re-entry, test personnel would retrieve target debris and marine species observers would survey the area for any evidence of adverse impacts to protected species.

Description of Marine Mammals in the Area of the Specified Activity

There are 28 species of marine mammals documented as occurring in Federal waters of the northern GOM. However, species with likely occurrence in the test area, and the subject of Eglin's incidental take request, are the Atlantic bottlenose dolphin (*Tursiops truncatus*) and Atlantic spotted dolphin (*Stenella frontalis*). These two species are frequently sighted in the northern GOM over the continental shelf, in a water depth range that encompasses the Maritime Strike test location (Garrison *et al.,* 2008; Navy, 2007; Davis *et al.,* 2000). Dwarf sperm whales (*Kogia sima*) and pygmy sperm whales (*K. breviceps*) are occasionally sighted over the shelf, but are not considered regular inhabitants (Davis *et al.,* 2000). The remaining cetacean species are primarily considered to occur at or beyond the shelf break (water depth of approximately 200 m), and are not included in the proposed take authorization. Of the 28 marine mammal species or stocks that may occur in the northern GOM, only the sperm whale is listed as endangered under the ESA and as depleted under the MMPA. Sperm whale occurrence in the area of the proposed activity is unlikely because almost all reported sightings have occurred in water depths greater than 200 m. Occurrence in the deeper portions of W–151 is possible, although based on reported sightings locations, density is expected to low. Therefore, Eglin AFB has not requested and NMFS has not proposed the issuance of take authorizations for this species. Eglin AFB's MMPA application contains a detailed discussion on the description, status, distribution, regional distribution, diving behavior, and acoustics and hearing for the marine mammals in proposed action area. More detailed information on these species can be found in Wursig *et al.* (2000), Eglin's DEA (see **ADDRESSES**), and in the NMFS U.S. Atlantic and GOM Stock Assessment Reports (SARs; Waring *et al.,* 2011). This latter document is available at: *http://www.nefsc.noaa.gov/publications/tm/tm210/.* The West Indian manatee (*Trichechus manatus*) is managed by the U.S. Fish and Wildlife Service and is not considered further in this proposed IHA **Federal Register** notice.

Density estimates for bottlenose dolphin and spotted dolphin were derived from two sources. Bottlenose dolphin density estimates were derived from a habitat modeling project conducted for portions of the EGTTR, including the Maritime Strike project area (Garrison, 2008). NMFS developed habitat models using recent aerial survey line transect data collected during winter and summer. The surveys covered nearshore and continental shelf waters (to a maximum depth of 200 meters), with the majority of effort concentrated in waters from the shoreline to 20 meters depth. Marine species encounter rates during the surveys were corrected for sighting probability and the probability that animals were available on the surface to be seen. In combination with remotely sensed environmental data/habitat parameters (water depth, sea surface temperature and chlorophyll), these data were used to develop habitat models for cetaceans within the continental shelf and coastal waters of the eastern GOM. The technical approach, described as Generalized Regression and Spatial Prediction, spatially projects the species-habitat relationship based on distribution of environmental factors, resulting in predicted densities for un-sampled locations and times. The spatial density model can therefore be used to predict density in unobserved areas and at different times of year based upon the monthly composite SST and chlorophyll datasets derived from satellite data. Similarly, the spatial density model can be used to predict relative density for any sub-region within the surveyed area.

Garrison (2008) produced bottlenose dolphin density estimates at various spatial scales within the EGTTR. At the largest scale, density data were aggregated into four principal strata categories: North-Inshore, North-Offshore, South-Inshore, and South-Offshore. Densities for these strata were provided in the published survey report. Unpublished densities were also provided for smaller blocks (sub-areas) corresponding to airspace units and a number of these sub-areas were combined to form larger zones. Densities in these smaller areas were provided to Eglin AFB in Excel© spreadsheets by the report author.

For both large areas and sub-areas, regions occurring entirely within waters deeper than 200 meters were excluded from predictions, and those straddling the 200 meter isobath were clipped to remove deep water areas. In addition, because of limited survey effort, density estimates beyond 150 meters water depth are considered invalid. The environmental conditions encountered during the survey periods (February and July/August) do not necessarily reflect the range of conditions potentially encountered throughout the year. In particular, the transition seasons of spring (April-May) and fall (October-November) have a very different range of water temperatures. Accordingly, for predictions outside of the survey period or spatial range, it is necessary to evaluate the statistical variance in predicted values when attempting to apply the model. The coefficient of variation (CV) of the predicted quantity is used to measure the validity of model predictions. According to Garrison (2008), the best predictions have CV values of approximately 0.2. When CVs approach 0.7, and particularly when they exceed 1.0, the resulting model predictions are extremely uncertain and are considered invalid.

Based upon the preceding discussion, the bottlenose dolphin density estimate used in this document is the median density corresponding to sub-area 137 (see Figure 3–1 in Eglin AFB's IHA application). The planned Maritime Strike test location lies within this sub-area. Within this block, Garrison (2008) provided densities based upon one year (2007) and five-year monthly averages for SST and chlorophyll. The 5-year average is considered preferable. Only densities with a CV rounded to 0.7 or lower (i.e., 0.64 and below) were

considered. The CV for June in this particular block is 0.62. Density estimates for bottlenose dolphin are provided in Table 3.

Atlantic spotted dolphin density was derived from Fulling *et al.* (2003), which describes the results of mammal surveys conducted in association with fall ichthyoplankton surveys from 1998 to 2001. The surveys were conducted by NMFS personnel from the U.S.-Mexico border to southern Florida, in water depths of 20 to 200 meters. Using the software program DISTANCE©, density estimates were generated for East and West regions, with Mobile Bay as the dividing point. The East region is used in this document. Densities were provided for Atlantic spotted dolphins and unidentified *T. truncatus/S. frontalis* (among other species). The unidentified *T. truncatus/S. frontalis* category is treated as a separate species group with a unique density. Density estimates from Fulling *et al.* (2003) were not adjusted for sighting probability (perception bias) or surface availability (availability bias) [g(0) = 1] in the original survey report, likely resulting in underestimation of true density. Perception bias refers to the failure of observers to detect animals, although they are present in the survey area and available to be seen. Availability bias refers to animals that are in the survey area, but are not able to be seen because they are submerged when observers are present. Perception bias and availability bias result in the underestimation of abundance and density numbers (negative bias).

Fulling *et al.* (2003) did not collect data to correct density for perception and availability bias. However, in order to address this negative bias, Eglin AFB has adjusted density estimates based on information provided in available literature. There are no published g(0) correction factors for Atlantic spotted dolphins. However, Barlow (2006) estimated g(0) for numerous marine mammal species near the Hawaiian Islands, including offshore pantropical spotted dolphins (*Stenella attenuata*). Separate estimates for this species were provided for group sizes of 1 to 20 animals [g(0) = 0.76], and greater than 20 animals [g(0) = 1.00]. Although Fulling *et al.* (2003) sighted some spotted dolphin groups of more than 20 individuals, the 0.76 value is used as a more conservative approach. Barlow (2006) provides the following equation for calculating density:

$$\text{Density (\# animals/km}^2) = \frac{(n)\,(S)\,(f_0)}{(2L)\,(g_0)}$$

Where

n = number of animal group sightings on effort

S = mean group size

f(0) = sighting probability density at zero perpendicular distance (influenced by species detectability and sighting cues such as body size, blows, and number of animals in a group)

L = transect length completed (km)

g(0) = probability of seeing a group directly on a trackline (influenced by perception bias and availability bias)

Because (n), (S), and (f_0) cannot be directly incorporated as independent values due to lack of the original information, we substitute the variable $X_{species}$ which incorporates all three values, such that $X_{species}$ = (n)(S)(f_0) for a given species. This changes the density equation to:

$$D = \frac{X_{species}}{(2L)\,(g_0)}$$

Using the minimum density estimates provided in Fulling *et al.* (2003) for Atlantic spotted dolphins and solving for $X_{SpottedDolphin}$:

$$0.201 = \frac{X_{Spotted\ Dolphin}}{(2)\,(816)\,(1.0)}$$

$X_{SpottedDolphin}$ = 328.032.

Placing this value of $X_{SpottedDolphin}$ and the revised g(0) estimate (0.76) in the original equation results in the following adjusted density estimate for Atlantic spotted dolphin:

$$D_{Adjusted} = \frac{328.032}{(2)(816)(0.76)}$$

$D_{Adjusted}$ = 0.265

Using the same method, adjusted density for the unidentified *T. truncatus/S. frontalis* species group is 0.009 animals/km². There are no variances attached to either of these recalculated density values, so overall confidence in these values is unknown.

TABLE 3—MARINE MAMMAL DENSITY ESTIMATES

Species	Density (animals/km²)
Bottlenose dolphin [1]	0.455
Atlantic spotted dolphin [2]	0.265
Unidentified bottlenose dolphin/Atlantic spotted dolphin [2]	0.009

[1] Source: Garrison, 2008; adjusted for observer and availability bias by the author.

[2] Source: Fulling *et al.*, 2003; adjusted for negative bias based on information provided by Barlow (2003; 2006)

Potential Effects of the Specified Activity on Marine Mammals

Potential impacts from the detonation of explosives include non-lethal injury (Level A harassment) and disturbance (Level B harassment). Takes in the form of mortality are neither anticipated nor requested. The number of marine mammals potentially impacted by Maritime Strike operations is based on impulsive noise and pressure waves generated by ordinance detonation at or near the water surface. Exposure to energy or pressure resulting from these detonations could result in injury or harassment of marine mammal species. The number of Maritime Strike missions generally corresponds to the number of live ordnance expenditures shown in Table 2. However, the number of bursts modeled for the CBU–103 cluster bomb is 202, which is the number of individual bomblets per bomb. Also, the 20 mm and 30 mm gunnery rounds were modeled as one burst each.

Criteria and thresholds for estimating the exposures from a single explosive activity on marine mammals were established for the Seawolf Submarine Shock Test Final Environmental Impact Statement (FEIS) (''SEAWOLF'') and subsequently used in the USS WINSTON S. CHURCHILL (DDG 81) Ship Shock FEIS (''CHURCHILL'') (DoN,

1998 and 2001). We adopted these criteria and thresholds in a final rule on the unintentional taking of marine animals occurring incidental to the shock testing which involved large explosives (65 FR 77546; December 12, 2000). Because no large explosives (greater than 1000 lbs NEW) would be used by Eglin AFB during the specified activities, a revised acoustic criterion for small underwater explosions (i.e., 23 pounds per square inch [psi] instead of previous acoustic criteria of 12 psi for peak pressure over all exposures) has been established to predict onset of TTS.

Thresholds and Criteria for Injurious Physiological Impacts

Single Explosion

For injury, NMFS uses dual criteria, eardrum rupture (i.e. tympanic-membrane injury) and onset of slight lung injury, to indicate the onset of injury. The threshold for tympanic-membrane (TM) rupture corresponds to a 50 percent rate of rupture (i.e., 50 percent of animals exposed to the level are expected to suffer TM rupture). This value is stated in terms of an Energy Flux Density Level (EL) value of 1.17 inch pounds per square inch (in-lb/in2), approximately 205 dB re 1 microPa^2–sec.

The threshold for onset of slight lung injury is calculated for a small animal (a dolphin calf weighing 26.9 lbs), and is given in terms of the ''Goertner modified positive impulse,'' indexed to 13 psi-msec (DoN, 2001). This threshold is conservative since the positive impulse needed to cause injury is proportional to animal mass, and therefore, larger animals require a higher impulse to cause the onset of injury. This analysis assumed the marine species populations were 100 percent small animals. The criterion with the largest potential impact range (most conservative), either TM rupture (energy threshold) or onset of slight lung injury (peak pressure), will be used in the analysis to determine Level A exposures for single explosive events.

For mortality and serious injury, we use the criterion corresponding to the onset of extensive lung injury. This is conservative in that it corresponds to a 1 percent chance of mortal injury, and yet any animal experiencing onset severe lung injury is counted as a lethal exposure. For small animals, the threshold is given in terms of the Goertner modified positive impulse, indexed to 30.5 psi-msec. Since the Goertner approach depends on propagation, source/animal depths, and animal mass in a complex way, the actual impulse value corresponding to the 30.5 psi-msec index is a complicated calculation. To be conservative, the analysis used the mass of a calf dolphin (at 26.9 lbs) for 100 percent of the populations.

Multiple Explosions

For multiple explosions, the CHURCHILL approach had to be extended to cover multiple sound events at the same training site. For multiple exposures, accumulated energy over the entire training time is the natural extension for energy thresholds since energy accumulates with each subsequent shot (detonation); this is consistent with the treatment of multiple arrivals in CHURCHILL. For positive impulse, it is consistent with the CHURCHILL final rule to use the maximum value over all impulses received.

Thresholds and Criteria for Non-Injurious Physiological Effects

To determine the onset of TTS (non-injurious harassment)—a slight, recoverable loss of hearing sensitivity, there are dual criteria: an energy threshold and a peak pressure threshold. The criterion with the largest potential impact range (most conservative), either the energy or peak pressure threshold, will be used in the analysis to determine Level B TTS exposures. We refer the reader to the following sections for descriptions of the thresholds for each criterion.

Single Explosion—TTS-Energy Threshold

The TTS energy threshold for explosives is derived from the Space and Naval Warfare Systems Center (SSC) pure-tone tests for TTS (Schlundt *et al.,* 2000; Finneran and Schlundt, 2004). The pure-tone threshold (192 dB as the lowest value) is modified for explosives by (a) interpreting it as an energy metric, (b) reducing it by 10 dB to account for the time constant of the mammal ear, and (c) measuring the energy in 1/3-octave bands, the natural filter band of the ear. The resulting threshold is 182 dB re 1 microPa^2-sec in any 1/3-octave band.

Single Explosion—TTS-Peak Pressure Threshold

The second threshold applies to all species and is stated in terms of peak pressure at 23 psi (about 225 dB re 1 µPa). This criterion was adopted for Precision Strike Weapons (PSW) Testing and Training by Eglin Air Force Base in the Gulf of Mexico (NMFS, 2005). It is important to note that for small shots near the surface (such as in this analysis), the 23-psi peak pressure threshold generally will produce longer impact ranges than the 182-dB energy metric. Furthermore, it is not unusual for the TTS impact range for the 23-psi pressure metric to actually exceed the without-TTS (behavioral change without onset of TTS) impact range for the 177-dB energy metric.

Thresholds and Criteria for Behavioral Effects

Single Explosion

For a single explosion, to be consistent with CHURCHILL, TTS is the criterion for Level B harassment. In other words, because behavioral disturbance for a single explosion is likely to be limited to a short-lived startle reaction, use of the TTS criterion is considered sufficient protection and therefore behavioral effects (Level B behavioral harassment without onset of TTS) are not expected for single explosions.

Multiple Explosions—Without TTS

For multiple explosions, the CHURCHILL approach had to be extended to cover multiple sound events at the same training site. For multiple exposures, accumulated energy over the entire uninterrupted firing time is the natural extension for energy thresholds since energy accumulates with each subsequent shot (detonation); this is consistent with the treatment of multiple arrivals in CHURCHILL. Because multiple explosions could occur within a discrete time period, a new acoustic criterion-behavioral disturbance without TTS is used to account for behavioral effects significant enough to be judged as harassment, but occurring at lower noise levels than those that may cause TTS.

The threshold is based on test results published in Schlundt *et al.* (2000), with derivation following the approach of the CHURCHILL FEIS for the energy-based TTS threshold. The original Schlundt *et al.* (2000) data and the report of Finneran and Schlundt (2004) are the basis for thresholds for behavioral disturbance without TTS. During this study, instances of altered behavior sometimes began at lower exposures than those causing TTS; however, there were many instances when subjects exhibited no altered behavior at levels above the onset-TTS levels. Regardless of reactions at higher or lower levels, all instances of altered behavior were included in the statistical summary. The behavioral disturbance without TTS threshold for tones is derived from the SSC tests, and is found to be 5 dB below the threshold for TTS, or 177 dB re 1

microPa²-sec maximum energy flux density level in any 1/3-octave band at frequencies above 100 Hz for cetaceans.

Summary of Thresholds and Criteria for Impulsive Sounds

The effects, criteria, and thresholds used in the assessment for impulsive sounds are summarized in Table 4. The criteria for behavioral effects without physiological effects used in this analysis are based on use of multiple explosives from live, explosive firing during Maritime Strike exercises.

TABLE 4—CURRENT NMFS ACOUSTIC CRITERIA WHEN ADDRESSING HARASSMENT FROM EXPLOSIVES

Effect	Criteria	Metric	Threshold	Effect
Mortality	Onset of Extensive Lung Injury.	Goertner modified positive impulse	indexed to 30.5 psi-msec (assumes 100 percent small animal at 26.9 lbs).	Mortality.
Injurious Physiological	50 percent Tympanic Membrane Rupture.	Energy flux density	1.17 in-lb/in² (about 205 dB re 1 microPa²-sec).	Level A.
Injurious Physiological	Onset Slight Lung Injury	Goertner modified positive impulse	indexed to 13 psi-msec (assumes 100 percent small animal at 26.9 lbs).	Level A.
Non-injurious Physiological.	TTS	Greatest energy flux density level in any ⅓-octave band (> 100 Hz for toothed whales and > 10 Hz for baleen whales)—for total energy over all exposures.	182 dB re 1 microPa²-sec.	Level B.
Non-injurious Physiological.	TTS	Peak pressure over all exposures	23 psi	Level B.
Non-injurious Behavioral	Multiple Explosions Without TTS.	Greatest energy flux density level in any ⅓-octave (> 100 Hz for toothed whales and > 10 Hz for baleen whales)—for total energy over all exposures (multiple explosions only).	177 dB re 1 microPa²-sec.	Level B.

Anticipated Effects on Habitat

The primary source of marine mammal habitat impact is noise resulting from live Maritime Strike missions. However, the noise does not constitute a long-term physical alteration of the water column or bottom topography. In addition, the activity is not expected to affect prey availability, is of limited duration, and is intermittent in time. Surface vessels associated with the missions are present in limited duration and are intermittent as well. Therefore, it is not anticipated that marine mammal utilization of the waters in the project area will be affected, either temporarily or permanently, as a result of mission activities.

Other sources that could potentially impact marine mammal habitat were considered and include the introduction of fuel, debris, ordnance, and chemical materials into the water column. The potential effects of each were analyzed in the Draft Environmental Assessment and determined to be insignificant. The analyses are summarized in the following paragraphs (for a complete discussion of potential effects, please refer to section 3.3 in the DEA).

Metals typically used to construct bombs, missiles, and gunnery rounds include copper, aluminum, steel, and lead, among others. Aluminum is also present in some explosive materials. These materials would settle to the seafloor after munitions detonate. Metal ions would slowly leach into the substrate and the water column, causing elevated concentrations in a small area around the munitions fragments. Some of the metals, such as aluminum, occur naturally in the ocean at varying concentrations and would not necessarily impact the substrate or water column. Other metals, such as lead, could cause toxicity in microbial communities in the substrate. However, such effects would be localized to a very small distance around munitions fragments and would not significantly affect the overall habitat quality of sediments in the northeastern GOM. In addition, metal fragments would corrode, degrade, and become encrusted over time.

Chemical materials include explosive byproducts and also fuel, oil, and other fluids associated with remotely controlled target boats. Explosive byproducts would be introduced into the water column through detonation of live munitions. Explosive materials would include 2,4,6-trinitrotoluene (TNT) and RDX, among others. Various byproducts are produced during and immediately after detonation of TNT and RDX. During the very brief time that a detonation is in progress, intermediate products may include carbon ions, nitrogen ions, oxygen ions, water, hydrogen cyanide, carbon monoxide, nitrogen gas, nitrous oxide, cyanic acid, and carbon dioxide (Becker, 1995). However, reactions quickly occur between the intermediates, and the final products consist mainly of water, carbon monoxide, carbon dioxide, and nitrogen gas, although small amounts of other compounds are typically produced as well.

Chemicals introduced into the water column would be quickly dispersed by waves, currents, and tidal action, and eventually become uniformly distributed. A portion of the carbon compounds such as carbon monoxide and carbon dioxide would likely become integrated into the carbonate system (alkalinity and pH buffering capacity of seawater). Some of the nitrogen and carbon compounds, including petroleum products, would be metabolized or assimilated by phytoplankton and bacteria. Most of the gas products that do not react with the water or become assimilated by organisms would be released into the atmosphere. Due to dilution, mixing, and transformation, none of these chemicals are expected to have significant impacts on the marine environment.

Explosive material that is not consumed in a detonation could sink to the substrate and bind to sediments. However, the quantity of such materials is expected to be inconsequential. Research has shown that if munitions function properly, nearly full combustion of the explosive materials will occur, and only extremely small amounts of raw material will remain. In

addition, any remaining materials would be naturally degraded. TNT decomposes when exposed to sunlight (ultraviolet radiation), and is also degraded by microbial activity (Becker, 1995). Several types of microorganisms have been shown to metabolize TNT. Similarly, RDX decomposes by hydrolysis, ultraviolet radiation exposure, and biodegradation.

Based on this information, the proposed Maritime Strike activities would not have any impact on the food or feeding success of marine mammals in the northern GOM. Additionally, no loss or modification of the habitat used by cetaceans in the GOM is expected. Marine mammals are anticipated to temporarily vacate the area of live fire events. However, these events usually do not last more than 90 to 120 min at a time, and animals are anticipated to return to the activity area during periods of non-activity. Thus, the proposed activity is not expected to have any habitat-related effects that could cause significant or long-term consequences for individual marine mammals or on the food sources that they utilize.

Proposed Mitigation

In order to issue an incidental take authorization (ITA) under sections 101(a)(5)(A) and (D) of the MMPA, NMFS must, where applicable, set forth the permissible methods of taking pursuant to such activity and other means of effecting the least practicable impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses (where relevant). The NDAA of 2004 amended the MMPA as it relates to military readiness activities and the ITA process such that ''least practicable impact'' shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the ''military readiness activity''. The Maritime Strike activities described in Eglin AFB's application are considered military readiness activities.

Visual Mitigation

Areas to be used for Maritime Strike operations would be visually monitored for marine mammal presence from several platforms before, during, and after the commencement of the mission. Eglin AFB would provide experienced protected species survey personnel, vessels, and equipment as required for vessel-based surveys. The primary observers would be marine scientists with over 1,000 hours of marine mammal surveying experience collectively. Additionally, all range clearance personnel involved with the missions would receive NMFS-approved training developed by the Eglin Natural Resources Section. The designated protected species survey vessels would be two 25-ft (7.6 m) Parker 2520 boats with a fully enclosed pilothouse and tower. These vessels provide large viewing areas and observers would be stationed approximately 16-ft (4.9 m) above the water surface. Each vessel will have two observers and each observer will be equipped with binoculars. Observers will rotate on a regular basis to prevent eye fatigue as needed. Additional protected species survey vessels can be made available if required.

If the presence of one or more marine mammals is detected, the target area will be avoided. In addition, monitoring will continue during the mission. If marine mammals are detected at any time, the mission will halt immediately and relocate as necessary or be suspended until the marine mammal has left the area. The visual mitigation procedures for Maritime Strike operations are outlined below.

Pre-mission: The purposes of pre-mission monitoring are to: (1) Evaluate the test site for environmental suitability of the mission; and (2) verify that the Zone of Influence (ZOI) is free of visually detectable marine mammals, as well as potential indicators of these species. The area of the ZOI surveyed would be based on the distance to the largest Level B harassment threshold for the specific ordnance involved in a given test. For example, the largest ZOI would be 3,526 m (2.2 mi), which corresponds to the distance to the Level B threshold (177 dB) for 945 lb munitions detonated at 3 m (10 ft) underwater. The smallest ZOI would be 37 m (0.02 mi), which is the distance to the Level B threshold (23 psi) for 20 mm gunnery rounds. Table 5 provides the ZOI ranges for all the ordnance types and detonation depths proposed for Maritime Strike operations. On the morning of the Maritime Strike mission, the test director and safety officer would confirm that there are no issues that would preclude mission execution and that weather is adequate to support mitigation measures.

(A) Two Hours Prior to Mission

Mission-related surface vessels would be on site at least two hours prior to the mission. Observers on board at least one vessel would assess the overall suitability of the test site based on environmental conditions (e.g., sea state) and presence/absence of marine mammals or marine mammal indicators. This information would be related to the safety officer.

(B) One and One-half Hours Prior to Mission

Vessel-based surveys and video camera surveillance would begin one and one-half hours prior to live weapon deployment. Surface vessel observers would survey the applicable ZOI and relay all marine species and indicator sightings, including the time of sighting and direction of travel, if known, to the safety officer. Surveys would continue for approximately one hour. During this time, mission personnel in the test area would also observe for marine species as feasible. If marine mammals or indicators are observed within the applicable ZOI, the test range would be declared ''fouled,'' which would signify to mission personnel that conditions are such that a live ordnance drop cannot occur (e.g., protected species or civilian vessels are in the test area). If no marine mammals or indicators are observed, the range will be declared ''green.''

(C) One-half Hour Prior to Mission

At approximately 30 minutes prior to live weapon deployment, marine species observers would be instructed to leave the test site and remain outside the safety zone, which on average would be 9.5 miles from the detonation point, (the actual size would be determined by weapon NEW and method of delivery) during conduct of the mission. Once the survey vessels have arrived at the perimeter of the safety zone (approximately 30 minutes after being instructed to leave, depending on actual travel time) the mission would be allowed to proceed. Monitoring for protected species would continue from the periphery of the safety zone while the mission is in progress. The other safety boat crews would also be instructed to observe for marine mammals. Due to the distance from the target site, these observations would be considered supplemental and would not be relied upon as the primary monitoring method. After survey vessels leave the area, marine species monitoring would continue from the tower through the video feed received from the high definition cameras on the instrument barge.

(D) Execution of Mission

Immediately prior to live weapons drop, the test director and safety officer would communicate to confirm the results of marine mammal surveys and the appropriateness of proceeding with the mission. The safety officer would have final authority to proceed with, postpone, move, or cancel the mission.

The mission would be postponed or moved if:

(1) Any marine mammal is visually detected within the applicable ZOI. Postponement would continue until the animal(s) that caused the postponement is confirmed to be outside of the applicable ZOI due to the animal swimming out of the range.

(2) Large schools of fish or large flocks of birds feeding at the surface are observed within the applicable ZOI. Postponement would continue until these potential indicators are confirmed to be outside the applicable ZOI.

In the event of a postponement, pre-mission monitoring would continue as long as weather and daylight hours allow.

Post-mission Monitoring: Post mission monitoring would be designed to determine the effectiveness of pre-mission visual mitigation by reporting sightings of any dead or injured marine mammals. If post-mission surveys determine that an injury or lethal take of a marine mammal has occurred, the next Maritime Strike mission would be suspended until the test procedure and the monitoring methods would be reviewed with NMFS and appropriate changes made. Post-mission monitoring surveys would be conducted by the same observers that conducted pre-mission surveys, and would commence as soon as EOD personnel declare the test area safe. Vessels would move into the applicable ZOI from outside the safety zone and monitor for at least 30 minutes, concentrating on the area down-current of the test site. The monitoring team would document any marine mammals that were killed or injured as a result of the test and immediately contact the local marine mammal stranding network and NMFS to coordinate recovery and examination of any dead animals. The species, number, location, and behavior of any animals observed would be documented and reported to the Eglin Natural Resources Section.

Multiple offshore Air Force missions have been successfully executed in the general vicinity of the proposed Maritime Strike test location (W–151 of the EGTTR). These missions have involved both inert (no explosives) and live weapons testing, and include the following:

- 2009 Stand-off Precision Guided Munitions (SOPGM) live missile tests.
- 2012 Maritime Strike inert drops.
- 2013 Longbow live missile test (in-air detonation).
- 2013 Combat Hammer Maritime WESP missions (inert drops in the Gulf and strafing in the Choctawhatchee Bay).

During these missions, vessel-based observers surveyed for protected marine species (marine mammals and sea turtles) and species indicators. They also provided support to enforce human safety exclusion zones.

All live and inert missions were conducted in a variety of sea states and weather conditions that encompass the environmental conditions likely to be encountered during Maritime Strike activities. While no marine mammals were sighted within the various take threshold zones (mortality, Level A and B harassment zones) during any of the live tests (i.e., SOPGM and Longbow missile), survey personnel judged that they were able to adequately observe the sea surface and there was reasonable likelihood that marine mammals would have been detected if present. There have been no documented marine mammal takes throughout Eglin's history of activities in the Gulf of Mexico. Therefore, based on these factors, Eglin AFB and NMFS expect that trained protected species observers would be able to adequately survey and clear mortality zones (maximum of 457 m) and effectively communicate any marine mammal sightings to test directors. Further, we expect that test directors would be able to act quickly to delay live weapon drops should protected species be observed.

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 impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to 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, practicability of implementation, and impact on the effectiveness of the military-readiness activity.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS, the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, while also considering personnel safety, practicability of implementation, and impact on the effectiveness of the military-readiness 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, where applicable, 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 ITAs 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 proposed action area.

NMFS proposes to include the following measures in the Maritime Strike IHA (if issued). They are:

(1) Eglin will track their use of the EGTTR for test firing missions and protected species observations, through the use of mission reporting forms.

(2) A summary annual report of marine mammal observations and Maritime Strike activities will be submitted to the NMFS Southeast Regional Office (SERO) and the Office of Protected Resources either at the time of a request for renewal of an IHA or 90 days after expiration of the current IHA if a new IHA is not requested. This annual report must include the following information: (i) Date and time of each Maritime Strike exercise; (ii) a complete description of the pre-exercise and post-exercise activities related to mitigating and monitoring the effects of Maritime Strike exercises on marine mammal populations; and (iii) results of the Maritime Strike exercise monitoring, including numbers by species/stock of any marine mammals noted injured or killed as a result of the missions and number of marine mammals (by species if possible) that may have been harassed due to presence within the activity zone.

(3) If any dead or injured marine mammals are observed or detected prior to testing, or injured or killed during live fire, a report must be made to NMFS by the following business day.

(4) Any unauthorized takes of marine mammals (i.e., injury or mortality) must be immediately reported to NMFS and to the respective stranding network representative.

Estimated Take by Incidental Harassment

As it applies to a ''military readiness activity'', the definition of harassment is (Section 3(18)(B) of the MMPA): (i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) Any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Takes by Level A and B harassment are anticipated as a result of the Maritime Strike mission activities. The exercises are expected to only affect animals at or very near the surface of the water. Cetaceans in the vicinity of the exercises may incur temporary changes in behavior, and/or temporary changes in their hearing thresholds. Based on the proposed mitigation and monitoring measures described earlier in this document, no serious injury or mortality of marine mammals is anticipated as a result of Maritime Strike activities, and no takes by serious injury or mortality are proposed to be authorized.

Estimating the impacts to marine mammals from underwater detonations is difficult due to complexities of the physics of explosive sound under water and the limited understanding with respect to hearing in marine mammals. Assessments of impacts from Maritime Strike exercises use, and improve upon, the criteria and thresholds for marine mammal impacts that were developed for the shock trials of the USS SEAWOLF and the USS WINSTON S. CHURCHILL (DDG–81) (Navy, 1998; 2001). The criteria and thresholds used in those actions were adopted by NMFS for use in calculating incidental takes from explosives. Criteria for assessing impacts from Eglin AFB's Maritime Strike exercises include: (1) Mortality, as determined by exposure to a certain level of positive impulse pressure (expressed as pounds per square inch per millisecond or psi-msec); (2) injury, both hearing-related and non-hearing related; and (3) harassment, as determined by a temporary loss of some hearing ability and behavioral reactions. Due to the mitigation measures proposed by NMFS for implementation, mortality resulting from the resulting sounds generated into the water column from detonations was determined to be highly unlikely and was not considered further by Eglin AFB or NMFS.

Permanent hearing loss is considered an injury and is termed permanent threshold shift (PTS). NMFS, therefore, categorizes PTS as Level A harassment. Temporary loss of hearing ability is termed TTS, meaning a temporary reduction of hearing sensitivity which abates following noise exposure. TTS is considered non-injurious and is categorized as Level B harassment. NMFS recognizes dual criteria for TTS, one based on peak pressure and one based on the greatest ⅓ octave sound exposure level (SEL) or energy flux density level (EFDL), with the more conservative (i.e., larger) of the two criteria being selected for impacts analysis (note: SEL and EFDL are used interchangeably, but with increasing scientific preference for SEL). The peak pressure metric used to predict TTS is 23 pounds per square inch (psi).

Documented behavioral reactions occur at noise levels below those considered to cause TTS in marine mammals (Finneran *et al.,* 2002; Schlundt *et al.,* 2000; Finneran and Schlundt, 2004). In controlled experimental situations, behavioral effects are typically defined as alterations of trained behaviors. Behavioral effects in wild animals are more difficult to define but may include decreased ability to feed, communicate, migrate, or reproduce. Abandonment of an area due to repeated noise exposure is also considered a behavioral effect. Analyses in other sections of this document refer to such behavioral effects as ''sub-TTS Level B harassment.'' Schlundt *et al.* (2000) exposed bottlenose dolphins and beluga whales to various pure-tone sound frequencies and intensities in order to measure underwater hearing thresholds. Masking is considered to have occurred because of the ambient noise environment in which the experiments took place. Sound levels were progressively increased until behavioral alterations were noted (at which point the onset of TTS was presumed). It was found that decreasing the sound intensity by 4 to 6 dB greatly decreased the occurrence of anomalous behaviors. The lowest sound pressure levels, over all frequencies, at which altered behaviors were observed, ranged from 178 to 193 dB re 1 µPa for the bottlenose dolphins and from 180 to 196 dB re 1 µPa for the beluga whales. Thus, it is reasonable to consider that sub-TTS (behavioral) effects occur at approximately 6 dB below the TTS-inducing sound level, or at approximately 177 dB in the greatest ⅓ octave band EFDL/SEL.

Table 4 (earlier in this document) summarizes the relevant thresholds for levels of noise that may result in Level A harassment (injury) or Level B harassment via TTS or behavioral disturbance to marine mammals. Mortality and injury thresholds are designed to be conservative by considering the impacts that would occur to the most sensitive life stage (e.g., a dolphin calf).

The following three factors were used to estimate the potential noise effects on marine mammals from Maritime Strike operations: (1) The zone of influence, which is the distance from the explosion to which a particular energy or pressure threshold extends; (2) the density of animals potentially occurring within the zone of influence; and (3) the number of events.

The zone of influence is defined as the area or volume of ocean in which marine mammals could potentially be exposed to various noise thresholds associated with exploding ordnance. Table 5 provides the estimated ZOI radii for the Maritime Strike ordnance. At this time, there are no empirical data or information that would allow NMFS to establish a peak pressure criterion for sub-TTS behavioral disruption.

TABLE 5—ESTIMATED RANGE FOR A ZONE OF IMPACT (ZOI) DISTANCE FOR THE MARITIME STRIKE ORDNANCE

[In meters]

Munition	Height/Depth of detonation	Mortality	Level A Harassment		Level B Harassment		
		30.5 psi-msec	205 dB EFD*	13 psi-msec	182 dB EFD*	23 psi	177 dB EFD*
GBU–10	Water Surface	202	275	362	1023	1280	1361
GBU–24	Water Surface	202	275	362	1023	1280	1361
GBU–31 (JDAM)	Water Surface	202	275	362	1023	1280	1361
	20 feet AGL	0	0	0	0	0	0

TABLE 5—ESTIMATED RANGE FOR A ZONE OF IMPACT (ZOI) DISTANCE FOR THE MARITIME STRIKE ORDNANCE—Continued

[In meters]

Munition	Height/Depth of detonation	Mortality	Level A Harassment		Level B Harassment		
		30.5 psi-msec	205 dB EFD*	13 psi-msec	182 dB EFD*	23 psi	177 dB EFD*
	5 feet underwater	385	468	700	2084	1281	2775
	10 feet underwater.	457	591	836	2428	1280	3526
GBU–12	Water Surface	114	161	243	744	752	1020
GBU–38 (JDAM)	Water Surface	114	161	243	744	752	1020
	20 feet AGL	0	0	0	0	0	0
	5 feet underwater	239	280	445	1411	752	2070
	10 feet underwater.	279	345	532	1545	752	2336
GBU–54 (LJDAM)	Water Surface	114	161	243	744	752	1020
AGM–65E/L/K/G2 (Maverick)	Water Surface	84	124	187	618	575	846
CBU–103	Water Surface	9	231	21	947	111	1335
AGM–114 (Hellfire)	Water Surface	46	70	105	425	353	618
M–117	20 feet AGL	0	0	0	0	0	0
	Water Surface	147	203	293	847	950	1125
PGU–13 HEI 30 mm	Water Surface	0	6	7	31	60	55
M56/PGU–28 HEI 20 mm	Water Surface	0	0	0	16	37	27

* In greatest ⅓ octave band above 10 Hz or 100 Hz.

Density estimates for marine mammals occurring in the EGTTR are provided in Table 3. As discussed above, densities were derived from the results of published documents authored by NMFS personnel. Density is nearly always reported for an area (e.g., animals per square kilometer). Analyses of survey results may include correction factors for negative bias, such as the Garrison (2008) report for bottlenose dolphins. Even though Fulling *et al.* (2003) did not provide a correction for Atlantic spotted dolphins or unidentified bottlenose/spotted dolphins, Eglin AFB adjusted those densities based on information provided in other published literature (Barlow 2003; 2006). Although the study area appears to represent only the surface of the water (two-dimensional), density actually implicitly includes animals anywhere within the water column under that surface area. Density estimates usually assume that animals are uniformly distributed within the prescribed area, even though this is likely rarely true. Marine mammals are often clumped in areas of greater importance, for example, in areas of high productivity, lower predation, safe calving, etc. Density can occasionally be calculated for smaller areas, but usually there are insufficient data to calculate density for such areas. Therefore, assuming an even distribution within the prescribed area is the typical approach.

In addition, assuming that marine mammals are distributed evenly within the water column does not accurately reflect behavior. Databases of behavioral and physiological parameters obtained through tagging and other technologies have demonstrated that marine animals use the water column in various ways. Some species conduct regular deep dives while others engage in much shallower dives, regardless of bottom depth. Assuming that all species are evenly distributed from surface to bottom is almost never appropriate and can present a distorted view of marine mammal distribution in any region. Therefore, a depth distribution adjustment is applied to marine mammal densities in this document (Table 6). By combining marine mammal density with depth distribution information, a three-dimensional density estimate is possible. These estimates allow more accurate modeling of potential marine mammal exposures from specific noise sources.

TABLE 6—DEPTH DISTRIBUTION OF MARINE MAMMALS IN THE MARITIME STRIKE TEST AREA

Species	Depth distribution	Reference
Bottlenose dolphin	Daytime: 96% at <50 m, 4% at >50 m; Nightime: 51% at <50 m, 8% at 50–100 m, 19% at 101–250 m, 13% at 251–450 m, and 9% at >450 m.	Klatsky *et al.* (2007).
Atlantic spotted dolphin	76% at <10 m, 20% at 10–20 m, and 4% at 21–60 m	Davis *et al.* (1996).

As mentioned previously, the number of Maritime Strike activities generally corresponds to the number of live ordnance expenditures, as shown in Table 2. However, the number of bursts modeled for the CBU–103 cluster bomb is 202, which is the number of individual bomblets per bomb. Also, the 20 mm and 30 mm gunnery rounds were modeled as one burst each.

Table 7 indicates the modeled potential for lethality, injury, and non-injurious harassment (including behavioral harassment) to marine mammals in the absence of mitigation measures. The numbers represent total impacts for all detonations combined. Mortality was calculated as approximately one-half an animal for bottlenose dolphins and about 0.1 animals for spotted dolphins. It is expected that, with implementation of the management practices described below, potential impacts would be mitigated to the point that there would be no mortality takes. Based on the low mortality exposure estimates calculated

by the acoustic model combined with the implementation of mitigation measures, zero marine mammals are expected to be affected by pressure levels associated with mortality. Therefore, Eglin AFB has requested an IHA, as opposed to an LOA.

TABLE 7—MODELED NUMBER OF MARINE MAMMALS POTENTIALLY AFFECTED BY MARITIME STRIKE MISSIONS

Species	Mortality	Level A Harassment	Level B Harassment (TTS)	Level B Harassment (Behavioral)
Bottlenose dolphin	0.524	2.008	30.187	61.069
Atlantic spotted dolphin	0.145	1.050	16.565	31.345
Unidentified bottlenose dolphin/Atlantic spotted dolphin	0.010	0.040	0.597	1.208
TOTAL	0.679	3.098	47.349	93.622

Table 8 provides Eglin AFB's the annual number of marine mammals, by species, potentially taken by Level A harassment and Level B harassment, by Maritime Strike operations. It should be noted that these estimates are derived without consideration of the effectiveness of Eglin AFB's proposed mitigation measures. As indicated in Table 8, Eglin AFB and NMFS estimate that approximately three marine mammals could potentially be exposed to injurious Level A harassment noise levels (205 dB re 1 μPa²-s or higher).

TABLE 8—NUMBER OF MARINE MAMMALS TAKES

Species	Level A Harassment	Level B Harassment (TTS)	Level B Harassment (Behavioral)
Bottlenose dolphin	2	30	61
Atlantic spotted dolphin	1	16	32
Unidentified bottlenose dolphin/Atlantic spotted dolphin	0	1	1
TOTAL	3	47	93

Approximately 47 marine mammals would be exposed annually to non-injurious (TTS) Level B harassment associated with the 182 dB re 1 μPa²-s threshold. TTS results from fatigue or damage to hair cells or supporting structures and may cause disruption in the processing of acoustic cues; however, hearing sensitivity is recovered within a relatively short time. Based on Eglin AFB and NMFS' estimates, up to 94 marine mammals may experience a behavioral response to these exercises associated with the 177 dB re 1 μPa²-s threshold (see Table 8). NMFS has preliminarily determined that this number will be significantly lower due to the expected effectiveness of the mitigation measures proposed for inclusion in the IHA (if issued).

Negligible Impact and Preliminary Determinations

NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''. . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) The number of anticipated mortalities; (2) the number and nature of anticipated injuries; (3) the number, nature, and intensity, and duration of harassment; and (4) the context in which the takes occur.

The takes from Level B harassment will be due to potential behavioral disturbance and TTS. The takes from Level A harassment will be due to potential tympanic-membrane (TM) rupture. Activities would only occur over a timeframe of two to three weeks in June 2013, with one or two missions occurring per day. It is possible that some individuals may be taken more than once if those individuals are located in the exercise area on two different days when exercises are occurring. However, multiple exposures are not anticipated to have effects beyond Level A and Level B harassment.

While animals may be impacted in the immediate vicinity of the activity, because of the small ZOIs (compared to the vast size of the GOM ecosystem where these species live) and the short duration of the Maritime Strike operations, NMFS has preliminarily determined that there will not be a substantial impact on marine mammals or on the normal functioning of the nearshore or offshore GOM ecosystems. The proposed activity is not expected to impact rates of recruitment or survival of marine mammals since neither mortality (which would remove individuals from the population) nor serious injury are anticipated to occur. In addition, the proposed activity would not occur in areas (and/or times) of significance for the marine mammal populations potentially affected by the exercises (e.g., feeding or resting areas, reproductive areas), and the activities would only occur in a small part of their overall range, so the impact of any potential temporary displacement would be negligible and animals would be expected to return to the area after the cessations of activities. Although the proposed activity could result in Level A (TM rupture) and Level B (behavioral disturbance and TTS) harassment of marine mammals, the level of harassment is not anticipated to impact rates of recruitment or survival of marine mammals because the number of exposed animals is expected to be low due to the short term and site specific nature of the activity, and the type of effect would not be detrimental to rates of recruitment and survival.

Additionally, the mitigation and monitoring measures proposed to be implemented (described earlier in this document) are expected to further minimize the potential for harassment.

The protected species surveys would require Eglin AFB to search the area for marine mammals, and if any are found in the live fire area, then the exercise would be suspended until the animal(s) has left the area or relocated. Moreover, marine species observers located in the Eglin control tower would monitor the high-definition video feed from cameras located on the instrument barge anchored on-site for the presence of protected species. Furthermore, Maritime Strike missions would be delayed or rescheduled if the sea state is greater than a 4 on the Beaufort Scale at the time of the test. In addition, Maritime Strike missions would occur no earlier than two hours after sunrise and no later than two hours prior to sunset to ensure adequate daylight for pre- and post-mission monitoring.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS preliminarily finds that Eglin AFB's Maritime Strike operations will result in the incidental take of marine mammals, by Level A and Level B harassment only, and that the taking from the Maritime Strike exercises will have a negligible impact on the affected species or stocks.

Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has preliminarily determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

Eglin AFB initiated consultation with the Southeast Region, NMFS, under section 7 of the ESA regarding the effects of this action on ESA-listed species and critical habitat under the jurisdiction of NMFS. The consultation will be completed and a biological opinion issued prior to any final determinations on the IHA. Due to the location of the activity, no ESA-listed marine mammal species are likely to be affected; therefore, NMFS has preliminarily determined that this proposed IHA would have no effect on ESA-listed species. However, prior to issuance of this IHA, NMFS will make a final determination whether additional consultation is necessary.

National Environmental Policy Act (NEPA)

Eglin AFB released a Draft Environmental Assessment (EA) on the Maritime Strike Operations. NMFS has made this EA available on the permits Web page. Eglin AFB will issue a Final EA and a Finding of No Significant Impact (FONSI) on the Maritime Strike Operations prior to NMFS' final determination on the IHA.

In accordance with NOAA Administrative Order 216–6 (Environmental Review Procedures for Implementing the National Environmental Policy Act, May 20, 1999), NMFS will review the information contained in Eglin AFB's EA and determine whether the EA accurately and completely describes the preferred action alternative, a reasonable range of alternatives, and the potential impacts on marine mammals, endangered species, and other marine life that could be impacted by the preferred and non-preferred alternatives. Based on this review and analysis, NMFS may adopt Eglin AFB's PEA under 40 CFR 1506.3, and issue its own FONSI statement on issuance of an annual authorization under section 101(a)(5) of the MMPA.

Proposed Authorization

As a result of these preliminary determinations, NMFS proposes to authorize the take of two species of marine mammals incidental to Eglin AFB's Maritime Strike operations in the GOM provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: May 29, 2013.

Helen M. Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XC389

Takes of Marine Mammals Incidental to Specified Activities; Low-Energy Marine Geophysical Survey in the Gulf of Mexico, April to May 2013

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

ACTION: Notice; issuance of an Incidental Take Authorization (ITA).

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) regulations, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to the U.S. Geological Survey (USGS) to take marine mammals, by Level B harassment, incidental to conducting a low-energy marine geophysical (i.e., seismic) survey in the deep water of the Gulf of Mexico, April to May 2013.

DATES: Effective April 17 through June 10, 2013.

ADDRESSES: A copy of the final IHA and application are available by writing 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 or by telephoning the contacts listed here.

A copy of the IHA application containing a list of the references used in this document may be obtained by writing to the above address, telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**) or visiting the internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications.*

FOR FURTHER INFORMATION CONTACT: Howard Goldstein or Jolie Harrison, Office of Protected Resources, NMFS, 301–427–8401.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(D) of the MMPA, as amended (16 U.S.C. 1371 (a)(5)(D)), directs the Secretary of Commerce (Secretary) to authorize, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for the incidental taking of small numbers of marine mammals shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). The authorization must set forth the permissible methods of taking, other means of effecting the least practicable adverse impact on the species or stock and its habitat, and requirements pertaining to the mitigation, monitoring

and reporting of such takings. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as ''. . . an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.''

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) of the MMPA establishes a 45-day time limit for NMFS's review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the public comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

The USGS has prepared an ''Environmental Assessment and Determination Pursuant to the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* and Executive Order 12114 Low-Energy Marine Seismic Survey by the U.S. Geological Survey in the Deepwater Gulf of Mexico, April-May 2013'' (EA). USGS's EA incorporates an ''Environmental Assessment of a Low-Energy Marine Geophysical Survey by the U.S. Geological Survey in the Northwestern Gulf of Mexico, April-May 2013,'' prepared by LGL Ltd., Environmental Research Associates, on behalf of USGS, which is also available at the same Internet address as well as on the USGS's environmental compliance Web site, which is available online at: *http://woodshole.er.usgs.gov/project-pages/environmental_compliance/index.html.* NMFS also issued a Biological Opinion under section 7 of the Endangered Species Act (ESA) to evaluate the effects of the survey and IHA on marine species listed as threatened or endangered. The NMFS Biological Opinion is available online at: *http://www.nmfs.noaa.gov/pr/consultations/opinions.htm.* Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

Summary of Request

On November 5, 2012, NMFS received an application from the USGS requesting that NMFS issue an IHA for the take, by Level B harassment only, of small numbers of marine mammals incidental to conducting a low-energy marine seismic survey within the U.S. Exclusive Economic Zone in the deep water of the Gulf of Mexico during April to May 2013. The USGS plans to use one source vessel, the R/V *Pelican* (*Pelican*), or similar vessel, and a seismic airgun array to collect seismic data as part of the ''Gas Hydrates Project'' in the deep water of the northwest Gulf of Mexico. The USGS plans to use conventional low-energy, seismic methodology and ocean bottom seismometers (OBSs) to acquire the data necessary to delineate the distribution, saturation, and thickness of sub-seafloor methane hydrates and to image near-seafloor structure (e.g., faults) at high-resolution. In addition to the planned operations of the seismic airgun array and hydrophone streamer, USGS intends to operate a sub-bottom profiler continuously throughout the survey. On February 20, 2013, NMFS published a notice in the **Federal Register** (78 FR 11821) making preliminary determinations and proposing to issue an IHA. The notice initiated a 30-day public comment period.

Acoustic stimuli (i.e., increased underwater sound) generated during the operation of the seismic airgun array may have the potential to cause a behavioral disturbance for marine mammals in the survey area. This is the principal means of marine mammal taking associated with these activities, and USGS has requested an authorization to take 19 species of marine mammals by Level B harassment. Take is not expected to result from the use of the sub-bottom profiler, for reasons discussed in this notice; nor is take expected to result from collision with the source vessel because it is a single vessel moving at a relatively slow speed (4.5 knots [kts]; 8.1 kilometers per hour [km/hr]; 5.0 miles per hour [mph]) during seismic acquisition within the survey, for a relatively short period of time (approximately 8 days of airgun operations out of 15 total operational days). It is likely that any marine mammal would be able to avoid the vessel.

Description of the Specified Activity

USGS planned to conduct a low-energy seismic survey at two sites that have been studied as part of the Gulf of Mexico Gas Hydrates Joint Industry Project. The GC955 (i.e., Green Canyon lease block 955) and WR313 (i.e., Walker Ridge lease block 313) study sites are located in the deep water of the northwestern GOM (see Figure 1 of the IHA application). Study site GC955 will be surveyed first, followed by WR313. The seismic survey is scheduled to take place for approximately eight days (out of 15 total operational days) in April to May 2013.

The purpose of USGS's seismic survey, which is to be carried out by personnel from the USGS Gas Hydrates Project, is to develop technology and to collect data to assist in the characterization of marine gas hydrates in order to respond to a need to better understand their potential as an energy source and their impact on seafloor stability. In addition to these two topics, the USGS Gas Hydrates Project also researches the impact of climate change on natural gas hydrates and the impact of degassing from shallow sub-seafloor and permafrost gas hydrates on climate change. However, that is not the purpose of this specific project. These goals of the GOM research program are consistent with the USGS mission to ''provide reliable scientific information to describe and understand the Earth; minimize loss of life and property from natural disasters; manage water, biological, energy, and mineral resources; and enhance and protect our quality of life.'' The objectives of this seismic research program also coincide with the goals articulated in the USGS Energy and Minerals Science Strategy (Ferrero *et al.,* 2012). Through the USGS Energy Resources Program (ERP), which partially funds the USGS Gas Hydrates Project, the USGS conducts research to enhance understanding of the geologic occurrence, formation, and evolution of oil, gas, coal, and uranium resources. The ERP is responsible for applying the results of this research to the assessment of, economic and environmental impact of development of these resources, as well, and making this knowledge public. The ERP provides accurate, dependable, and unbiased assessments of the world's energy resources and associated hazards for use in formulating policies at local, state, and Federal levels. As an agency whose mission is entirely scientific, the USGS has no authority to exploit natural resources.

The target sites for the GOM methane hydrates seismic characterization study

have been extensively studied, including detailed logging while drilling (LWD), and are known to hold thick sequences of sand containing high saturations of gas hydrate. The purpose of this new seismic acquisition is to expand outward from the boreholes the detailed characterization that has been accomplished there and to develop and calibrate improved geophysical techniques for gas hydrate characterization, which may in some cases obviate further scientific drilling.

The need for this activity is related to the inadequacy of existing seismic data to fully characterize the gas hydrate deposits and nearby geologic structures. The available industry data for the locations of the survey were acquired with parameters that targeted deep (in some cases, sub-salt) hydrocarbon occurrences. Exhaustive analysis of these existing data during site evaluation (Hutchinson *et al.,* 2009a; 2009b) and before and after the LWD expedition underscored the inadequacy of these data for complete characterization of the gas hydrate deposits and relevant geologic structures. Specifically, the existing data do not appropriately image the shallow sub-seafloor, including potential gas migration pathways, and do not provide appropriate data for regional estimates of gas hydrate saturations through analysis of compressional to shear wave conversions. If new seismic data designed to address these deficiencies are not acquired, then researchers will be unable to constrain whether faults intersect the hydrate-bearing sediments and how extensive the hydrate-bearing sediments may be. The new seismic data will also expand scientific expertise in using shipborne, instead of drilling, data to estimate hydrate saturations within sediment formations.

The survey will involve one source vessel, most likely the R/V *Pelican* (*Pelican*) or a similar vessel. USGS will deploy two (each with a discharge volume of 105 cubic inch [in^3]) Generator Injector (GI) airgun array as a primary energy source at a tow depth of 3 m (9.8 ft). A subset of the survey lines will be repeated using a single 35 in^3 GI airgun. The receiving system will consist of one 450 meter (m) (1,476.4 feet [ft]) long, 72-channel hydrophone streamer and 25 ocean bottom seismometers (OBSs). As the GI airguns are towed along the survey lines, the hydrophone streamer will receive the returning acoustic signals and transfer the data to the onboard processing system. The OBSs record the returning acoustic signals internally for later analysis. Regardless of which energy source is used, the calculated isopleths for the two GI (105 in^3) airguns will be used.

At each of the two study sites, 25 OBSs will be deployed and a total of approximately 700 km (378 nautical miles [nmi]) of survey lines will be collected in a grid pattern (see Figure 1 of the IHA application). The water depth will be 1,500 to 2,000 m (4,921.3 to 6,561.7 ft) at each study site). All planned seismic data acquisition activities will be conducted by technicians provided by USGS with onboard assistance by the scientists who have planned the study. The Principal Investigators are Dr. Seth Haines (USGS Energy Program, Denver, Colorado) and Mr. Patrick Hart (USGS Coastal and Marine Geology, Santa Cruz, California). The vessel will be self-contained, and the crew will live aboard the vessel for the entire cruise.

The planned seismic survey (e.g., equipment testing, startup, line changes, repeat coverage of any areas, and equipment recovery) will consist of approximately 1,480 km (799.1 nmi) of transect lines (including turns) in the survey area in the deep water of the northwestern Gulf of Mexico (GOM) (see Figure 1 of the IHA application). In addition to the operation of the airgun array, a Knudsen sub-bottom profiler will also likely be operated from the *Pelican* continuously throughout the cruise. USGS will not be operating a multibeam system, the *Pelican* is not equipped with this equipment. There will be additional seismic operations associated with equipment testing, ramp-up, and possible line changes or repeat coverage of any areas where initial data quality is sub-standard. In USGS's estimated take calculations, 25% has been added for those additional operations.

Dates, Duration, and Specified Geographic Region

The planned project will be located near the GC955 and WR313 study sites in the deep water of the northwest Gulf of Mexico and would have a total duration of approximately 15 operational days occurring during the April through May 2013 timeframe, which will include approximately 8 days of active seismic airgun operations. Water depth at the site is approximately 2,000 m (6561.7 ft). The total survey time would be approximately 96 hours at each site. The survey is scheduled from April 17 to May 6, 2013. The *Pelican* is expected to depart and return to Cocodrie, Louisiana, with no intermediate stops.

Some minor deviation from this schedule is possible, depending on logistics and weather (i.e., the cruise may depart earlier or be extended due to poor weather; there could be additional days of seismic operations if collected data are deemed to be of substandard quality).

The latitude and longitude for the bounds of the two study sites are:

WR313:
91°34.75′ West to 91°46.75′ West
26°33.75′ North to 26°45.75′ North
GC955:
90°20.0′ West to 90°31.75′ West
26°54.1′ North to 27°6.0′ North

NMFS outlined the purpose of the program in a previous notice for the proposed IHA (78 FR 11821, February 20, 2013). The activities to be conducted have not changed between the proposed IHA notice and this final notice announcing the issuance of the IHA. For a more detailed description of the authorized action, including vessel and acoustic source specifications, the reader should refer to the proposed IHA notice (78 FR 11821, February 20, 2013), the IHA application, EA, and associated documents referenced above this section.

Comments and Responses

A notice of the proposed IHA for the USGS seismic survey was published in the **Federal Register** on February 20, 2013 (78 FR 11821). During the 30-day public comment period, NMFS received comments from the Marine Mammal Commission (Commission), International Association of Geophysical Contractors (IAGC) and the America Petroleum Institute (API) (hereinafter referred to as Industry Associations), Center for Biological Diversity (CBD), and numerous private citizens. The Commission, Industry Associations, CBD, and private citizen's comments are online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm.* Following are their substantive comments and NMFS's responses:

Comment 1: The Commission recommends that NMFS require the USGS to re-estimate the proposed exclusion and buffer zones and associated takes of marine mammals using site-specific information—if the exclusion and buffer zones and numbers of takes are not re-estimated, require the USGS to provide a detailed justification for (1) basing the exclusion and buffer zones for the proposed survey on modeling that does not incorporate site-specific environmental parameters and has been documented to underestimate the size of those zones and (2) how tow depth was incorporated into the model.

Response: With respect to the Commission's first point regarding re-estimating the proposed exclusion and

buffer zones and associated takes of marine mammals using site-specific information, based upon the best available information and NMFS's analysis of the likely effects of the specified activity on marine mammals and their habitat, NMFS is satisfied that the data supplied by USGS are sufficient for NMFS to conduct its analysis and support the determinations under the MMPA, Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*), and the National Environmental Policy Act (NEPA). The identified exclusion and buffer zones are appropriate for the survey, and additional field measurements are not necessary at this time. Thus, for this survey, NMFS will not require USGS to re-estimate the proposed exclusion zones and buffer zones and associated number of marine mammal takes using operational and site-specific environmental parameters.

With respect to the Commission's second point on how tow depth was incorporated into the model, USGS has modeled the exclusion and buffer zones in the action area based on Lamont-Doherty Earth Observatory (L–DEO) of Columbia University's 2003 (Tolstoy *et al.,* 2004) and 2007–2008 (Tolstoy *et al.,* 2009; Diebold *et al.,* 2010) peer-reviewed, calibration studies in the GOM. Received levels have been predicted and modeled by L–DEO for a number of airgun configurations and tow depths (e.g., 36-airgun array and a single 1900LL 40 in^3 airgun), including two 105 in^3 GI airguns, in relation to distance and direction from airguns (see Figure 2 of the IHA application). This modeling approach uses ray tracing for the direct wave traveling from the array to the receiver and its associated source ghost (reflection at the air-water interface in the vicinity of the array), in a constant-velocity half space (infinite homogeneous ocean layer, unbounded by a seafloor). USGS's EA and the conclusions in Appendix H of the ''Programmatic Environmental Impact Statement/Overseas Environmental Impact Statement for Marine Seismic Research Funded by the National Science Foundation or Conducted by the U.S. Geological Survey'' (NSF/USGS PEIS) include detailed information on the study, their modeling process of the experiment in shallow, intermediate, and deep water. It also shows that L–DEO's model represents the actual produced sound levels, particularly within the first few kilometers, where the predicted zones (i.e., exclusion and buffer zones) lie. The conclusions show that USGS model represents the actual produced sound levels. At greater distances, local oceanographic variations begin to take effect, and the model tends to over predict.

Because the modeling matches the observed measurement data, the authors of these peer-reviewed papers concluded that those using the models to predict zones can continue to do so, including predicting exclusion and buffer zones around the vessel for various depths. At present, L–DEO's model does not account for site-specific environmental conditions and the calibration study analysis of the model predicted that using site-specific environmental conditions. In addition, the calibration study analysis of the model predicted that using site-specific information may actually estimate less conservative exclusion zones at greater distances.

While it is difficult to estimate exposures of marine mammals to acoustic stimuli, USGS's approach to quantifying the exclusion and buffer zones uses the best available scientific information (as required by NMFS regulations) and estimation methodologies. After considering this comment and evaluating the respective approaches for establishing exclusion and buffer zones, NMFS has determined that USGS's approach and corresponding monitoring and mitigation measures will effect the least practicable impact on affected marine mammal species or stocks.

Comment 2: The Commission recommends that NMFS require USGS to re-estimate the numbers of takes by including those takes that would occur if the survey repeats a subset of the tracklines using the single airgun, which would be in addition to takes that occur during turns and equipment testing or that occur because of equipment failure/poor data.

Response: On page 21 of the USGS's IHA application, USGS states that ''. . . ensonified areas calculated using the planned number of line-kilometers have been increased by 25% to accommodate turns, lines that may need to be repeated, equipment testing, etc.'' The IHA application states that approximately 700 km of survey lines will be conducted at each site and that the total survey time would be approximately 96 hours (i.e., 700 km + 25% [175 km] = 875 km). As a result, the request for a 25% increase accounts for turns, lines that may be repeated and equipment testing. Also, the repeated lines in the survey grid may increase the number of potential exposures to the sound source but may not increase the number of individuals of marine mammals exposed as the USGS's take calculation methodology assumes that all marine mammals are stationary.

Comment 3: The Commission recommends that NMFS prohibit the use of only a 15-minute pause following the sighting of a mysticete or large odontocete in the exclusion zone and extend that pause to cover the maximum dive times of the species likely to be encountered prior to initiating ramp-up procedures after a shut-down.

Response: NMFS would like to clarify the Commission's understanding of two conditions within the IHA—one related to turning on the airguns (ramp-up) after a shut-down due to a marine mammal sighting about to enter or within the exclusion zone, and the other related to a ramp-up after an extended shut-down (i.e., the 15 minute pause due to equipment failure or routine maintenance).

To clarify, the IHA requires the *Pelican* to shut-down the airguns when a Protected Species Observer (PSO) sees a marine mammal within, approaching, or entering the relevant exclusion zone for cetaceans. Following a shut-down, the *Pelican* would only ramp-up the airguns if a marine mammal had exited the exclusion zone or if the PSO had not seen the animals within the relevant exclusion zone for 15 minutes for species with shorter dive times (i.e., small odontocetes and pinnipeds) or 30 minutes for species with longer dive durations (i.e., mysticetes and large odontocetes, including sperm, pygmy sperm, dwarf sperm, killer, and beaked whales).

NMFS believes that 30 minutes is an adequate length for the monitoring period prior to the ramp-up of the airgun array after sighting a mysticete or large odontocete for the following reasons:

- The *Pelican* can transit roughly 4.5 knots; the ship would move 1.1 km (0.6 nmi) in 15 minutes or 2.3 km (1.3 nmi) in 30 minutes. At this distance, the vessel will have moved 15.7 times (1.1 km/0.07 km) in 15 minutes and 32.9 times (2.3 km/0.07 km) in 30 minutes away from the distance of the original 180 dB exclusion zone (70 m [229.7 ft] for two 105 in^3 airguns) from the initial sighting.
- The relevant exclusion zone for cetaceans is relatively small (i.e., 70 m for cetaceans for the two 105 in^3 GI airguns). Extending the monitoring period for a relatively small exclusion zones would not meaningfully increase the effectiveness of observing marine mammals approaching or entering the exclusion zone for the full source level and would not further minimize the potential for take.
- Because a significant part of their movement is vertical (deep-diving), it is

unlikely that a submerged mysticete or large odontocete would move in the same direction and speed (roughly 4.5 knots) with the vessel for 30 minutes. If a mysticete or large odontocete's maximum underwater dive time is 45 minutes, then there is only a one in three chance that the last random surfacing could occur within the 70 m exclusion zone.

• The PSOs are constantly monitoring the horizon and the exclusion zones during the 30-minute period. PSOs can observe to the horizon from the height of the *Pelican's* observation deck and should be able to say with a reasonable degree of confidence whether a marine mammal would be encountered within this distance before resuming the two GI airgun operations at full power.

Next, NMFS intends to clarify the monitoring period associated with an extended shut-down (i.e., the 15-minute pause due to equipment failure or routine maintenance). During active seismic operations, there are occasions when the *Pelican* crew will need to temporarily shut-down the airguns due to equipment failure or for maintenance. Thus, an extended shut-down is not related to the PSO detecting a marine mammal within, approaching, or entering the relevant exclusion zones. However, the PSOs are still actively monitoring the relevant exclusion zones for cetaceans and pinnipeds.

In conclusion, NMFS has designed monitoring and mitigation measures to comply with the requirement that incidental take authorizations must include means of effecting the least practicable impact on marine mammal species and their habitat. The effectiveness of monitoring is science-based, and monitoring and mitigation measures must be ''practicable.'' NMFS believes that the framework for visual monitoring will: (1) be effective at spotting almost all species for which USGS has requested take, and (2) that imposing additional requirements, such as those suggested by the Commission, would not meaningfully increase the effectiveness of observing marine mammals approaching or entering the exclusion zones and further minimize the potential for take.

In the case of an extended shut-down, due to equipment failure or routine maintenance, the *Pelican's* crew will turn on the airguns and follow the mitigation and monitoring procedures for a ramp-up after a period of 15 minutes. Again, the PSOs will monitor the full exclusion zones for marine mammals and will implement a shut-down, if necessary. After considering this comment and evaluating the monitoring and mitigation requirements to be included in the IHA, NMFS has determined that USGS's approach and corresponding monitoring and mitigation measures will effect the least practicable impact on affected marine mammal species or stocks.

Comment 4: The Commission recommends that NMFS consult with the USGS and other relevant entities (e.g., NSF and L–DEO) to develop, validate, and implement a monitoring program that provides a scientifically sound, reasonably accurate assessment of the types of marine mammal taking and the numbers of marine mammals taken—the assessment should account for availability biases and the detection biases of the seismic survey observers.

Response: Several studies have reported on the abundance and distribution of marine mammals inhabiting the GOM, and the USGS has incorporated these data into their analyses used to predict marine mammal take in their IHA applications. NMFS believes that the USGS's approach for estimating abundance in the survey areas (prior to the survey) is the best available approach.

There will be periods of transit time during the cruise, and Protected Species Observers (PSOs) will be on watch prior to and after the seismic portions of the surveys, in addition to during the surveys. The collection of this visual observational data by PSOs may contribute to baseline data on marine mammals (presence/absence) and provide some generalized support for estimated take numbers, but it is unlikely that the information gathered from these cruises alone would result in any statistically robust conclusions for any particular species because of the small number of animals typically observed.

NMFS acknowledges the Commission's recommendations and is open to further coordination with the Commission, USGS, and other entities, to develop, validate, and implement a monitoring program that will provide or contribute towards a more scientifically sound and reasonably accurate assessment of the types of marine mammal taking and the number of marine mammals taken. However, the cruise's primary focus is marine seismic research, and the surveys may be operationally limited due to considerations such as location, time, fuel, services, and other resources.

Comment 5: The Commission recommends that NMFS work with USGS and NSF to analyze monitoring data to assess the effectiveness of ramp-up procedures as a mitigation measure for geophysical surveys.

Response: NMFS acknowledges the Commission's request for an analysis of ramp-ups and will work with USGS and NSF to help identify the effectiveness of the mitigation measure for seismic surveys. The IHA requires that PSOs on the *Pelican* make observations for 30-minutes prior to ramp-up, during all ramp-ups, and during all daytime seismic operations and record the following information when a marine mammal is sighted:

(i) Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from the seismic vessel, sighting cue, apparent reaction of the airguns or vessel (e.g., none, avoidance, approach, paralleling, etc., and including responses to ramp-up), and behavioral pace; and

(ii) Time, location, heading, speed, activity of the vessel (including number of airguns operating and whether in state of ramp-up or shut-down), Beaufort wind force and sea state, visibility, and sun glare.

One of the primary purposes of monitoring is to result in ''increased knowledge of the species'' and the effectiveness of required monitoring and mitigation measures; the effectiveness of ramp-up as a mitigation measure and marine mammal reaction to ramp-up would be useful information in this regard. NMFS requires USGS and NSF to gather all data that could potentially provide information regarding the effectiveness of ramp-up as a mitigation measure in its monitoring report. However, considering the low numbers of marine mammal sightings and low number of ramp-ups, it is unlikely that the information will result in any statistically robust conclusions for this particular seismic survey. Over the long term, these requirements may provide information regarding the effectiveness of ramp-up as a mitigation measure, provided PSOs detect animals during ramp-up.

Comment 6: The Industry Associations state that environmental consequences should be evaluated using the best available science that properly discriminates between empirical fact and conjecture; and reflects the probabilities of effect and weight of the evidence in presenting the risks of adverse impacts of anthropogenic sound upon marine species.

Response: NMFS's determinations, in order to meet the requirements of section 101(a)(5)(D) of the MMPA, use peer-reviewed data that are based on the best science available regarding the biology of animals affected and the propagation of sounds from sources

during the seismic survey. This information is supported by USGS's IHA application and EA.

Comment 7: The Industry Associations state that reasonable threshold for anticipation of adverse effects should be established before mitigation is demanded and that mitigation should be effective and practicable.

Response: NMFS's proposed action is triggered by USGS requesting an IHA to take marine mammals incidental to conducting a low-energy marine seismic survey in the deep water of the GOM. The USGS's seismic survey has the potential to cause marine mammals to be behaviorally disturbed by exposing them to elevated levels of sound which, as NMFS has explained, is anticipated to result in take that would otherwise be prohibited by the MMPA. The USGS, therefore, requires an IHA for incidental take and has requested that NMFS provide it through the issuance of an IHA under section 101(a)(5)(D) of the MMPA. IHAs must include requirements or conditions pertaining to the monitoring and reporting of such taking in large part to better understand the effects of such taking on the species.

Based on the analysis contained in the USGS's EA and IHA application, NMFS notice of the proposed IHA (78 FR 11821, February 20, 2013), and this document, of the likely effects (including potential adverse effects) of the specified activity on marine mammals and their habitat, which is based on the best scientific information available, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS finds that USGS's planned research activities, will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from the low-energy marine seismic survey will have a negligible impact on the affected species or stocks of marine mammals; and that impacts to affected species or stocks of marine mammals have been mitigated to the lowest level practicable. Therefore, per our implementing regulations, NMFS shall issue the IHA to USGS.

Also, USGS has proposed to implement the monitoring and mitigation measures included in the IHA in their IHA application and EA. They have determined that the measures are effective and practicable as described in this **Federal Register** notice, and NMFS concurs with their determination.

Comment 8: The Industry Associations state that the USGS IHA application refers to related NEPA documents that results in a much less robust EA which contains conjectural risk assessments and unwarranted mitigation zone requirements. The NSF, USGS and NMFS expended significant resources over a five-year period in development of the 2011 NSF/USGS PEIS to develop a consistent, standardized approach to frequent IHA applications for seismic surveys. The IHA application, while referencing the 2011 NSF/USGS PEIS, does not appear to fully utilize its extensive environmental assessment indicating minimal impacts from low energy seismic surveys not adopts its more moderate, generic mitigation requirements. In fact, the USGS IHA application seems to require larger buffer and exclusion zones without information or explanation of what new or site-specific risk factors justify them.

Response: In many sections throughout USGS's EA, the USGS refers to the NSF/USGS PEIS for comprehensive reviews on relevant background and more specific information, and incorporates them by reference. USGS has proposed the buffer and exclusion zones as well as monitoring and mitigation measures that are included in the IHA in their IHA application and EA, and they have determined that the zones and measures are effective and practicable.

Comment 9: The Industry Associations states that the requested IHA application has minimal potential for substantive, adverse environmental consequences. The benefits of the action are significant. Thus, an IHA for non-lethal, incidental take of small numbers of marine mammals should be issued promptly.

Response: Generally, under the MMPA, NMFS shall authorize the harassment of small numbers of marine mammals incidental to an otherwise lawful activity, provided NMFS finds that the taking will have a negligible impact on the species or stock, will not have an unmitigable adverse impact on the availability of the species or stock for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth to achieve the least practicable adverse impact. 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.'' NMFS believes that the short time period of the seismic survey, the small size of the airgun array, the requirement to implement mitigation measures (e.g., shut-down of seismic operations), 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 it will have a negligible impact on the species or stocks in the action area. USGS has applied for an IHA and has met the necessary requirements for issuance of an IHA for small numbers of marine mammals, by Level B harassment, incidental to the low-energy marine seismic survey in the deep water of the GOM. Therefore, NMFS has issued an IHA to USGS.

Comment 10: The Industry Associations state that a clear and consistently applied regulatory process is needed where the various factors are evaluated, conservative factors reflecting reasonable probabilities are documented in a way that the regulated community can see the layers of conservative factors and the balancing of empirical facts, conjecture and observed field effects for decisions are clearly explained.

Response: To the maximum extent possible, NMFS applies a clear and consistent process under section 105(a)(5)(A) and (D) of the MMPA. 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. In requesting an IHA from NMFS, USGS provided the information detailed in 14 sections specified in 50 CFR 216.104 for its specified activity NMFS determined that the USGS's IHA request was adequate and complete, and began a public review process by publishing it in the **Federal Register**. NMFS makes available the IHA application, proposed IHA, related NEPA documents, etc. online at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#iha.*

In order to issue an 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 the availability of such species or stock for taking for certain subsistence uses.

NMFS has carefully evaluated the applicant's mitigation measures and has considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. NMFS's evaluation of potential measures included consideration of the following factors in relation to one another:

(1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;

(2) The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and

(3) The practicability of the measure for applicant implementation.

Based on NMFS's evaluation of the applicant's measures, as well as other measures considered by NMFS or recommended by the public, NMFS has determined that the mitigation measures provide the means of effecting the least practicable adverse impacts on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

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 (i.e., the manner and degree in which the measure is likely to reduce adverse impacts to marine mammals, the likely effectiveness of the measures, and the practicability of implementation).

NMFS believes that the length of the seismic survey, the requirement to implement mitigation measures (e.g., shut-down of seismic operations), 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 it will have a negligible impact on the species or stocks in the action area.

Comment 11: The Industry Associations state that the evaluation of impacts from marine sound sources continues to blur the distinctions between exposure and effect leading to unsupportable overestimates of the risks to marine wildlife. The USGS IHA in fact validates this concern: ''It is common practice to estimate how many mammals would be present within a particular distance of industrial activities and/or exposed to a particular level of sound. In most cases, this approach likely overestimates the numbers of marine mammals that would be affected in some biologically important manner.''

Response: In USGS and NMFS's analysis, we focus qualitatively on the different ways that exposure to signals from the seismic airguns may affect marine mammals (e.g., sensory impairment, masking, physiological responses, behavioral disturbance, etc.) that may be classified as behavioral harassment or injury and may be likely to adversely affect the species or stocks of marine mammals in the GOM study area. Although responses to sound are highly variable and context-specific, NMFS uses acoustic criteria, estimates of take of marine mammals to various sound sources and modeled received levels are used as a method in to estimate the number of individuals that would potentially be taken by Level B harassment and to meet NMFS's small numbers and negligible impact determinations under the MMPA.

Comment 12: The Industry Associations do not believe the principle of equating received sound levels to ''takes'' has been subjected to public comment or peer review as is required. This interpretive application of exposure as a proxy for incidental take is not supported by the MMPA, which requires that harassment must occur (16 U.S.C. 1362(18)(A)). In the case of Level B harassment, the disturbance must be related to a disruption in behavioral patterns, not just a change in behavior (16 U.S.C. 1362(18)(A)(ii), 1362(18)(D)).

Further, the Industry Associations state that there is no jurisdiction precedent defining whether sound occurring at a certain level constitutes a take. It is simply not enough for an animal to be exposed to a sound. For there to be a ''take'' based on harassment, there must be disruption in a pattern of behavior, and it must be caused by an act of pursuit, torment or annoyance (16 U.S.C. 1362(18)(A)).

Response: 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]. Because the behavioral and/or physiological responses of the majority of the marine mammals exposed to noise from the airgun array cannot be detected or measured, a method is needed to estimate the number of individuals that will be taken, pursuant to the MMPA, based on the proposed action. To this end, NMFS uses established acoustic criteria that estimate at what received level (when exposed to seismic airguns) Level B harassment of marine mammals would occur. NMFS has published notices in the **Federal Register** initiating a 30-day public review process for specified activities producing anthropogenic noise, and specifically seismic surveys, for over a decade.

Comment 13: The Industry Associations state that the USFWS in its Polar Bear and Walrus incidental take regulations clarified how it evaluates the potential effects of sound on marine life by clearly labeling ''exposures'' and more clearly differentiating ''exposures'' from ''takes.''

The USGS IHA application and associated EA do not provide this clarity and thus overstate the environmental effects of the action. In addition, the USGS IHA application does not clearly explain when an exposure has a behavioral effect, whether this rises to be a countable take and finally whether any of this is biologically significant at either an individual or population level. The overestimate of effect is especially acute for a ''low-energy'' seismic survey. The fact that in the IHA, USGS proposes to use large seismic source arrays as a proxy for a small two source element operation and that it uses shallow-water sound propagation as a proxy for deep water propagation further adds to the overestimate of potential acoustic impacts.

Response: For USGS's action, NMFS uses a reasonable estimate of exposures that may elicit a response that rises to the level of ''take'' definition. In the EA and IHA application, the number of different individuals that could be exposed to airguns sounds with received levels greater than or equal to

160 dB (rms) on one or more occasions can be estimated by considering the total marine area that would be within the 160 dB (rms) radius around the operating seismic source on at least one occasion, along with the expected density of animals in the area. The number of possible exposures (including repeated exposures of the same individuals) can be estimated by considering the total marine area that would be within the 160 dB (rms) radius around the operating airguns, including areas of overlap. During the planned survey, the transect lines in the square grid are closely spaced (100 m [ft] apart at the GC955 site and 250 m [ft] at the WR313 site) relative to the 160 dB distance (670 m [ft]). Thus, the area including overlap is 6.5 times the area excluding overlap at GC955 and 5.3 times the area excluding overlap at WR313, so a marine mammal that stayed in the survey areas during the entire survey could be exposed approximately 6 or 7 times, on average. Some degree of re-exposure may occur due to re-exposure of the same area along designated tracklines; however, it is unlikely to assume that a particular animal would not move within their environment and stay in the area during the entire survey. NMFS assumes that individuals will move away if they experience sound levels high enough to cause significant stress or functional impairment.

For marine mammals in the IHA (including those listed under the ESA, such as sperm whales), exposures are often equated to take and are assessed in a quantitative method, however, take does not necessarily mean an exposure to a specific threshold. In the Biological Opinion conducted under the ESA, exposure analyses identify species that are likely to co-occur with the specified activity's effects on the environment in space and time, and identify the nature of that co-occurrence. The exposure analysis identifies, as possible, the number, age or life stage, and gender of the individuals likely to be exposed to the action's effects and the population(s) or subpopulation(s) those individuals represent. See the ''Estimated Take by Incidental Harassment'' section below to see how USGS and NMFS calculated take for this IHA. NMFS applies certain acoustic thresholds to help determine at what point during exposure to seismic airguns marine mammals may be ''harassed,'' and these thresholds help to develop buffer and exclusion zones around the sound source. Pending better information, NMFS believes the data and methodology represent the best available information and methods to evaluate exposure and take to the marine mammal species in the action area of the specified activity.

Comment 14: The Industry Associations states that the USGS IHA application and associated EA would have been improved by the inclusion of more recent scientific information. The application, for example, makes extensive reference to Richardson *et al.* (1995) and Richardson *et al.* (1999). It should have also included more recent science indicating that avoidance responses are likely both minor and unrelated to sound levels (Richardson *et al.,* 2011; Southall, 2010; and Ellison, 2012). This would have facilitated a more accurate risk assessment and would have more clearly noted that the detailed statistical analyses needed to validate conjecture regarding subtle changes in direction are simply not available.

Response: NMFS acknowledges that behavioral responses are complex and influenced by a variety of factors, including species, behavioral context, source characteristics, and prior experience and agrees with current science indicating this. All these factors are important in determining the likelihood of an animal exhibiting an avoidance response. In the severity index provided in Ellison *et al.* (2012), avoidance responses are given a severity score of 6 or higher, which indicates a higher-level response (i.e., those that score between 5 and 9 on the severity index). Ellison *et al.* (2012) states that higher-level response are best described by a dose-response relationship, which directly relates to received sound level (opposed to lower-level responses that correspond more closely to the context of exposure). Nevertheless, NMFS agrees that context of exposure is an important factor for consideration for all behavioral responses and is considered within the overall assessment qualitatively, since it cannot yet be formally incorporated into quantitative acoustic criteria.

Comment 15: The Industry Associations state that it does not appear that frequency weighting was adequately considered in assessing Level B (behavioral) effects. It is well documented that dolphins are mid-frequency hearing specialists. The seismic source, as described in the IHA application, has ''dominant frequency components <500 Hz'' and the 105 in^3 GI airgun source has dominant frequency components 0 to 188 Hz. There is little overlap in dolphins' nominal hearing range (150 Hz to 160 kHz; Southall *et al.,* 2007), and the dominant frequency components of the seismic sources. Failure to incorporate frequency weighting likely results in overestimating dolphin incidental takes by at least a factor of two.

Response: Frequency weighting takes into account that all marine mammal species do not have identical hearing capabilities. To reflect this, Southall *et al.* (2007) proposed that marine mammals divided into five functional hearing groups and subsequently recommended frequency weighting functions for each of these groups. NMFS agrees that taking into account frequencies that marine mammals hear is an important consideration. For example, if a sound is entirely outside the hearing range of a species, it is not considered to have the potential to cause a significant response.

There are data to indicate that frequency weighting is an important consideration associated with noise-induced hearing loss (Finneran and Schlundt, 2009; Finneran and Schlundt, 2011). For behavior, the relationship between severity of response and frequency weighting is less clear and does not necessarily correspond to the severity of behavioral response expected (e.g., individuals have been shown to behaviorally respond to sounds that are on the edge of their hearing range, where they cannot hear sound as well). Behavioral effects are more challenging to predict since they often involve other variables beyond detection (e.g., perception and cognition, contextual cues, and previous experience). Despite most of the acoustic energy from seismic activities occurring outside the best hearing range of odontocetes, there are data showing that these species do behaviorally respond to these types of activities. For example, Miller *et al.* (2005) reported that belugas responded (avoidance) to seismic activity by 10 to 20 km (5.4 to 10.8 nmi). Thus, frequency weighting does not appear to be an accurate way to predict the potential of an animal to behavioral respond to a sound.

Comment 16: The Industry Associations state that there is mounting scientific evidence that behavioral reactions are species-dependent (Stone and Tasker, 2006) and can vary due to biological and environmental context (Wartzok *et al.,* 2004; Frost *et al.,* 1984; Finley *et al.,* 1990; Richardson *et al.,* 2011; Miller *et al.,* 2005; and Richardson *et al.,* 1999).

Response: In the notice of the proposed IHA (78 FR 11821, February 20, 2013), NMFS agrees that ''behavioral responses to stimuli are complex and influenced to varying degrees by a number of factors, such as species, behavioral contexts, geographical regions, source characteristics (moving

or stationary, speed, direction, etc.), prior experience of the animal and physical status of the animal.'' NMFS's current acoustic criteria are based on the best available science, which does not typically allow for one to develop species-specific criteria. Instead, species, as far as acoustic criteria, must be considered within larger overall marine mammal groups. Species-specific or context-dependent considerations are considered within larger overall marine mammal groups. Species-specific or context-dependent considerations are considered within the overall assessment qualitatively, since they cannot yet be formally incorporated into quantitative acoustic criteria.

Comment 17: The Industry Associations states that bow-riding dolphins are an excellent example of a normal behavioral pattern and should not be assessed as a take based on received sound levels, using any metric. This behavior has been commonly observed on seismic and other vessels, challenging assertions of harm to the animals. The fact that various marine mammals want to approach and enter the ensonified area raises serious questions about the basic validity of a regulatory approach that rigidly established proximity to sound as its basis. The proposed shut-down requirement for dolphins, which frequently bowride vessels, is not warranted.

The USGS IHA prescribes mitigation zones and requires shut-downs for all marine mammals, including dolphins, entering the defined 190/180/160 dB (rms) ensonified area. Scientific research on the hearing of delphinids and hearing control plus decades of studies and field observations of dolphins interacting with seismic vessels fail to support a conclusion that sound from seismic surveys injure these animals. The biology of dolphin hearing, hearing control mechanisms, and dolphin behavior involving bow-riding should have been more fully considered in the IHA request and environmental risk analyses of the EA. Failure to adequately consider these factors results in overestimating the risk of seismic surveys to bow-riding dolphins. The EA fails to present the environmental assessment sufficient to justify the need for shut-downs. This faulty risk assessment is then used to support the new and unwarranted dolphin shut-down requirement. The proposal is operationally disruptive, potentially to a level of making such surveys impossible to conduct. The requirement conflicts with longstanding mitigation methods for seismic surveys in the GOM as well as proposed mitigation measures. Based on the information detailed in the Industry Associations letter, they strongly recommend that NMFS and USGS do not require shut-down of the seismic sources for dolphins entering the exclusion zone.

Response: USGS has proposed the buffer and exclusion zones included in the IHA in their IHA application and EA. Also, USGS has proposed to implement the monitoring and mitigation measures included in the IHA in their IHA application and EA. They have determined that the measures are effective and practicable as described in this **Federal Register** notice, and NMFS concurs with their determination. As a precautionary approach, USGS has included dolphins and whales in the shut-down procedures as a mitigation measure, which has been standard for other seismic surveys conducted for the purpose of scientific research and that have occurred worldwide.

The shut-down procedure for dolphins is not a ''new and unwarranted'' requirement, it has been proposed by USGS and NSF (and required by NMFS in IHAs) on numerous seismic surveys that have occurred around the world since at least 2003.

Comment 18: The Industry Associations states that it has been long recognized that cetaceans emit sounds as they echolocate that are well above the regulatory protective levels of 180/160 dB 1 μPa (rms). Repeated dolphin clicks have been measured up to 230 dB (Au *et al.,* 1978). Dr. Alexander Supin and Dr. Paul Nachtigall developed a way of measuring the hearing of cetaceans during echolocation by examining the brain wave patterns of the animals to both the outgoing echolocation signal and the echo that returned from that signal (Supin *et al.,* 2003; Nachtigall and Supin, 2008). Research on harbor porpoise (Linnenschmidt *et al.,* 2012) and the bottlenose dolphin (Li *et al.,* 2011; 2012) suggest hearing control may apply to a number of different species of echolocating whales and dolphins. The EA should consider this new research regarding the potential hearing control mechanisms of odontocetes. There are indications that some cetaceans naturally reduce their hearing sensitivity and therefore the estimates of incidental takes should be reduced.

Response: Many mammals, especially those that echolocate (i.e., bats), exhibit a vocally-induced acoustic reflex of the middle ear muscles (i.e., stapedius reflex). This reflex acts as a protective mechanism to protect the ear from damage from loud sounds. This reflex depends on a multitude of factors, including sound pressure level and frequency. It is not surprising that marine mammals are able to control their hearing while echolocating. Whether this phenomenon in marine mammals is associated with the stapedius reflex or another mechanism is uncertain. What also remains unclear is whether these animals are capable of adjusting their hearing when exposed to sources other than their own vocalizations (which they know are about to occur) and specifically the acoustic characteristics associated with seismic activities. Last, considering the amount of anthropogenic sound present in the marine environment, using this reflex in association with it would likely reduce their ability to hear important environmental and biological cues.

Comment 19: The Industry Associations state that recent work by Dr. Jim Finneran investigated the auditory effects on bottlenose dolphins exposed to multiple underwater impulses produced by a seismic airgun. The pre- and post-exposure hearing thresholds in exposed dolphins were compared to determine the amount of temporary hearing loss, called a temporary threshold shift (TTS), as a function of exposure level and the number of impulses. The dolphins exposed to seismic sound levels up to 196 dB re 1 μPa^2s (cumulative SEL) showed no measurable TTS (Finneran *et al.,* 2012; Finneran *et al.,* 2011). The USGS EA would be improved by a discussion of this research regarding animal sound tolerance. These results would further explain why dolphins may bow-ride seismic vessels without sustaining injury.

Response: NMFS believes that these documents are adequate and contain a proper description of risk assessment in order for it to make the necessary determinations under the MMPA and issue the IHA. USGS has proposed the buffer and exclusion zones included in the IHA in their IHA application and EA. As a precautionary approach, USGS has included dolphins and whales in the shut-down procedures as a mitigation measure. Also, USGS has proposed to implement the monitoring and mitigation measures included in the IHA in their IHA application and EA. They have determined that the measures are effective and practicable as described in this **Federal Register** notice, and NMFS concurs with their determination. USGS included a discussion of tolerance in the section on the ''Potential Effects of Airguns Sounds on Marine Mammals'' in the EA as well

as the IHA application. No Level A harassment, serious injury, or mortality is expected or has been authorized.

Comment 20: The Industry Associations state that the USGS EA should have considered extensive peer-reviewed literature and field observations that establish that bow-riding is normal, not abnormal, behavior for dolphins. Also, Northern bottlenose whales (*Hyperoodon ampullatus*) are sometimes quite tolerant of slow-moving vessels (Reeves *et al.,* 1993; Hooker *et al.,* 2001); dolphins may tolerate boats of all sizes, often approaching and riding the bow and stern waves (Shane *et al.,* 1986); and spinner dolphins in the GOM were observed bow-riding the survey vessel in all 14 sightings of this species during one survey (Wursig *et al.,* 1998).

Response: NMFS believes that these documents are adequate and contain a proper description of risk assessment in order for it to make the necessary determinations under the MMPA and issue the IHA. NMFS states in the notice of the proposed IHA (78 FR 11821, February 20, 2013) that ''seismic operators and PSOs on seismic vessels regularly see dolphins and other small toothed whales near operating airgun arrays, but in general there is a tendency for most delphinids to show some avoidance of operating seismic vessels (e.g., Goold, 1996a,b,c; Calambokidis and Osmek, 1998; Stone, 2003; Moulton and Miller, 2005; Holst *et al.,* 2006; Stone and Tasker, 2006; Weir, 2008; Richardson *et al.,* 2009; Barkaszi *et al.,* 2009; Moulton and Holst, 2010). Some dolphins seem to be attracted to the seismic vessel and floats, and some ride the bow wave of the seismic vessel even when large arrays of airguns are firing (e.g., Moulton and Miller, 2005). Nonetheless, small toothed whales more often tend to head away, or to maintain a somewhat greater distance from the vessel, when a large array of airguns is operating than when it is silent (e.g., Stone and Tasker, 2006; Weir, 2008; Barry *et al.,* 2010; Moulton and Holst, 2010). In most cases, the avoidance radii for delphinids appear to be small, on the order of one km or less, and some individuals show no apparent avoidance.''

Comment 21: The Industry Associations state that proposed mitigation measures conflict with existing requirements. In the U.S. GOM, the requirement to shut-down seismic sources if an animal enters the exclusion zone has historically been applied to whales, but not dolphins. The Bureau of Ocean Energy Management (BOEM) and Bureau of Safety and Environmental Enforcement's (BSEE) existing mitigation requirements are documented in JOINT NTL No. 2012–G02 ''Notice to Lessees and Operators of Federal Oil, Gas, and Sulphur Leases in the OCS, Gulf of Mexico OCS Region—Implementation of Seismic Survey Mitigation Measures and Protected Species Observer Program,'' which can be found online at: *http://www.boem.gov/Regulations/Notices-To-Lessees/Notices-to-Lessees-and-Operators.aspx.* The USGS monitoring/shut-down zones should be consistent with these existing mitigation measures which have been proven protective. The existing standard is premised upon a 2002 NMFS Biological Opinion. BOEM has itself previously recognized in its recent Supplemental EA for a specific seismic permit in the GOM that extending the shut-down requirement to delphinids is unwarranted.

Response: USGS has proposed the buffer and exclusion zones included in the IHA in their IHA application and EA. As a precautionary approach, USGS has included dolphins and whales in the shut-down procedures as a mitigation measure. USGS states that if a marine mammal is detected outside the exclusion zone, but is likely to enter the exclusion zone, and if the vessel's speed and/or course cannot be changed to avoid having the animal enter the exclusion zone, the seismic source will be shut-down before the animal is within the exclusion zone. Likewise, if a marine mammal is already within the exclusion zone when first detected, the seismic source will be shut-down immediately. For USGS's specified activity, NMFS has included this mitigation measure in the IHA. Under the MMPA, NMFS (not BOEM) 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; therefore, it has included the shut-down for whales and dolphins as a mitigation measure in the IHA. NMFS will enter into further future discussions with BOEM, BSEE, the Industry Associations, and other parties as to whether certain monitoring and mitigation measures are practicable from an economic, safety, and/or operational standpoint as part of BOEM's request to NMFS for incidental take regulations under the MMPA for oil and gas-related seismic surveys on the outer continental shelf of the GOM.

Comment 22: The Industry Associations state that the proposed USGS requirement to shut-down for all marine mammals entering the exclusion zone conflicts with discretionary shut-downs contemplated in BOEM's ''Atlantic Geological and Geophysical (G&G) Activities Programmatic Environmental Impact Statement'' (Atlantic G&G PEIS). In the Atlantic G&G draft PEIS proposal, shut-downs would not be required for dolphins approaching the vessel or towed equipment at a speed and vector that indicates voluntary approach to bow-ride or chase towed equipment (this proposed mitigation measures is also unwarranted). If a dolphin voluntarily moves into the exclusion zone after acoustic sound sources are operating, it is reasoned that the sound pressure level is not negatively affecting that particular animal.

The Industry Associations state that dolphin shut-downs would be operationally disruptive. Seismic operators report that dolphins frequently approach and chase equipment towed in the water behind the vessel. Therefore, requiring a shut-down for dolphins could significantly increase survey duration or even make it impossible to conduct some high-resolution surveys.

Response: USGS has proposed the buffer and exclusion zones included in the IHA in their IHA application and EA. As a precautionary approach, USGS has included dolphins and whales in the shut-down procedures as a mitigation measure. Also, USGS has proposed to implement the monitoring and mitigation measures included in the IHA in their IHA application and EA. They have determined that the measures are effective and practicable as described in this **Federal Register** notice, and NMFS concurs with their determination.

NMFS will enter into further future discussions with BOEM, BSEE, the Industry Associations, and other parties as to whether certain monitoring and mitigation measures are practicable from an economic, safety, and/or operational standpoint as part of Industry's request to NMFS for IHAs under the MMPA for oil and gas-related seismic surveys on the outer continental shelf of the Atlantic Ocean.

Comment 23: CBD states that if NMFS intends to allow harassment of marine mammal for this activity, the IHA and supporting environmental analyses under the NEPA must be revised and reissued as a draft for further public review and comment.

Response: NMFS disagrees with the CBD's statement. USGS has revised its EA made it available online on its environmental compliance Web site at: *http://woodshole.er.usgs.gov/project-pages/environmental_compliance/index.html.*

Comment 24: CBD states that NMFS is violating its duty under NEPA to take a hard look at the impact of its decision to allow incidental harassment of marine mammals generally failing to analyze cumulative impacts of human activity on the habitat and wildlife in the GOM. The NEPA analysis must quantitatively evaluate the impacts of military activities, fisheries, the *Deepwater Horizon* disaster, and the ongoing Unusual Mortality Event (UME) declared for cetaceans in the northern GOM beginning February 1, 2010. In the absence of such analysis, the Finding of No Significant Impact (FONSI) is arbitrary. Without knowing the extent of the harm done to the GOM ecosystem, NMFS should proceed with utmost caution before authorizing additional disruptive activities. Not quantitatively analyzing cumulative impacts prevents the public from understanding whether the incremental harm that this survey inflicts has significant impacts on an already injured ecosystem that could restrict other uses like fishing.

Response: NMFS disagrees with the CBD's statement. Cumulative effects are defined as ''the impact on the environment which results from the incremental impact on the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions'' (40 CFR 1508.7). Cumulative impacts can result from individually minor but collectively significant actions that take place over a period of time. While the EA did not contain a quantitative analysis, USGS's EA had a comprehensive discussion of ongoing and reasonably foreseeable actions in the GOM that included: Ongoing oil and gas exploration, development, and production; existing oil and gas infrastructure; commercial fishing; alternate energy development; military operations; marine vessel traffic; scientific research; recreation and tourism; acoustic masking; and marine mining and disposal areas. These activities account for cumulative impacts to regional and worldwide populations of marine mammals, many of whom are a small fraction of their former abundance and are listed as endangered or threatened under the ESA and depleted under the MMPA.

Despite these regional and global anthropogenic and natural pressures, available trend information indicates that most local populations of marine mammals in the GOM are stable or increasing (Waring *et al.,* 2013). Most importantly, this seismic survey uses a small airgun array configuration and would be limited to a small area for a relatively short period of time, the inclusion of the monitoring and reporting measures and the requirement to implement mitigation measures (e.g., shut-down of seismic operations), will reduce the amount and severity of the potential impacts; therefore, it is expected to have a negligible impact on the species or stocks of marine mammals in the action area.

The results of the cumulative impacts analysis in the NSF/USGS PEIS indicated that there would not be any significant cumulative effects to marine resources from the proposed NSF-funded or USGS marine seismic research. That same section of the NSF/USGS PEIS also stated that, ''a more detailed, cruise-specific cumulative effects analysis would be conducted at the time of the preparation of the cruise-specific EAs, allowing for the identification of other potential activities in the area of the proposed seismic survey that may result in cumulative impacts to environmental resources.'' USGS's cruise-specific EA for the low-energy seismic survey, ''it appears that there is little overlap between the seismic survey and other activities, and little chance of significant cumulative effects * * * low-energy airgun operations are unlikely to cause any large-scale or prolonged effects in marine mammals, and the duration of the surveys is very short (i.e., 96 hours at each site).''

Comment 25: The CBD states that the EA fails to mention the lingering effects on habitat and wildlife in the GOM from the *Deepwater Horizon* oil spill. Without knowing the extent of the harm done to the GOM ecosystem, NMFS should proceed with utmost caution before authorizing additional disruptive activities. Not quantitatively analyzing cumulative impacts prevents the public from understanding whether the incremental harm that this survey inflicts has significant impacts on an already injured ecosystem that could restrict other uses like fishing.

Response: NMFS disagrees with the CBD's statement. While the EA did not contain a quantitative analysis, USGS's EA had a qualitative analysis and comprehensive discussion of ongoing and reasonably foreseeable actions in the GOM that included: Ongoing oil and gas exploration, development, and production; existing oil and gas infrastructure; commercial fishing; alternate energy development; military operations; marine vessel traffic; scientific research; recreation and tourism; and marine mining and disposal areas.

Comment 26: The CBD states that NMFS's IHA does not rely on the best available science regarding marine mammal impact thresholds, including the 160 dB (rms) Level B harassment threshold (i.e., buffer zone) and the 180 dB (rms) Level A harassment threshold (i.e., exclusion zone). Further, even if NMFS's assumptions regarding impact thresholds were correct, the IHA authorizes the take of more than small numbers of marine mammals and greater than negligible impacts on species and stocks, rendering the IHA as proposed illegal under the MMPA.

Response: NMFS has established 160 dB (rms) as the criterion for potential Level B harassment for impulse noise for marine mammals and 180 dB (rms) and 190 dB (rms) as the criterion for potential Level A harassment for impulse noise for cetaceans (i.e., whales, dolphins, and porpoises) and pinnipeds (i.e., seals and sea lions), respectively. NMFS is currently developing new acoustic guidelines for assessing the effects of anthropogenic sound on marine mammal species under our jurisdiction. The updated acoustic criteria will be based on recent advances in science. More information regarding NMFS's marine mammal acoustic guidelines can be found online at: *http://www.nmfs.noaa.gov/pr/acoustics/guidelines.htm*. NMFS has determined, provided that the aforementioned mitigation and monitoring measures are implemented, that the impact of conducting a marine seismic survey in the deep water of the Gulf of Mexico, April to May 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 3 below for authorized take numbers).

Comment 27: The CBD requests that NMFS make all of the information regarding the contents of an EFH assessment and EFH consultation (including EFH conservation recommendations), available to the public along with the revised NEPA analysis prior to publishing a final rule authorizing the activity.

Response: USGS has made a no effect determination regarding impacts on EFH. NMFS, Office of Protected Resources, Permits and Conservation Division has determined that the issuance of an IHA for the taking of marine mammals incidental to a low-energy marine seismic survey in the GOM will not have an adverse impact on EFH; therefore, an EFH consultation is not required.

Comment 28: The CBD states that NMFS's IHA does not rely on the best available science regarding thresholds for marine mammal impacts, including

the 160 dB (rms) threshold and the 180/190 dB (rms) Level A harassment (exclusion zone) threshold. Five of the world's leading biologists and bioacousticians working in this field recently characterized the 160 dB threshold as ''overly simplified, scientifically outdated, and artificially rigid'' and therefore NMFS must use a more conservative threshold. Using a single sound pressure level of 160 dB for Level B harassment represents a major step backward from recent programmatic authorizations. For Navy sonar activity, NMFS has incorporated into its analysis linear risk functions that endeavor to take account of risk and individual variability and to reflect the potential for take at relatively low levels. If NMFS were to modify its threshold estimates, as it must be based on the best available science, the estimated number of marine mammal takes incidental to the proposed seismic survey would be significantly higher than NMFS's current estimates. Further, even if NMFS's assumptions regarding impact thresholds were correct, the IHA authorizes the take of more than small numbers of marine mammals and greater than negligible impacts on species and stocks, rendering the IHA as proposed illegal under the MMPA.

Response: NMFS has established 180 dB (rms) and 190 dB (rms) as the criterion for potential Level A harassment for impulse noise for cetaceans (i.e., whales, dolphins, and porpoises) and pinnipeds (i.e., seals and sea lions), respectively, which were conservatively derived to encompass levels associated with temporary threshold shifts (TTS) and not permanent threshold shifts (PTS). NMFS's is currently developing new acoustic guidelines for assessing the effects of anthropogenic sound on marine mammal species under our jurisdiction. The updated acoustic criteria will be based on recent advances in science. NMFS is working toward establishing Level B harassment criteria that better account for the variability and complexity of behavioral responses associated with noise exposure (e.g., moving away from a step function towards exposure-response functions that accounts for risk varying with received level. More information regarding NMFS's marine mammal acoustic guidelines can be found online at: *http://www.nmfs.noaa.gov/pr/acoustics/guidelines.htm*. NMFS has determined, provided that the aforementioned mitigation and monitoring measures are implemented, that the impact of conducting a marine seismic survey in the deep water of the Gulf of Mexico, April to May 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 3 below for authorized take numbers).

Comment 29: The CBD states that NMFS's use of the 180/190 dB (rms) threshold for Level A harassment ignores the best available science and is inadequate. NMFS cannot assume that TTS, and even PTS would be unlikely for marine mammals that enter the exclusion zone. A number of recent studies indicate that anthropogenic sound can induce PTS at lower levels than anticipated. New data indicate that mid-frequency cetaceans have greater sensitivity to sounds within their best hearing range than was previously thought. This recent research indicates it is possible that marine mammals will experience injury, or potentially serious injury, at lower sound thresholds than NMFS assumes. NMFS must take into account the best available science and set lower thresholds for Level A harassment, which would lead to larger exclusion zones around the survey. Given NMFS's lax approach to estimating impact thresholds for injury to marine mammals from the proposed survey, it is likely that many more marine mammals will be harmed than NMFS estimates. In light of the best available science, NMFS cannot rationally defend its conclusion that the proposed survey will harm no more than small numbers of marine mammals and will have no more than negligible impacts on those species or stocks.

Response: NMFS has established 180 dB (rms) and 190 dB (rms) as the criterion for potential Level A harassment for impulse noise for cetaceans (i.e., whales, dolphins, and porpoises) and pinnipeds (i.e., seals and sea lions), respectively, which were conservatively based on TTS. NMFS's is currently developing new acoustic guidelines for assessing the effects of anthropogenic sound on marine mammal species under our jurisdiction. The updated acoustic criteria will be based on recent advances in science and includes studies that take into account frequency sensitivity associated with noise-induced hearing loss. Nevertheless, since these original criteria (i.e., 180/190 dB [rms]) were based on TTS, in the majority of situations, especially for intermittent sources, like airguns, the ranges of exclusion zones that account for these new data are equal, if not smaller than the zones based on the 180 and 190 dB (rms) thresholds. Thus, the exclusion zones to 180 and 190 dB are expected to be protective. More information regarding NMFS's marine mammal acoustic guidelines can be found online at: *http://www.nmfs.noaa.gov/pr/acoustics/guidelines.htm*.

NMFS has determined, provided that the aforementioned mitigation and monitoring measures are implemented, that the impact of conducting a marine seismic survey in the deep water of the Gulf of Mexico, April to May 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 3 below for authorized take numbers). NMFS believes that the length of the seismic survey, the requirement to implement mitigation measures (e.g., shut-down of seismic operations), 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 it will have a negligible impact on the species or stocks in the action area.

Comment 30: The CBD states that NMFS has blatantly disregarded the MMPA's prohibition on allowing the take of more than small numbers of marine mammals. For example, NMFS estimates that in eight days, 118 melon-headed whales will be taken, which is over five percent of the population. As noted above, this number is likely an underestimate. But even taken at face value, NMFS cannot rationally argue that this is a small number. There is no numerical cut-off for ''small numbers.'' NMFS does not even attempt to explain how its take estimates meet the ''small numbers'' requirement. In fact, the IHA entirely disregards this statutory requirement. NMFS does not attempt to define small numbers, nor does it undertake any sort of analysis of what small numbers might be. The Ninth Circuit recently confirmed that the MMPA requires that authorizing agencies (here NMFS) to separately find both that only small numbers of marine mammals will be taken and that the impacts to the species or stock will be negligible. While NMFS attempted to rationalize its determination that impacts to the species or stocks will be negligible, it undertook no such analysis regarding small numbers. The IHA here violates the MMPA because it does not guarantee that only small numbers of marine mammals will be taken.

Response: 50 CFR 216.103 defines ''small numbers'' as ''a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock.'' NMFS has determined, provided that the aforementioned mitigation and

monitoring measures are implemented, that the impact of USGS conducting a low-energy marine seismic survey in the deep water of the Gulf of Mexico, April to May 2013, may result, at worst, in a temporary modification in behavior and/or low-level physiological effects (Level B harassment) of small numbers of 18 species of marine mammals (see Table 3 below for authorized take numbers and approximate percentage of best population estimate of stock). NMFS has determined that the 118 authorized takes of melon-headed whales is a small number, as it is approximately 5.3% of the estimated best population (2,235 animals) in the northern GOM stock.

Comment 31: The CBD states that for the endangered sperm whale, a deep-diving whale that feeds in the ocean's ''sound channel,'' take of even one individual would constitute more than a negligible impact and would therefore violate the MMPA. Reliance on observers for mitigation also has limited likelihood of success given the deep-diving behavior of sperm whales and the limits of visual observations at night and in poor weather. For sperm whales, the take is planned for peak breeding season, suggesting that the long-term impacts if reproductive success is compromised may be more severe than anticipated.

Response: NMFS believes that the length of the seismic survey, the requirement to implement mitigation measures (e.g., shut-down of seismic operations), 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 it will have a negligible impact on the species or stocks in the action area. No Level A harassment, serious injury, or mortality is expected or has been authorized.

Comment 32: The CBD states that NMFS underestimates the risk of entanglement for sperm whales. Even though NMFS acknowledges that this ''large of an array carries the risk of entanglement for marine mammals,'' it completely fails to support the conclusion that large whales ''have a low probability of becoming entangled due to slow speed of the survey vessel and onboard monitoring efforts.'' In 2008, a fishing vessel killed a sperm whale that became entangled in the sea anchor (parachute anchor and lines). As the purpose of the sea anchor is to drastically slow a vessel (almost stop it), this contradicts the proposition that the USGS can reduce sperm whale entanglements by slow speed or onboard monitoring efforts (which are limited by low visibility at night, when a sperm whale also might not be able to see the array).

Response: In the notice of the proposed IHA (78 FR 11821, February 20, 2013), NMFS states that the ''. . . proposed seismic survey would require towing approximately a single 450 m cable streamer. This large of an array carries the risk of entanglement for marine mammals. Wildlife, especially slow moving individuals, such as large whales, have a low probability of becoming entangled due to slow speed of the survey vessel and onboard monitoring efforts. The probability for entanglement of marine mammals is considered not significant because of the vessel speed and the monitoring efforts onboard the survey vessel.'' NMFS has included a requirement in the IHA that PSOs shall conduct monitoring while the airgun array and streamer are being deployed or recovered from the water. Although the towed hydrophone streamers and other towed seismic equipment could come in direct contact with marine mammal species, NMFS believes that entanglement is highly unlikely due to streamer design and extensive use of this equipment (thousands of miles of effort over a many years) without entanglement of marine mammals; therefore entanglement is considered discountable. No Level A harassment, serious injury, or mortality is expected or has been authorized.

Comment 33: The CBD states that the estimated take exceeds the potential biological removal (PBR) level of 1.1 sperm whales. The most recent abundance estimate for the sperm whale is 763, from a summer 2009 oceanic survey covering waters from the 200 m isobaths to the seaward extend of the U.S. EEZ. Threats to sperm whales in the GOM are numerous. The most recent stock assessment report counts one death from entanglement in a fishing vessel's anchor line and seven strandings from 2006 to 2010 for which it could not be determined if it was due to human interaction. This presents the possibility that mortality from human activities is already above the PBR level of 1.1. Any additional take of a sperm whale would have greater than negligible impacts on the stock because NMFS must take into account the cumulative take of sperm whales from other activities.

Response: The NMFS Draft 2012 Stock Assessment Report for the Northern GOM stock of sperm whale has a best abundance estimate of 763 and a minimum population estimate of 560 individuals. PBR is the product of the minimum population size (560), one half the maximum net productivity rate (0.04), and a recovery factor (assumed to be 0.1 because it is an endangered species). PBR for the northern GOM stock of sperm whales is 1.1. NMFS has reviewed USGS's EA and IHA application and has determined that no more than Level B harassment of marine mammals would occur. Any marine mammal that could be exposed to the seismic survey would likely experience short-term disturbance. Marine mammals are expected, at most, to show an avoidance response to the seismic pulses. Further, mitigation measures such as controlled speed, course alteration, visual monitoring, and shut-downs when marine mammals are detected within defined ranges should further reduce short-term reactions to disturbance, and minimize any effects on hearing sensitivity. No Level A harassment, serious injury, or mortality is expected or has been authorized; therefore PBR is not applicable.

Comment 34: The CBD states that based on multiple factors in NEPA's regulations and the controversial nature of the government seismic surveys to prospect for novel deepwater fossil fuel sources as well as the significant environmental effects of this action requires NMFS to prepare a full Environmental Impact Statement (EIS) analyzing the impacts of the proposed survey.

Response: NMFS disagrees with the CBD's comments, NMFS and USGS have satisfied all requirements of NEPA. NMFS has adopted USGS's EA and prepared a FONSI for this action. NMFS has evaluated USGS's EA and found it includes all required components for adoption, these include: sufficient evidence and analysis for determining whether to prepare an EIS or FONSI; brief discussion of need for the proposed action; a listing of alternative to the proposed action; description of the affected environment; and brief discussion of the environmental impacts of the proposed action and alternatives. NMFS has determined that it is not necessary to prepare an EIS for the issuance of an IHA to USGS for this activity.

Comment 35: The CBD states that the EA fails to meet the requirement that alternatives ''be given full and meaningful consideration'' by dismissing the no action alternative in a cursory fashion and failing to consider other alternatives adequately. Other alternatives for NMFS to consider include (1) using alternative equipment that would reduce the number or length of survey lines; (2) selecting alternative sites that are not in EFH and a habitat area of particular concern; or (3) conducting more extensive analysis of

the data collected previously to either eliminate the need for the current survey or reduce its size or duration. NMFS cannot support the EA and determinations conclusion that the ''no action'' alternative would result in the loss of seismic data of considerable scientific value because it is possible to collect seismic data without harassing marine mammals. In light of this, the USGS and NMFS must analyze alternative means of collecting seismic data that lessen impacts to wildlife.

Response: NMFS and USGS have satisfied all requirements of NEPA. Given the limited window for the operations and the fact that marine mammals are widespread in the survey area throughout the year, altering the timing of the proposed project likely would result in no net benefits and does not meet the purpose and need of the USGS. Issuing the IHA for another period could result in significant delays and disruptions to the cruise as well as subsequent studies on the *Pelican* for 2013 and beyond. NMFS has fully complied with its obligations under NEPA.

Comment 36: Several private citizens oppose the issuance of an IHA to USGS for the take of marine mammals incidental to conducting a low-energy seismic survey in deep water of the northwest Gulf of Mexico from April to May 2013. They state that the airguns will emit decibels at 190 to 230 for 96 hours in two different locations, and can cause hearing damage, bleeding of the brain, behavioral issues, and strandings. Marine mammals depend on their sensitive hearing for survival. Hearing loss for a cetacean can mean the inability to function, hunt, navigate, and cause death. They state that it has been widely documented that the use of active sonar, underwater detonations, and other extremely loud noises terrorizes and often kills cetaceans. Marine life is already threatened from oil spills, drilling, pollution, hunting, ship strikes, over-fishing, climate change, etc. Species, such as the North Atlantic, humpback, sei, fin, blue, and sperm whale and West Indian manatee, are listed as endangered under the ESA. Using lookouts (i.e., PSOs) to detect marine life during this seismic survey is unacceptable as they can only see the surface of the ocean, and the marine mammals spend most of their lives underwater. Alternative technologies and methods should be used so that these activities have less potential impacts. They request a public hearing be held before the Commission.

Response: NMFS recognizes that numerous private citizens oppose the issuance of an IHA to USGS for the low-energy marine seismic survey in the deep water of the GOM. The notice of the proposed IHA (78 FR 11821, February 20, 2013) included a discussion of the effects of sounds from airguns and Navy sonar on mysticetes and odontocetes including tolerance, masking, behavioral disturbance, hearing impairment, other non-auditory physical effects and strandings. In April 2013, NMFS issued a Biological Opinion and concluded that the action and issuance of the IHA are not likely to jeopardize the continued existence of cetaceans and sea turtles, which included sperm whales, and included an Incidental Take Statement (ITS) incorporating the requirements of the IHA as Terms and Conditions of the ITS is likewise a mandatory requirement of the IHA. The West Indian manatee is managed under the jurisdiction of the U.S. Fish and Wildlife Service (USFWS) and is not expected to occur in the action area. On February 25 to 27, 2013, the BOEM held a workshop on the status of alternative and quieting technologies entitled ''Quieting Technologies for Reducing Noise during Seismic Surveying and Pile Driving'' that examined current and emerging technologies that have the potential to reduce the impacts of noise generated during offshore exploratory seismic surveys, pile driving, and vessels associated with these activities. NMFS will work with other Federal agencies to identify, evaluate, and potentially develop these alternative and quieting technologies for potential future use. During the 30-day public comment period, NMFS forwarded copies of the IHA application to the Commission and its Committee of Scientific Advisors and received comments on March 12, 2013. NMFS does not expect to hold a public hearing before the Commission.

Comment 37: A private citizen recommends:

(1) The installation of a passive acoustic monitoring (PAM) system to detect any vocalizations by whales or dolphins, and to help PSOs locate any that may be present at night;

(2) Additional PSOs be added to the ship; and

(3) An additional support vessel should be provided to steam in front of the survey vessel to spot any whales or dolphins prior to the larger vessel approaching.

Response: The NSF/USGS PEIS states that a towed PAM system is used normally for high-energy seismic surveys, and implied that it was not used for low-energy seismic surveys since towing PAM equipment is not practicable in some cases. USGS's project is considered a low-energy marine seismic survey; therefore, USGS has determined that it is not practicable and a towed PAM system will not be used for this specific project. USGS has appointed two PSOs onboard the *Pelican,* with NMFS's concurrence, to monitor and mitigate the buffer and exclusion zones during daylight. The *Pelican* is relatively small; therefore, the available berths for additional PSOs are limited. In addition to the PSOs, at least two of the USGS personnel aboard the vessel will have PSO training to detect protected species and will be available to cover for PSOs during mealtimes and restroom breaks, if needed. Also, the vessel's crew will be instructed to observe from the bridge and decks for opportunistic sightings. In certain situations, NMFS has recommended the use of additional support vessels to enhance PSO monitoring effort during seismic surveys. For this and other similar low-energy seismic surveys, however, NMFS has not deemed it necessary to employ additional support vessels to monitor the buffer and exclusion zones due to the relatively small distances of these zones. An additional vessel would unnecessarily increase noise and emissions in the action area as well.

Description of the Marine Mammals in the Specified Geographic Area of the Specified Activity

The marine mammal species that potentially occur within the GOM include 28 species of cetaceans and one sirenian (Jefferson and Schiro, 1997; Wursig *et al.,* 2000; see Table 2 below). In addition to the 28 species known to occur in the GOM, the long-finned pilot whale (*Globicephala melas*), long-beaked common dolphin (*Delphinus capensis*), and short-beaked common dolphin (*Delphinus delphis*) could potentially occur there. However, there are no confirmed sightings of these species in the GOM, but they have been seen close and could eventually be found there (Wursig *et al.,* 2000). Those three species are not considered further in this document. The marine mammals that generally occur in the action area belong to three taxonomic groups: mysticetes (baleen whales), odontocetes (toothed whales), and sirenians (the West Indian manatee). Of the marine mammal species that potentially occur within the GOM, 21 species of cetaceans (20 odontocetes, 1 mysticete) are routinely present and have been included in the analysis for incidental take to the seismic survey. Marine mammal species listed as endangered under the U.S. Endangered Species Act of 1973 (ESA; 16 U.S.C. 1531 *et seq.*), includes the North Atlantic right

(*Eubalaena glacialis*), humpback (*Megaptera novaeangliae*), sei (*Balaenoptera borealis*), fin (*Balaenoptera physalus*), blue (*Balaenoptera musculus*), and sperm (*Physeter macrocephalus*) whale, as well as the West Indian (Florida) manatee (*Trichechus manatus latirostris*). Of those endangered species, only the sperm whale is likely to be encountered in the survey area. No species of pinnipeds are known to occur regularly in the GOM, and any pinniped sighted in the study area would be considered extralimital. The Caribbean monk seal (*Monachus tropicalis*) used to inhabit the GOM but is considered extinct and has been delisted from the ESA. The West Indian manatee is the one marine mammal species mentioned in this document that is managed by the U.S. Fish and Wildlife Service (USFWS) and is not considered further in this analysis; all others are managed by NMFS.

In general, cetaceans in the GOM appear to be partitioned by habitat preferences likely related to prey distribution (Baumgartner *et al.,* 2001). Most species in the northern GOM concentrated along the upper continental slope in or near areas of cyclonic circulation in waters 200 to 1,000 m (656.2 to 3,280.8 ft) deep. Species sighted regularly in these waters include Risso's, rough-toothed, spinner, striped, pantropical spotted, and Clymene dolphins, as well as short-finned pilot, pygmy and dwarf sperm, sperm, *Mesoplodon* beaked, and unidentified beaked whales (Davis *et al.,* 1998). In contrast, continental shelf waters (< 200 m deep) are primarily inhabited by two species: bottlenose and Atlantic spotted dolphins (Davis *et al.,* 2000, 2002; Mullin and Fulling, 2004). Bottlenose dolphins are also found in deeper waters (Baumgartner *et al.,* 2001). The narrow continental shelf south of the Mississippi River delta (20 km [10.8 nmi] wide at its narrowest point) appears to be an important habitat for several cetacean species (Baumgartner *et al.,* 2001; Davis *et al.,* 2002). There appears to be a resident population of sperm whales within 100 km (54 nmi) of the Mississippi River delta (Davis *et al.,* 2002).

Table 2 (below) presents information on the abundance, distribution, population status, conservation status, and population trend of the species of marine mammals that may occur in the study area during April to May 2013.

TABLE 2—THE HABITAT, REGIONAL ABUNDANCE, AND CONSERVATION STATUS OF MARINE MAMMALS THAT MAY OCCUR IN OR NEAR THE SEISMIC SURVEY AREA IN THE DEEP WATER OF THE NORTHWEST GOM

[See text and Table 2 in USGS's application for further details]

Species	Habitat	Population estimate [3] (minimum)	ESA [1]	MMPA [2]	Population trend [3]
Mysticetes					
North Atlantic right whale (*Eubalaena glacialis*).	Coastal and shelf	Extralimital	EN	D	Increasing.
Humpback whale (*Megaptera novaeangliae*).	Pelagic, nearshore waters, and banks.	Rare	EN	D	Increasing.
Minke whale (*Balaenoptera acutorostrata*)	Pelagic and coastal	Rare	NL	NC	No information available.
Bryde's whale (*Balaenoptera brydei*)	Pelagic and coastal	33 (16)—Northern GOM stock.	NL	NC	Unable to determine.
Sei whale (*Balaenoptera borealis*)	Primarily offshore, pelagic.	Rare	EN	D	Unable to determine.
Fin whale (*Balaenoptera physalus*)	Continental slope, pelagic.	Rare	EN	D	Unable to determine.
Blue whale (*Balaenoptera musculus*)	Pelagic, shelf, coastal.	Extralimital	EN	D	Unable to determine
Odontocetes					
Sperm whale (*Physeter macrocephalus*)	Pelagic, deep sea	763 (560)—Northern GOM stock.	EN	D	Unable to determine.
Pygmy sperm whale (*Kogia breviceps*) and Dwarf sperm whale (*Kogia sima*).	Deep waters off the shelf.	186 (90)—Northern GOM stock.	NL	NC	Unable to determine.
Cuvier's beaked whale (*Ziphius cavirostris*).	Pelagic	74 (36)—Northern GOM stock.	NL	NC	Unable to determine.
Mesoplodon beaked whale (includes Blainville's beaked whale [*M. densirostris*], Gervais' beaked whale [*M. europaeus*], and Sowerby's beaked whale [*M. bidens*].	Pelagic	149 (77)—Northern GOM stock.	NL	NC	Unable to determine.
Killer whale (*Orcinus orca*)	Pelagic, shelf, coastal.	28 (14)—Northern GOM stock.	NL	NC	Unable to determine.
Short-finned pilot whale (*Globicephala macrorhynchus*)	Pelagic, shelf coastal	2,415 (1,456)—Northern GOM stock.	NL	NC	Unable to determine.
False killer whale (*Pseudorca crassidens*)	Pelagic	NA—Northern GOM stock.	NL	NC	Unable to determine.
Melon-headed whale (*Peponocephala electra*).	Pelagic	2,235 (1,274)—Northern GOM stock.	NL	NC	Unable to determine.
Pygmy killer whale (*Feresa attenuata*)	Pelagic	152 (75)—Northern GOM stock.	NL	NC	Unable to determine.

TABLE 2—THE HABITAT, REGIONAL ABUNDANCE, AND CONSERVATION STATUS OF MARINE MAMMALS THAT MAY OCCUR IN OR NEAR THE SEISMIC SURVEY AREA IN THE DEEP WATER OF THE NORTHWEST GOM—Continued

[See text and Table 2 in USGS's application for further details]

Species	Habitat	Population estimate [3] (minimum)	ESA [1]	MMPA [2]	Population trend [3]
Risso's dolphin (*Grampus griseus*)	Deep water, seamounts.	2,442 (1,563)—Northern GOM stock.	NL ...	NC	Unable to determine.
Bottlenose dolphin (*Tursiops truncatus*)	Offshore, inshore, coastal, estuaries.	NA (NA)—32 Northern GOM Bay, Sound and Estuary stocks. NA (NA)—Northern GOM continental shelf stock. 7,702 (6,551)—GOM eastern coastal stock. 2,473 (2,004)—GOM northern coastal stock. NA (NA)—GOM western coastal stock. 5,806 (4,230)—Northern GOM oceanic stock.	NL ...	NC ..... S—32 stocks inhabiting the bays, sounds, and estuaries along GOM coast, and GOM western coastal stock.	Unable to determine.
Rough-toothed dolphin (*Steno bredanensis*).	Pelagic	624 (311)—Northern GOM stock.	NL ...	NC	Unable to determine.
Fraser's dolphin (*Lagenodelphis hosei*)	Pelagic	NA (NA)—Northern GOM stock.	NL ...	NC	Unable to determine.
Striped dolphin (*Stenella coeruleoalba*)	Pelagic	1,849 (1,041)—Northern GOM stock.	NL ...	NC	Unable to determine.
Pantropical spotted dolphin (*Stenella attenuata*).	Pelagic	50,880 (40,699)—Northern GOM stock.	NL ...	NC	Unable to determine.
Atlantic spotted dolphin (*Stenella frontalis*)	Coastal and pelagic	NA (NA)—Northern GOM stock.	NL ...	NC	Unable to determine.
Spinner dolphin (*Stenella longirostris*)	Mostly pelagic	11,441 (6,221)—Northern GOM stock.	NL ...	NC	Unable to determine.
Clymene dolphin (*Stenella clymene*)	Pelagic	129 (64)—Northern GOM stock.	NL ...	NC	Unable to determine.
Sirenians					
West Indian (Florida) manatee (*Trichechus manatus latrostris*).	Coastal, rivers, and estuaries.	3,802—U.S. stock	EN ...	D	Increasing or stable throughout much of Florida.

NA = Not available or not assessed.
[1] U.S. Endangered Species Act: EN = Endangered, T = Threatened, DL = Delisted, NL = Not listed.
[2] U.S. Marine Mammal Protection Act: D = Depleted, S = Strategic, NC = Not Classified.
[3] NMFS Draft 2012 Stock Assessment Reports.
[4] USFWS Stock Assessment Reports.

Refer to sections 3 and 4 of USGS's application for detailed information regarding the abundance and distribution, population status, and life history and behavior of these other marine mammal species and their occurrence in the project area. The application also presents how USGS calculated the estimated densities for the marine mammals in the survey area. NMFS has reviewed these data and determined them to be the best available scientific information for the purposes of the IHA.

Potential Effects on Marine Mammals

Acoustic stimuli generated by the operation of the airguns, which introduce sound into the marine environment, may have the potential to cause Level B harassment of marine mammals in the survey area. The effects of sounds from airgun operations might include one or more of the following: tolerance, masking of natural sounds, behavioral disturbance, temporary or permanent hearing impairment, or non-auditory physical or physiological effects (Richardson *et al.,* 1995; Gordon *et al.,* 2004; Nowacek *et al.,* 2007; Southall *et al.,* 2007).

Permanent hearing impairment, in the unlikely event that it occurred, would constitute injury, but temporary threshold shift (TTS) is not an injury (Southall *et al.,* 2007). Although the possibility cannot be entirely excluded, it is unlikely that the project would

result in any cases of temporary or permanent hearing impairment, or any significant non-auditory physical or physiological effects. Based on the available data and studies described here, some behavioral disturbance is expected, but NMFS expects the disturbance to be localized and short-term. A more comprehensive review of these issues can be found in the ''Programmatic Environmental Impact Statement/Overseas Environmental Impact Statement prepared for Marine Seismic Research that is funded by the National Science Foundation and conducted by the U.S. Geological Survey'' (NSF/USGS, 2011).

The notice of the proposed IHA (78 FR 11821, February 20, 2013) included a discussion of the effects of sounds from airguns on mysticetes and odontocetes including tolerance, masking, behavioral disturbance, hearing impairment, and other non-auditory physical effects. NMFS refers the reader to USGS's application and EA for additional information on the behavioral reactions (or lack thereof) by all types of marine mammals to seismic vessels.

Anticipated Effects on Marine Mammal Habitat, Fish, and Invertebrates

NMFS included a detailed discussion of the potential effects of this action on marine mammal habitat, including physiological and behavioral effects on marine fish, fisheries, and invertebrates in the notice of the proposed IHA (78 FR 11821, February 20, 2013). The seismic survey will not result in any permanent impact on habitats used by the marine mammals in the survey area, including the food sources they use (i.e., fish and invertebrates), and there will be no physical damage to any habitat. While NMFS anticipates that the specified activity may result in marine mammals avoiding certain areas due to temporary ensonification, this impact to habitat is temporary and reversible which was considered in further detail in the notice of the proposed IHA (78 FR 11821, February 20, 2013), as behavioral modification. The main impact associated with the activity will be temporarily elevated noise levels and the associated direct effects on marine mammals.

Recent work by Andre *et al.* (2011) purports to present the first morphological and ultrastructural evidence of massive acoustic trauma (i.e., permanent and substantial alterations of statocyst sensory hair cells) in four cephalopod species subjected to low-frequency sound. The cephalopods, primarily cuttlefish, were exposed to continuous 40 to 400 Hz sinusoidal wave sweeps (100% duty cycle and 1 second sweep period) for two hours while captive in relatively small tanks (one 2,000 liter [L, 2 m^3] and one 200 L [0.2 m^3] tank). The received SPL was reported as 157±5 dB re 1 µPa, with peak levels at 175 dB re 1 µPa. As in the McCauley *et al.* (2003) paper on sensory hair cell damage in pink snapper as a result of exposure to seismic sound, the cephalopods were subjected to higher sound levels than they would be under natural conditions, and they were unable to swim away from the sound source.

Mitigation

In order to issue an 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 the availability of such species or stock for taking for certain subsistence uses.

USGS reviewed the following source documents and have incorporated a suite of appropriate mitigation measures into their project description.

(1) Protocols used during previous NSF and USGS-funded seismic research cruises as approved by NMFS and detailed in the recently completed ''Final Programmatic Environmental Impact Statement/Overseas Environmental Impact Statement for Marine Seismic Research Funded by the National Science Foundation or Conducted by the U.S. Geological Survey;''

(2) Previous IHA applications and IHAs approved and authorized by NMFS; and

(3) Recommended best practices in Richardson *et al.* (1995), Pierson *et al.* (1998), and Weir and Dolman, (2007).

To reduce the potential for disturbance from acoustic stimuli associated with the activities, USGS and/or its designees shall implement the following mitigation measures for marine mammals:

(1) Exclusion zones around the sound source;

(2) Speed and course alterations;

(3) Shut-down procedures; and

(4) Ramp-up procedures.

Exclusion Zones—USGS use radii to designate exclusion and buffer zones and to estimate take for marine mammals. Table 1 (presented earlier in this document) shows the distances at which one would expect to receive three sound levels (160, 180, and 190 dB) from the 18 airgun array and a single airgun. The 180 dB and 190 dB level shut-down criteria are applicable to cetaceans and pinnipeds, respectively, as specified by NMFS (2000). USGS used these levels to establish the exclusion and buffer zones.

Received sound levels have been modeled by L–DEO for a number of airgun configurations, including two 105 in^3 GI airguns, in relation to distance and direction from the airguns (see Figure 2 of the IHA application). USGS has used the modeling by L–DEO to determine the buffer and exclusion zones for this seismic survey. The model does not allow for bottom interactions, and is most directly applicable to deep water. Based on the modeling, estimates of the maximum distances from the GI airguns where sound levels are predicted to be 190, 180, and 160 dB re 1 µPa (rms) in deep water were determined (see Table 1 above).

Empirical data concerning the 190, 180, and 160 dB (rms) distances were acquired for various airgun arrays based on measurements during the acoustic verification studies conducted by L–DEO in the northern GOM in 2003 (Tolstoy *et al.,* 2004) and 2007 to 2008 (Tolstoy *et al.,* 2009). Results of the 36 airgun array are not relevant for the 2 GI airguns to be used in the survey. The empirical data for the 6, 10, 12, and 20 airgun arrays indicate that, for deep water, the L–DEO model tends to overestimate the received sound levels at a given distance (Tolstoy *et al.,* 2004). Measurements were not made for the two GI airgun array in deep water; however, USGS propose to use the safety radii predicted by L–DEO's model for the GI airgun operations in deep water, although they are likely conservative given the empirical results for the other arrays. The 180 and 190 dB (rms) radii are shut-down criteria applicable to cetaceans and pinnipeds, respectively, as specified by NMFS (2000); these levels were used to establish exclusion zones. Therefore, the assumed 180 and 190 dB radii are 70 m (229.7 ft) and 20 m (65.6 ft), respectively. If the PSO detects a marine mammal(s) within or about to enter the appropriate exclusion zone, the airguns will be shut-down immediately.

Table 2 summarizes the predicted distances at which sound levels (160, 180, and 190 dB [rms]) are expected to be received from the two airgun array operating in deep water (greater than 1,000 m [3,280 ft]) depths. For the project, USGS plans to use the distances for the two 105 in^3 GI airguns for the single 35 in^3 GI airgun, for the determination of the buffer and exclusion zones since this represents

the largest and therefore most conservative distances determined by the model results provided by L–DEO.

TABLE 2—MODELED (TWO 105 IN^3 GI AIRGUN ARRAY) DISTANCES TO WHICH SOUND LEVELS ≥ 190, 180, AND 160 dB RE: 1 μPA (RMS) COULD BE RECEIVED IN DEEP WATER DURING THE SURVEY IN THE DEEP WATER OF THE NORTHWEST GOM, APRIL TO MAY 2013

Source and volume	Tow depth (m)	Water depth (m)	Predicted RMS radii distances (m) for 2 airgun array		
			190 dB	180 dB	160 dB
Two GI Airguns (105 in^3)	3	Deep (>1,000)	20 m (65.6 ft)	70 m (229.7 ft)	670 m (2,198.2 ft).

Speed and Course Alterations—If a marine mammal is detected outside the exclusion zone and, based on its position and direction of travel (relative motion), is likely to enter the exclusion zone, changes of the vessel's speed and/or direct course will be considered if this does not compromise operational safety. This would be done if operationally practicable while minimizing the effect on the planned science objectives. For marine seismic surveys towing large streamer arrays, however, course alterations are not typically implemented due to the vessel's limited maneuverability. After any such speed and/or course alteration is begun, the marine mammal activities and movements relative to the seismic vessel will be closely monitored to ensure that the marine mammal does not approach within the exclusion zone. If the marine mammal appears likely to enter the exclusion zone, further mitigation actions will be taken, including further course alterations and/or shut-down of the airgun(s). Typically, during seismic operations, the source vessel is unable to change speed or course, and one or more alternative mitigation measures will need to be implemented.

Shut-down Procedures—USGS will shut-down the operating airgun(s) if a marine mammal is detected outside the exclusion zone for the airgun(s), and if the vessel's speed and/or course cannot be changed to avoid having the animal enter the exclusion zone, the seismic source will be shut-down before the animal is within the exclusion zone. Likewise, if a marine mammal is already within the exclusion zone when first detected, the seismic source will be shut down immediately.

Following a shut-down, USGS will not resume airgun activity until the marine mammal has cleared the exclusion zone. USGS will consider the animal to have cleared the exclusion zone if:

- A PSO has visually observed the animal leave the exclusion zone, or
- A PSO has not sighted the animal within the exclusion zone for 15 minutes for species with shorter dive durations (i.e., small odontocetes), or 30 minutes for species with longer dive durations (i.e., mysticetes and large odontocetes, including sperm, killer, and beaked whales).

Although power-down procedures are often standard operating practice for seismic surveys, they are not planned to be used during this planned seismic survey because powering-down from two airguns to one airgun would make only a small difference in the exclusion zone(s)—but probably not enough to allow continued one-airgun operations if a marine mammal came within the exclusion zone for two airguns.

Ramp-up Procedures—Ramp-up of an airgun array provides a gradual increase in sound levels, and involves a step-wise increase in the number and total volume of airguns firing until the full volume of the airgun array is achieved. The purpose of a ramp-up is to ''warn'' marine mammals in the vicinity of the airguns and to provide the time for them to leave the area avoiding any potential injury or impairment of their hearing abilities. USGS will follow a ramp-up procedure when the airgun array begins operating after a specified period without airgun operations or when a shut-down shut down has exceeded that period. USGS proposes that, for the present cruise, this period would be approximately 15 minutes. L–DEO and Scripps Institution of Oceanography (SIO) has used similar periods (approximately 15 minutes) during previous low-energy seismic surveys.

Ramp-up will begin with a single GI airgun (105 in^3). The second GI airgun (105 in^3) will be added after 5 minutes. During ramp-up, the PSOs will monitor the exclusion zone, and if marine mammals are sighted, a shut-down will be implemented as though both GI airguns were operational.

If the complete exclusion zone has not been visible for at least 30 minutes prior to the start of operations in either daylight or nighttime, USGS will not commence the ramp-up. Given these provisions, it is likely that the airgun array will not be ramped-up from a complete shut-down at night or in thick fog, because the outer part of the exclusion zone for that array will not be visible during those conditions. If one airgun has operated, ramp-up to full power will be permissible at night or in poor visibility, on the assumption that marine mammals will be alerted to the approaching seismic vessel by the sounds from the single airgun and could move away if they choose. A ramp-up from a shut-down may occur at night, by only where the exclusion zone is small enough to be visible. USGS will not initiate a ramp-up of the airguns if a marine mammal is sighted within or near the applicable exclusion zones during the day or close to the vessel at night.

NMFS has carefully evaluated the applicant's mitigation measures and has considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. NMFS's evaluation of potential measures included consideration of the following factors in relation to one another:

(1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals;

(2) The proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and

(3) The practicability of the measure for applicant implementation.

Based on NMFS's evaluation of the applicant's measures, as well as other measures considered by NMFS or recommended by the public, NMFS has determined that the mitigation measures provide the means of effecting the least practicable adverse impacts on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

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.

Monitoring

USGS will sponsor marine mammal monitoring during the present project, in order to implement the mitigation measures that require real-time monitoring, and to satisfy the anticipated monitoring requirements of the IHA. USGS's ''Monitoring Plan'' is described below this section. USGS understand that this monitoring plan will be subject to review by NMFS and that refinements may be required. The monitoring work described here has been planned as a self-contained project independent of any other related monitoring projects that may be occurring simultaneously in the same regions. USGS are prepared to discuss coordination of their monitoring program with any related work that might be done by other groups insofar as this is practical and desirable.

Vessel-Based Visual Monitoring

USGS's PSOs will be based aboard the seismic source vessel and will watch for marine mammals near the vessel during daytime airgun operations and during any ramp-ups of the airguns at night. PSOs will also watch for marine mammals near the seismic vessel for at least 30 minutes prior to the start of airgun operations after an extended shut-down (i.e., greater than approximately 15 minutes for this cruise). When feasible, PSOs will conduct observations during daytime periods when the seismic system is not operating for comparison of sighting rates and behavior with and without airgun operations and between acquisition periods. Based on PSO observations, the airguns will be shut-down when marine mammals are observed within or about to enter a designated exclusion zone. The exclusion zone is a region in which a possibility exists of adverse effects on animal hearing or other physical effects.

During seismic operations in the deep water of the northwestern GOM, at least three PSOs will be based aboard the *Pelican.* USGS will appoint the PSOs with NMFS's concurrence. Observations will take place during ongoing daytime operations and nighttime ramp-ups of the airguns. During the majority of seismic operations, at least one PSO will be on duty from observation platforms (i.e., the best available vantage point on the source vessel) to monitor marine mammals near the seismic vessel. PSO(s) will be on duty in shifts no longer than 4 hours in duration. Other crew will also be instructed to assist in detecting marine mammals and implementing mitigation requirements (if practical). Before the start of the seismic survey, the crew will be given additional instruction on how to do so.

The *Pelican* is a suitable platform for marine mammal observations and will serve as the platform from which PSOs will watch for marine mammals before and during seismic operations. Two locations are likely as observation stations onboard the *Pelican.* When stationed on the aft control station on the upper deck (01 level), the eye level will be approximately 12 m (39.3 ft) above sea level, and the PSO will have an approximately 210° view aft of the vessel centered on the seismic source location. At the bridge station, the eye level will be approximately 13 m (42.7 ft) above sea level, and the location will offer a full 360° view around the entire vessel. During daytime, the PSO(s) will scan the area around the vessel systematically with reticle binoculars (e.g., 7 x 50 Fujinon), optical range-finders (to assist with distance estimation), and the naked eye. At night, night-vision equipment will be available. The optical range-finders are useful in training observers to estimate distances visually but are generally not useful in measuring distances to animals directly. Estimating distances is done primarily with the reticles in the binoculars. The PSO(s) will be in wireless communication with ship's officers on the bridge and scientists in the vessel's operations laboratory, so they can advise promptly of the need for avoidance maneuvers or a shut-down of the seismic source.

When marine mammals are detected within or about to enter the designated exclusion zone, the airguns will immediately be shut-down if necessary. The PSO(s) will continue to maintain watch to determine when the animal(s) are outside the exclusion zone by visual confirmation. Airgun operations will not resume until the animal is confirmed to have left the exclusion zone, or if not observed after 15 minutes for species with shorter dive durations (small odontocetes) or 30 minutes for species with longer dive durations (mysticetes and large odontocetes, including sperm, pygmy sperm, dwarf sperm, killer, and beaked whales).

PSO Data and Documentation

PSOs will record data to estimate the numbers of marine mammals exposed to various received sound levels and to document apparent disturbance reactions or lack thereof. Data will be used to estimate numbers of animals potentially ''taken'' by harassment (as defined in the MMPA). They will also provide information needed to order a shut-down of the airguns when a marine mammal is within or near the exclusion zone. Observations will also be made during daytime periods when the *Pelican* is underway without seismic operations (i.e., transits, to, from, and through the study area) to collect baseline biological data.

When a sighting is made, the following information about the sighting will be recorded:

1. Species, group size, age/size/sex categories (if determinable), behavior when first sighted and after initial sighting, heading (if consistent), bearing and distance from seismic vessel, sighting cue, apparent reaction to the seismic source or vessel (e.g., none, avoidance, approach, paralleling, etc.), and behavioral pace.

2. Time, location, heading, speed, activity of the vessel, sea state, wind force, visibility, and sun glare.

The data listed under (2) will also be recorded at the start and end of each observation watch, and during a watch whenever there is a change in one or more of the variables.

All observations, as well as information regarding ramp-ups or shut-downs will be recorded in a standardized format. The data accuracy will be verified by the PSOs at sea, and preliminary reports will be prepared during the field program and summaries forwarded to the operating institution's shore facility weekly or more frequently.

Results from the vessel-based observations will provide the following information:

1. The basis for real-time mitigation (airgun shut-down).

2. Information needed to estimate the number of marine mammals potentially taken by harassment, which must be reported to NMFS.

3. Data on the occurrence, distribution, and activities of marine mammals in the area where the seismic study is conducted.

4. Information to compare the distance and distribution of marine mammals relative to the source vessel at times with and without seismic activity.

5. Data on the behavior and movement patterns of marine mammals

seen at times with and without seismic activity.

USGS will submit a comprehensive report to NMFS within 90 days after the end of the cruise. The report will describe the operations that were conducted and sightings of marine mammals near the operations. The report submitted to NMFS will provide full documentation of methods, results, and interpretation pertaining to all monitoring. The 90-day report will summarize the dates and locations of seismic operations and all marine mammal sightings (i.e., dates, times, locations, activities, and associated seismic survey activities). The report will minimally include:

- Summaries of monitoring effort—total hours, total distances, and distribution of marine mammals through the study period accounting for sea state and other factors affecting visibility and detectability of marine mammals;
- Analyses of the effects of various factors influencing detectability of marine mammals including sea state, number of PSOs, and fog/glare;
- Species composition, occurrence, and distribution of marine mammals sightings including date, water depth, numbers, age/size/gender, and group sizes; and analyses of the effects of seismic operations;
- Sighting rates of marine mammals during periods with and without airgun activities (and other variables that could affect detectability);
- Initial sighting distances versus airgun activity state;
- Closest point of approach versus airgun activity state;
- Observed behaviors and types of movements versus airgun activity state;
- Numbers of sightings/individuals seen versus airgun activity state; and
- Distribution around the source vessel versus airgun activity state.

The report will also include estimates of the number and nature of exposures that could result in ''takes'' of marine mammals by harassment or in other ways. After the report is considered final, it will be publicly available on the NMFS Web site at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#iha*.

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 (e.g., ship-strike, gear interaction, and/or entanglement), USGS will 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 NMFS Southeast Region Marine Mammal Stranding Network at 877–433–8299 (*Blair.Mase@noaa.gov* and *Erin.Fougeres@noaa.gov*) or the Florida Marine Mammal Stranding Hotline at 888–404–3922. The report must include the following information:

- Time, date, and location (latitude/longitude) of the incident;
- Name and type of vessel involved;
- Vessel's speed during and leading up to the incident;
- Description of the incident;
- Status of all sound source 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 all marine mammal observations in the 24 hours preceding the incident;
- Species identification or description of the animal(s) involved;
- Fate of the animal(s); and
- Photographs or video footage of the animal(s) (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with USGS to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. USGS may not resume their activities until notified by NMFS via letter or email, or telephone.

In the event that USGS 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), USGS 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 Southeast Region Marine Mammal Stranding Network (877–433–8299) and/or by email to the Southeast Regional Stranding Coordinator (*Blair.Mase@noaa.gov*) and Southeast Regional Stranding Program Administrator (*Erin.Fougeres@noaa.gov*). The report must include the same information identified in the paragraph above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with USGS to determine whether modifications in the activities are appropriate.

In the event that USGS 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 in the IHA (e.g., previously wounded animal, carcass with moderate or advanced decomposition, or scavenger damage), USGS will 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 Southeast Regional Marine Mammal Stranding Network (877–433–8299), and/or by email to the Southeast Regional Stranding Coordinator (*Blair.Mase@noaa.gov*) and Southeast Regional Stranding Program Administrator (*Erin.Fougeres@noaa.gov*), within 24 hours of discovery. USGS will provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. Activities may continue while NMFS reviews the circumstances of the incident.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Level B harassment is anticipated and authorized as a result of the low-energy marine seismic survey in the deep water of the northwestern GOM. Acoustic stimuli (i.e., increased underwater sound) generated during the operation of the seismic airgun array are expected to result in the behavioral disturbance of some marine mammals. There is no evidence that the planned activities for which USGS seeks the IHA could result in injury, serious injury, or mortality. The required mitigation and monitoring measures will minimize any potential risk for injury, serious injury, or mortality.

The following sections describe USGS's methods to estimate take by incidental harassment and present the applicant's estimates of the numbers of

marine mammals that could be affected during the seismic program in the deep water of the northwestern GOM. The estimates are based on a consideration of the number of marine mammals that could be harassed by approximately 1,480 km (799.1 nmi) of seismic operations with the two GI airgun array to be used. The size of the 2D seismic survey area in 2013 is approximately 356 km^2 (103.8 nmi^2) (approximately 445 km^2 [129.7 nmi^2]), as depicted in Figure 1 of the IHA application.

USGS assumes that, during simultaneous operations of the airgun array and the other sources, any marine mammals close enough to be affected by the sub-bottom profiler would already be affected by the airguns. However, whether or not the airguns are operating simultaneously with the other sources, marine mammals are expected to exhibit no more than short-term and inconsequential responses to the sub-bottom profiler given their characteristics (e.g., narrow, downward-directed beam) and other considerations described previously. Such reactions are not considered to constitute ''taking'' (NMFS, 2001). Therefore, USGS provides no additional allowance for animals that could be affected by sound sources other than airguns.

USGS used spring densities reported in Table A–9 of Appendix A of the Bureau of Ocean Energy Management, Regulation and Enforcement's (BOEMRE, now the BOEM and BSEE) ''Request for incidental take regulations governing seismic surveys on the Outer Continental Shelf (OCS) of the Gulf of Mexico'' (BOEMRE, 2011). Those densities were calculated from the U.S. Navy's ''OPAREA Density Estimates'' (NODE) database (DoN, 2007b). The density estimates are based on the NMFS-Southeast Fisheries Science Center (SEFSC) shipboard surveys conducted from 1994 to 2006 and were derived using a model-based approach and statistical analysis of the existing survey data. The outputs from the NODE database are four seasonal surface density plots of the GOM for each of the marine mammal species occurring there. Each of the density plots was overlaid with the boundaries of the 9 acoustic model regions used in Appendix A of BOEMRE (2011). USGS used the densities for Acoustic Model Region 8, which corresponds roughly with the deep waters (greater than 1,000 m) of the BOEMRE GOM Central Planning Area, and includes the GC955 and WR313 study sites.

TABLE 3—ESTIMATED DENSITIES AND POSSIBLE NUMBER OF MARINE MAMMAL SPECIES THAT MIGHT BE EXPOSED TO GREATER THAN OR EQUAL TO 160 dB DURING USGS'S SEISMIC SURVEY (ENSONIFIED AREA 445.4 KM^2) IN THE DEEP WATER OF THE NORTHWESTERN GOM, APRIL TO MAY 2013

Species	Density[a] (#/1,000 km^2)	Calculated take (i.e., estimated number of individuals exposed to sound levels ≥ 160 dB re 1 μPa) [1]	Approximate percentage of best population estimate of stock (calculated take) [2]	Requested take authorization [3]
Mysticetes				
North Atlantic right whale	NA	NA	NA	NA
Humpback whale	NA	NA	NA	NA
Minke whale	NA	NA	NA	NA
Bryde's whale	0.1	0	0	0
Sei whale	NA	NA	NA	NA
Fin whale	NA	NA	NA	NA
Blue whale	NA	NA	NA	NA
Odontocetes				
Sperm whale	4.9	2	1.7 (0.26)	13
Kogia spp. (Pygmy and dwarf sperm whale).	2.1	1	1.1 (0.54)	2
Small (*Mesoplodon* and Cuvier's) beaked whale.	3.7	2	1.3 (1.3)—*Mesoplodon* beaked whale 2.7 (2.7)—Cuvier's beaked whale	2
Killer whale	0.40	0	0	0
Short-finned pilot whale	6.3	3	0.79 (0.12)	19
False killer whale	2.7	1	NA	36
Melon-headed whale	9.1	4	5.3 (0.18)	118
Pygmy killer whale	1.1	0	0	0
Risso's dolphin	10.0	4	0.37 (0.16)	9
Bottlenose dolphin	4.8	2	NA (NA)—32 Northern GOM Bay, Sound and Estuary stocks. NA (NA)—Northern GOM continental shelf stock. 0.23 (0.03)—GOM eastern coastal stock. 0.73 (0.08)—GOM northern coastal stock. NA (NA)—GOM western coastal stock 0.28 (0.03)—Northern GOM oceanic stock.	18
Rough-toothed dolphin	6.7	3	2.6 (0.48)	16
Fraser's dolphin	1.9	1	NA (NA)	117
Striped dolphin	51.5	23	2.43 (1.24)	45
Pantropical spotted dolphin	582.6	259	0.51 (0.51)	259
Atlantic spotted dolphin	2.2	1	NA (NA)	15
Spinner dolphin	72.6	32	0.86 (0.28)	99

TABLE 3—ESTIMATED DENSITIES AND POSSIBLE NUMBER OF MARINE MAMMAL SPECIES THAT MIGHT BE EXPOSED TO GREATER THAN OR EQUAL TO 160 DB DURING USGS'S SEISMIC SURVEY (ENSONIFIED AREA 445.4 KM^2) IN THE DEEP WATER OF THE NORTHWESTERN GOM, APRIL TO MAY 2013—Continued

Species	Density[a] (#/1,000 km^2)	Calculated take (i.e., estimated number of individuals exposed to sound levels ≥ 160 dB re 1 μPa) [1]	Approximate percentage of best population estimate of stock (calculated take) [2]	Requested take authorization [3]
Clymene dolphin	45.6	20	15.5 (15.5)	20

NA = Not available or not assessed.
[1] Calculated take is density times the area ensonified to >160 dB (rms) around the planned seismic lines, increased by 25%.
[2] Stock sizes are best populations from NMFS Draft 2012 Stock Assessment Reports (see Table 2 above).
[3] Requested Take Authorization increased to mean group size.

USGS estimated the number of different individuals that may be exposed to airgun sounds with received levels greater than or equal to 160 dB re 1 μPa (rms) on one or more occasions by considering the total marine area that would be within the 160 dB radius around the operating airgun array on at least one occasion and the expected density of marine mammals in the area. The number of possible exposures (including repeat exposures of the same individuals) can be estimated by considering the total marine area that would be within the 160 dB radius around the operating airguns, excluding areas of overlap. During the survey, the transect lines in the square grid are closely spaced (approximately 100 m [328.1 ft] apart at the GC955 site and 250 m [820.2 ft] apart at the WR313 site) relative to the 160 dB distance (670 m [2,198.2 ft]). Thus, the area including overlap is 6.5 times the area excluding overlap at GC955 and 5.3 times the area excluding overlap at WR313, so a marine mammal that stayed in the survey areas during the entire survey could be exposed approximately 6 or 7 times on average. While some individuals may be exposed multiple times since the survey tracklines are spaced close together; however, it is unlikely that a particular animal would stay in the area during the entire survey.

The number of different individuals potentially exposed to received levels greater than or equal to 160 re 1 μPa (rms) was calculated by multiplying:

(1) The expected species density (in number/km^2), times

(2) The anticipated area to be ensonified to that level during airgun operations excluding overlap.

The area expected to be ensonified was determined by entering the planned survey lines into a MapInfo GIS, using the GIS to identify the relevant areas by ''drawing'' the applicable 160 dB buffer (see Table 1 of the IHA application) around each seismic line, and then calculating the total area within the buffers.

Applying the approach described above, approximately 356 km^2 (approximately 445 km^2 including the 25% contingency) would be within the 160 dB isopleth on one or more occasions during the survey. The take calculations within the study sites do not explicitly add animals to account for the fact that new animals (i.e., turnover) are not accounted for in the initial density snapshot and animals could also approach and enter the area ensonified above 160 dB; however, studies suggest that many marine mammals will avoid exposing themselves to sounds at this level, which suggests that there would not necessarily be a large number of new animals entering the area once the seismic survey started. Because this approach for calculating take estimates does not allow for turnover in the marine mammal populations in the area during the course of the survey, the actual number of individuals exposed may be underestimated, although the conservative (i.e., probably overestimated) line-kilometer distances used to calculate the area may offset this. Also, the approach assumes that no cetaceans will move away or toward the tracklines as the *Pelican* approaches in response to increasing sound levels before the levels reach 160 dB. Another way of interpreting the estimates that follow is that they represent the number of individuals that are expected (in absence of a seismic program) to occur in the waters that will be exposed to greater than or equal to 160 dB (rms).

USGS's estimates of exposures to various sound levels assume that the surveys will be carried out in full (i.e., approximately 8 days of seismic airgun operations for the two study sites, respectively); however, the ensonified areas calculated using the planned number of line-kilometers have been increased by 25% to accommodate lines that may need to be repeated, equipment testing, account for repeat exposure, etc. As is typical during offshore ship surveys, inclement weather and equipment malfunctions are likely to cause delays and may limit the number of useful line-kilometers of seismic operations that can be undertaken. The estimates of the numbers of marine mammals potentially exposed to 160 dB (rms) received levels are precautionary and probably overestimate the actual numbers of marine mammals that could be involved. These estimates assume that there will be no weather, equipment, or mitigation delays, which is highly unlikely.

Table 3 (Table 3 of the IHA application) shows the estimates of the number of different individual marine mammals anticipated to be exposed to greater than or equal to 160 dB re 1 μPa (rms) during the seismic survey if no animals moved away from the survey vessel. The requested take authorization is given in the far right column of Table 3 (Table 3 of the IHA application). The requested take authorization has been increased to the average mean group sizes in the GOM in 1996 to 2001 (Mullin and Fulling, 2004) and 2003 and 2004 (Mullin, 2007) in cases where the calculated number of individuals exposed was between one and the mean group size.

The estimate of the number of individual cetaceans that could be exposed to seismic sounds with received levels greater than or equal to 160 dB re 1 μPa (rms) during the survey is (with 25% contingency) as follows: 0 baleen whales, 13 sperm whales, 1 dwarf/pygmy sperm whale, and 2 beaked whales, (including Cuvier's and *Mesoplodon* beaked whales) could be taken by Level B harassment during the seismic survey. Most of the cetaceans potentially taken by Level B harassment are delphinids; pantropical spotted, spinner, Clymene, and striped dolphins are estimated to be the most common species in the area, with estimates of 259, 32, 20, and 23, which would

represent 0.51, 0.28, 15.5, and 1.24% of the affected populations or stocks, respectively.

Encouraging and Coordinating Research

USGS will coordinate the planned marine mammal monitoring program associated with the seismic survey with any parties that express interest in this activity.

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 (i.e., the manner and degree in which the measure is likely to reduce adverse impacts to marine mammals, the likely effectiveness of the measures, and the practicability of implementation).

For reasons stated previously in this document, in the notice of the proposed IHA (78 FR 11821, February 20, 2013) and based on the following factors, the specified activities associated with the marine seismic survey are not likely to cause PTS, or other non-auditory injury, serious injury, or death. The factors include:

(1) The likelihood that, given sufficient notice through relatively slow ship speed, marine mammals are expected to move away from a noise source that is annoying prior to its becoming potentially injurious;

(2) The potential for temporary or permanent hearing impairment is relatively low and would likely be avoided through the implementation of the shut-down measures; and

(3) The likelihood that marine mammal detection ability by trained PSOs is high at close proximity to the vessel.

No injuries, serious injuries, or mortalities are anticipated to occur as a result of the USGS's planned marine seismic surveys, and none are authorized by NMFS. Table 3 of this document outlines the number of requested Level B harassment takes that are anticipated as a result of these activities. Due to the nature, degree, and context of Level B (behavioral) harassment anticipated and described (see ''Potential Effects on Marine Mammals'' section above) in this notice, the activity is not expected to impact rates of annual recruitment or survival for any affected species or stock, particularly given the NMFS and the applicant's plan to implement mitigation, monitoring, and reporting measures to minimize impacts to marine mammals. Additionally, the seismic survey will not adversely impact marine mammal habitat.

For the other marine mammal species that may occur within the 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 hr cycle). Behavioral reactions to noise exposure (such as disruption of critical life functions, displacement, or avoidance of important habitat) are more likely to be significant if they last more than one diel cycle or recur on subsequent days (Southall *et al.,* 2007). Additionally, the seismic survey will be increasing sound levels in the marine environment in a relatively small area surrounding the vessel (compared to the range of the animals), which is constantly travelling over distances, and some animals may only be exposed to and harassed by sound for less than day.

Of the 28 marine mammal species under NMFS jurisdiction that may or are known to likely to occur in the study area, six are listed as threatened or endangered under the ESA: North Atlantic right, humpback, sei, fin, blue, and sperm whales. These species are also considered depleted under the MMPA. Of these ESA-listed species, incidental take has been requested to be authorized for sperm whales. 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 study area), USGS must cease or reduce airgun operations if any marine mammal enters designated zones. 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 19 species of marine mammals under its jurisdiction could be potentially affected by Level B harassment over the course of the IHA. The population estimates for the marine mammal species that may be taken by Level B harassment were provided in Table 3 of this document.

NMFS's practice has been to apply the 160 dB re 1 μPa (rms) received level threshold for underwater impulse sound levels to determine whether take by Level B harassment occurs. Southall *et al.* (2007) provide a severity scale for ranking observed behavioral responses of both free-ranging marine mammals and laboratory subjects to various types of anthropogenic sound (see Table 4 in Southall *et al.* [2007]).

NMFS has determined, provided that the aforementioned mitigation and monitoring measures are implemented, the impact of conducting a low-energy marine seismic survey in the deep water of the northwestern GOM, April to May 2013, may result, at worst, in a modification in behavior and/or low-level physiological effects (Level B harassment) of certain species of marine mammals.

While behavioral modifications, including temporarily vacating the area during the operation of the airgun(s), may be made by these species to avoid the resultant acoustic disturbance, the availability of alternate areas within these areas for species and the short and sporadic duration of the research activities, have led NMFS to 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 length of the seismic survey, the requirement to implement mitigation measures (e.g., shut-down of seismic operations), 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 it will have a negligible impact on the species or stocks in the action area.

NMFS has determined, provided that the aforementioned mitigation and monitoring measures are implemented, that the impact of conducting a marine seismic survey in the deep water of the Gulf of Mexico, April to May 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 3 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 (in the deep water of the northwest GOM) that implicate MMPA section 101(a)(5)(D).

Endangered Species Act

Of the species of marine mammals that may occur in the survey area, several are listed as endangered under the ESA, including the North Atlantic right, humpback, sei, fin, blue, and sperm whales. USGS did not request take of endangered North Atlantic right, humpback, sei, fin, and blue whales due to the low likelihood of encountering this species during the cruise. Under section 7 of the ESA, USGS has initiated formal consultation with the NMFS, Office of Protected Resources, Endangered Species Act Interagency Cooperation Division, on this seismic survey. NMFS's Office of Protected Resources, Permits and Conservation Division, has also initiated and engaged in formal consultation under section 7 of the ESA with NMFS's Office of Protected Resources, Endangered Species Act Interagency Cooperation Division, on the issuance of an IHA under section 101(a)(5)(D) of the MMPA for this activity. These two consultations were consolidated and addressed in a single Biological Opinion addressing the direct and indirect effects of these interdependent actions. In April 2013, NMFS issued a Biological Opinion and concluded that the action and issuance of the IHA are not likely to jeopardize the continued existence of cetaceans and sea turtles and included an Incidental Take Statement (ITS) incorporating the requirements of the IHA as Terms and Conditions of the ITS is likewise a mandatory requirement of the IHA. The Biological Opinion also concluded that designated critical habitat of these species does not occur in the action area and would not be affected by the survey.

National Environmental Policy Act

To meet NMFS's NEPA requirements for the issuance of an IHA to USGS, USGS provided NMFS an ''Environmental Assessment and Determination Pursuant to the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* and Executive Order 12114 Low-Energy Marine Seismic Survey by the U.S. Geological Survey in the Deepwater Gulf of Mexico, April–May 2013,'' which incorporates a draft ''Environmental Assessment of Low-Energy Marine Geophysical Survey by the U.S. Geological Survey in the Northwestern Gulf of Mexico, April–May 2013,'' prepared by LGL Ltd., Environmental Research Associates on behalf of USGS. The EA analyzes the direct, indirect, and cumulative environmental impacts of the specified activities on marine mammals including those listed as threatened or endangered under the ESA. NMFS has fully evaluated the potential direct, indirect, and cumulative effects on the human environment prior to making a final decision on the IHA application and deciding whether or not to issue a Finding of No Significant Impact (FONSI). After considering the EA, the information in the IHA application, Biological Opinion, and the **Federal Register** notice, as well as public comments, NMFS has determined that the issuance of the IHA is not likely to result in significant impacts on the human environment and has prepared a FONSI. An Environmental Impact Statement is not required and will not be prepared for the action.

Authorization

NMFS has issued an IHA to USGS for the take, by Level B harassment, of small numbers of marine mammals incidental to conducting a low-energy marine seismic survey in the deep water of the northwestern GOM, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: May 30, 2013.

Helen Golde,

Deputy Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2013–13185 Filed 6–3–13; 8:45 am]

BILLING CODE 3510–22–P

CONSUMER PRODUCT SAFETY COMMISSION

Public Availability of Consumer Product Safety Commission FY 2012 Service Contract Inventory

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: The Consumer Product Safety Commission (CPSC or we), in accordance with section 743(c) of Division C of the Consolidated Appropriations Act, 2010 (Pub. L. 111–117, 123 Stat. 3034, 3216), is announcing the availability of CPSC's service contract inventory for fiscal year (FY) 2012. This inventory provides information on service contract actions over $25,000 that CPSC made in FY 2012.

FOR FURTHER INFORMATION CONTACT: Donna Hutton, Director, Division of Procurement Services, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814. Telephone: 301–504–7009; email: *dhutton@cpsc.gov.*

SUPPLEMENTARY INFORMATION: On December 16, 2009, the Consolidated Appropriations Act, 2010 (Consolidated Appropriations Act), Public Law 111–117, became law. Section 743(a) of the Consolidated Appropriations Act, titled, ''Service Contract Inventory Requirement,'' requires agencies to submit to the Office of Management and Budget (OMB) an annual inventory of service contracts awarded or extended through the exercise of an option on or after April 1, 2010, and describes the contents of the inventory. The contents of the inventory must include:

(A) A description of the services purchased by the executive agency and the role the services played in achieving agency objectives, regardless of whether such a purchase was made through a contract or task order;

(B) The organizational component of the executive agency administering the contract, and the organizational component of the agency whose requirements are being met through contractor performance of the service;

(C) The total dollar amount obligated for services under the contract and the funding source for the contract;

(D) The total dollar amount invoiced for services under the contract;

(E) The contract type and date of award;

(F) The name of the contractor and place of performance;

(G) The number and work location of contractor and subcontractor employees, expressed as full-time equivalents for direct labor, compensated under the contract;

(H) Whether the contract is a personal services contract; and

(I) Whether the contract was awarded on a noncompetitive basis, regardless of date of award.

Section 743(a)(3)(A) through (I) of the Consolidated Appropriations Act.

Section 743(c) of the Consolidated Appropriations Act requires agencies to ''publish in the Federal Register a notice

that the inventory is available to the public.''

Consequently, through this notice, we are announcing that the CPSC's service contract inventory for FY 2012 is available to the public. The inventory provides information on service contract actions over $25,000 that CPSC made in FY 2012. The information is organized by function to show how contracted resources are distributed throughout the CPSC. We developed the inventory in accordance with guidance issued on December 19, 2011 by the OMB. (The OMB guidance is available at: *http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/service-contract-inventories-guidance-11052010.pdf.*) The CPSC's Division of Procurement Services has posted its inventory, and a summary of the inventory can be found at our homepage at the following link: *http://www.cpsc.gov/About-CPSC/Agency-Reports/Service-Contract-Inventory/.*

Dated: May 30, 2013.

Todd A. Stevenson,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2013–13164 Filed 6–3–13; 8:45 am]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

[Docket No. CPSC–2013–0022]

Petition Requesting a Ban or Standard on Adult Portable Bed Rails

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: The Consumer Product Safety Commission (CPSC or Commission) has received two requests, asking that the Commission initiate proceedings under section 8 of the Consumer Product Safety Act (CPSA) to determine that adult portable bed rails pose an unreasonable risk of injury and initiate related rulemaking under section 9 of the CPSA. Because both requests ask for rulemaking concerning the same product, CPSC is considering the requests as a single petition (CP13–1). The Commission invites written comments concerning the petition.

DATES: The Office of the Secretary must receive comments on the petition by August 5, 2013.

ADDRESSES: You may submit comments, identified by Docket No. CPSC–2013–0022, by any of the following methods:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: *http://www.regulations.gov.* Follow the instructions for submitting comments. The Commission does not accept comments submitted by electronic mail (email), except through www.regulations.gov. The Commission encourages you to submit electronic comments by using the Federal eRulemaking Portal, as described above.

Written Submissions: Submit written submissions in the following way: Mail/Hand delivery/Courier (for paper, disk, or CD–ROM submissions), preferably in five copies, to: Office of the Secretary, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923.

Instructions: All submissions received must include the agency name and docket number for this notice. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to: *http://www.regulations.gov.* Do not submit confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If furnished at all, such information should be submitted in writing.

Docket: For access to the docket to read background documents or comments received, go to: *http://www.regulations.gov,* and insert the docket number, CPSC–2013–0022, into the ''Search'' box, and follow the prompts. A copy of the petition is available at *http://www.regulations.gov* under Docket No. CPSC–2013–0022, Supporting and Related Materials.

FOR FURTHER INFORMATION CONTACT: Rockelle Hammond, Office of the Secretary, U.S. Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–6833.

SUPPLEMENTARY INFORMATION: The Commission received two requests to initiate proceedings under section 8 of the Consumer Product Safety Act (CPSA) to determine that adult portable bed rails pose an unreasonable risk of injury and initiate related rulemaking under section 9 of the CPSA. *See* 15 U.S.C. 2057 and 2058. Gloria Black, the Consumer Federation of America, and 60 other organizations (Consumer Group) made one request; Public Citizen made the other request (collectively referred to as petitioners). The CPSC has docketed the requests as a single petition.

Petitioners assert that adult portable bed rails currently on the market are responsible for many injuries and deaths among users, particularly the elderly and frail. Petitioners state that many of these deaths result from asphyxiation caused by entrapment within openings of the rail or between the rail and the mattress or bed frame. In addition, petitioners claim that individuals who attempt to climb over bed rails may be at greater risk of injury or death than they would be if no rail were used at all. In support of their request, petitioners cite a CPSC memorandum dated October 11, 2012, ''Adult Portable Bed Rail-Related Deaths, Injuries, and Potential Injuries: January 2003 to September 2012.'' According to petitioners, the CPSC's data showed that there were 155 fatalities, of which 129 involved victims ages 60 years and over; most of the fatalities related to rail entrapment. In addition, petitioners state that the CPSC found an estimated 36,900 adult portable bed rail-related injuries that were treated in U.S. hospital emergency departments from January 2003 to December 2011.

Petitioners request that the CPSC initiate proceedings under section 8 of the CPSA that would ban all adult portable bed rails because, they assert, the product presents an unreasonable risk of injury and no feasible consumer product safety standard would adequately protect the public from these products. Public Citizen contends that no mandatory standard or warnings could be developed that would adequately protect against the hazards presented by adult portable bed rails. The Consumer Group, however, states that if the CPSC does not pursue a ban, the Commission should initiate a rulemaking to promulgate mandatory standards under section 9 of the CPSA, to reduce the unreasonable risk of asphyxiation and the entrapment hazards posed by adult portable bed rails, and to include warning labels in the standards. The Consumer Group also requests action under section 27(e) of the CPSA to require manufacturers of adult portable bed rails to provide performance and technical data regarding the safety of their products.

In addition, petitioners request a public recall notice and refund for all adult portable bed rails under section 15 of the CPSA. However, the Commission may docket as petitions only requests for action that the Commission is authorized to take through the issuance, amendment, or revocation of rules. 16 CFR 1051.2(a). Accordingly, the recall and refund requested by petitioners are outside the scope of a rulemaking proceeding and will be forwarded to the CPSC Office of Compliance and Field Operations for review.

By this notice, the Commission seeks comments concerning this petition. Interested parties may obtain a copy of the petition by writing or calling the Office of the Secretary, U.S. Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504–7923. A copy of the petition also will be made available for viewing under ''Supporting and Related Materials'' in *www.regulations.gov* under this docket number. *www.regulations.gov.*

Dated: May 29, 2013

Todd A. Stevenson,

Secretary, U.S. Consumer Product Safety Commission.

[FR Doc. 2013–13000 Filed 6–3–13; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF DEFENSE

Notice To Extend Submittal Date for Scoping Comments for United States Air Force Main Operating Base 2 for the Beddown of the KC–46A Tanker Aircraft Environmental Impact Statement

AGENCY: U.S. Air Force, DOD.

ACTION: Notification of Extension for Submittal of Scoping Comments.

SUMMARY: The U.S. Air Force is issuing this notice to advise the public of an extension to submit scoping comments. The initial Notice of Availability published in the **Federal Register** on May 17, 2013 (Vol. 78, No. 96/Notices/29120), requested public scoping comments no later than June 10, 2013. The Air Force has extended the deadline for submitting public comments to July 5, 2013. All substantive scoping comments received during the public scoping period will be considered in the preparation of the Draft EIS.

Point of Contact: Please direct any written comments or requests for information to KC–46A EIS Project Manager, National Guard Bureau, NGB/A7AM, 3501 Fetchet Avenue, Joint Base Andrews, Maryland, 20762–5157.

Henry Williams Jr.,

Acting Air Force Federal Register Liaison Officer.

[FR Doc. 2013–13135 Filed 6–3–13; 8:45 am]

BILLING CODE 5001–10–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Meeting of the National Commission on the Structure of the Air Force

AGENCY: Director of Administration and Management, DoD.

ACTION: Notice of Advisory Committee Meeting.

SUMMARY: Under the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102–3.150, the Department of Defense (DoD) announces that the following Federal advisory committee meeting of the National Commission on the Structure of the Air Force (''the Commission'') will take place.

DATES: *Date of Meeting, including Hearing and Commission Discussion:* Monday, June 17, 2013, from 1:00 p.m. to 5:00 p.m.

ADDRESSES: Ballroom of the Drury Inn & Suites Greenville, 10 Carolina Point Parkway, Greenville, SC, 29607.

FOR FURTHER INFORMATION CONTACT: Mrs. Marcia Moore, Designated Federal Officer, National Commission on the Structure of the Air Force, 1950 Defense Pentagon, Room 3A874, Washington, DC 20301–1950. Email: *dfoafstrucomm@osd.mil.* Desk (703) 571–7057. Facsimile (703) 692–5625.

SUPPLEMENTARY INFORMATION:

Purpose of Meetings: The members of the Commission will hear testimony from a panel of witnesses and the public. The members will convene immediately after their hearings to discuss the hearings.

Agenda:

June 17, 2013—Public Hearing: State and local leaders, private citizens and professional military associations are invited to speak at the public hearing on June 17, 2013 and are asked to address matters pertaining to the U.S. Air Force, the Air National Guard, and the U.S. Air Force Reserve such as their common and unique interests, roles, history, organizational structure, and operational factors influencing decision-making. These witnesses are also asked to address the evaluation factors under consideration by the Commission for a U.S. Air Force structure that—(A) Meets current and anticipated requirements of the combatant commands; (B) achieves an appropriate balance between the regular and reserve components of the Air Force, taking advantage of the unique strengths and capabilities of each; (C) ensures that the regular and reserve components of the Air Force have the capacity needed to support current and anticipated homeland defense and disaster assistance missions in the United States; (D) provides for sufficient numbers of regular members of the Air Force to provide a base of trained personnel from which the personnel of the reserve components of the Air Force could be recruited; (E) maintains a peacetime rotation force to support operational tempo goals of 1:2 for regular members of the Air Forces and 1:5 for members of the reserve components of the Air Force; and (F) maximizes and appropriately balances affordability, efficiency, effectiveness, capability, and readiness. Individual Commissioners will also report their activities, information collection, and analyses to the full Commission.

Meeting Accessibility: Pursuant to 5 U.S.C. 552b, as amended, and 41 CFR 102–3.140 through 102–3.165, and the availability of space, the meeting is open to the public. Seating is limited and pre-registration is strongly encouraged for all attendees. Media representatives are also encouraged to register. The meeting facility is handicap accessible.

Written Comments: Pursuant to 41 CFR 102–3.105(j) and 102–3.140 and section 10(a)(3) of the Federal Advisory Committee Act, the public or interested organizations may submit written comments to the Commission in response to the stated agenda of the open meeting or the Commission's mission. The Designated Federal Officer (DFO) will review all submitted written statements. Written comments should be submitted to Mrs. Marcia Moore, DFO, via facsimile or electronic mail, the preferred modes of submission. Each page of the comment must include the author's name, title or affiliation, address, and daytime phone number. Mailed written comments will be given to the Commission before or after the meeting if postmarked by June 14, 2013. All contact information may be found in the **FOR FURTHER INFORMATION CONTACT** section.

Oral Comments: In addition to written statements, one hour will be reserved for individuals or interested groups to address the Commission. Oral commenters must summarize their oral statement in writing and submit with their registration. The Commission's staff will assign time to oral commenters at the meeting, for no more than 5 minutes each. While requests to make an oral presentation to the Commission will be honored on a first come, first served basis, other opportunities for oral

comments will be provided at future meetings.

Registration: Individuals who wish to attend the public hearing and meeting on Monday, June 17, 2013 are encouraged to register for the event with the Designated Federal Officer by Thursday, June 13, 2013, using the electronic mail and facsimile contact information found in the **FOR FURTHER INFORMATION CONTACT** section. The communication should include the registrant's full name, title, affiliation or employer, email address, day time phone number. If applicable, include written comments and a request to speak during the oral comment session. (Oral comment requests must be accompanied by a summary of your presentation.) Registrations and written comments must be typed.

Due to difficulties beyond the control of the Commission or its DFO, this **Federal Register** notice for the June 17, 2013 meetings as required by 41 CFR 102–3.150(a) was not met. Accordingly, the Advisory Committee Management Officer for the DoD, pursuant to 41 CFR 102–3.150(b), waives the 15-calendar day notification requirement.

Background:

The National Commission on the Structure of the Air Force was established by the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239). The Department of Defense sponsor for the Commission is the Director of Administration and Management, Mr. Michael L. Rhodes. The Commission is tasked to submit a report, containing a comprehensive study and recommendations, by February 1, 2014 to the President of the United States and the Congressional defense committees. The report will contain a detailed statement of the findings and conclusions of the Commission, together with its recommendations for such legislation and administrative actions it may consider appropriate in light of the results of the study. The comprehensive study of the structure of the U.S. Air Force will determine whether, and how, the structure should be modified to best fulfill current and anticipated mission requirements for the U.S. Air Force in a manner consistent with available resources.

Dated: May 30, 2013.

Aaron Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2013–13179 Filed 6–3–13; 8:45 am]

BILLING CODE 5001–06–P

DEPARTMENT OF EDUCATION

Annual Updates to the Income Contingent Repayment (ICR) Plan Formula for 2013—William D. Ford Federal Direct Loan Program

Catalog of Federal Domestic Assistance (CFDA) Number: 84.063

AGENCY: Federal Student Aid, Department of Education.

ACTION: Notice.

SUMMARY: The Secretary announces the annual updates to the ICR plan formula for 2013, as provided in 34 CFR 685.209(a)(8), to give notice to Direct Loan borrowers and the public regarding how monthly ICR payment amounts will be calculated for the 2013–2014 year.

DATES: The adjustments to the income percentage factors for the ICR plan formula contained in this notice are effective from July 1, 2013, to June 30, 2014, for any borrower who enters the ICR plan or has his or her monthly payment amount recalculated under the ICR plan during that period.

FOR FURTHER INFORMATION CONTACT: Ian Foss, U.S. Department of Education, 830 First Street, NE., room 114I1, Washington, DC 20202. Telephone: (202) 377–3681 or by email: *ian.foss@ed.gov.*

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free, at 1–800–877–8339.

SUPPLEMENTARY INFORMATION: Under the William D. Ford Federal Direct Loan (Direct Loan) Program, borrowers may choose to repay their loans (Direct Subsidized Loans, Direct Unsubsidized Loans, Direct PLUS Loans made to graduate or professional students, and Direct Consolidation Loans) under the ICR plan. The ICR plan bases the borrower's repayment amount on the borrower's income, family size, loan amount, and the interest rate applicable to each of the borrower's loans.

A Direct Loan borrower who repays his or her loans under the ICR plan pays the lesser of: (1) the amount that he or she would pay over 12 years with fixed payments multiplied by an income percentage factor or (2) 20 percent of discretionary income.

Each year, to reflect changes in inflation, we adjust the income percentage factor used to calculate a borrower's ICR payment. We use the adjusted income percentage factors to calculate a borrower's monthly ICR payment amount when the borrower initially applies for the ICR plan or when the borrower submits his or her annual income documentation, as required under the ICR plan. This notice contains the adjusted income percentage factors for 2013, examples of how the monthly payment amount in ICR is calculated, and charts showing sample repayment amounts based on the adjusted ICR plan formula. This information is included in the following three attachments:

- *Attachment 1—Income Percentage Factors for 2013*
- *Attachment 2—Examples of the Calculations of Monthly Repayment Amounts*
- *Attachment 3—Charts Showing Sample Repayment*

Amounts for Single and Married Borrowers

In Attachment 1, to reflect changes in inflation, we have updated the income percentage factors that were published in a **Federal Register** on May 22, 2012 (77 FR 30266). Specifically we have revised the table of income percentage factors by changing the dollar amounts of the incomes shown by a percentage equal to the estimated percentage change in the not-seasonally-adjusted Consumer Price Index for all urban consumers from December 2012 to December 2013.

The income percentage factors reflected in Attachment 1 may cause a borrower's payments to be lower than they were in prior years, even if the borrower's income is the same as in the prior year. However, the revised repayment amount more accurately reflects the impact of inflation on the borrower's current ability to repay.

Accessible Format: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) on request to the contact person listed under **FOR FURTHER INFORMATION CONTACT** in this section of the 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.

Program Authority: 20 U.S.C. 1087 et seq.

Dated: May 30, 2013.

James W. Runcie,

Chief Operating Officer, Federal Student Aid.

Attachment 1—Income Percentage Factors for 2013

INCOME PERCENTAGE FACTORS FOR 2013

Single		Married/head of household	
Income	% Factor	Income	% Factor
$10,690	55.00	$10,690	50.52
14,708	57.79	16,867	56.68
18,926	60.57	20,100	59.56
23,239	66.23	26,276	67.79
27,359	71.89	32,552	75.22
32,552	80.33	40,888	87.61
40,888	88.77	51,279	100.00
51,280	100.00	61,676	100.00
61,676	100.00	77,269	109.40
74,126	111.80	103,250	125.00
94,916	123.50	139,627	140.60
134,433	141.20	195,275	150.00
154,139	150.00	319,093	200.00
274,549	200.00	.....	.....

Attachment 2—Examples of the Calculations of Monthly Repayment Amounts

General notes about the examples in this attachment:

- We have two calculators that borrowers can use to estimate what their payment amount would be under the ICR plan. The first is available on *StudentAid.gov/ICR.* The second, a ''Repayment Estimator'' available at *StudentLoans.gov,* provides more detailed, individualized information about a borrower's loans and repayment plan options, including the ICR plan.
- The interest rates used in the examples are for illustration only. The actual interest rates on an individual borrower's Direct Loans depend on the loan type and when the postsecondary institution first disbursed the Direct Loan to the borrower.
- The Poverty Guideline amounts used in the examples are from the 2013 U.S. Department of Health and Human Services (HHS) Poverty Guidelines for the 48 contiguous States and the District of Columbia, as published in the **Federal Register** on January 24, 2013 (78 FR 5182). Different Poverty Guidelines apply to residents of Alaska and Hawaii.
- All of the examples use an income percentage factor corresponding to an adjusted gross income (AGI) in the table in Attachment 1. If your AGI is not listed in the income percentage factors table in Attachment 1, calculate the applicable income percentage by following the instructions under the heading later in this attachment.
- Married borrowers may repay their Direct Loans jointly under the ICR plan. If a married couple elects this option, we add the outstanding balance on the Direct Loans of each borrower and we add together both borrowers' AGIs to determine a joint ICR payment amount. We then prorate the joint payment amount for each borrower based on the proportion of that borrower's debt to the total outstanding balance. We bill each borrower separately.
- For example, if a married couple, John and Sally, has a total outstanding Direct Loan debt of $60,000, of which $40,000 belongs to John and $20,000 to Sally, we would apportion 67 percent of the monthly ICR payment to John and the remaining 33 percent to Sally. To take advantage of a joint ICR payment, married couples need not file taxes jointly; they may file separately and subsequently provide the other spouse's tax information to the borrower's Federal loan servicer.

Calculating the monthly payment amount using a standard amortization and a 12-year repayment period.

The formula to amortize a loan with a standard schedule (in which each payment is the same over the course of the repayment period) is as follows:

$$M = P \times \frac{\frac{I}{12}}{1 - \left(1 + \frac{I}{12}\right)^{-N}}$$

In the formula—

- M is the monthly payment amount;
- P is the outstanding principal balance of the loan at the time the calculation is performed;
- I is the annual interest rate on the loan, expressed as a decimal (for example, for a loan with an interest rate of 6.8 percent, 0.068); and
- N is the total number of months in the repayment period (for example, for a loan with a 12-year repayment period, 144 months).

For example, assume that Billy has a $10,000 Direct Unsubsidized Loan with an interest rate of 6.8 percent.

Step 1: To solve for M, first simplify the numerator of the fraction by which we multiply P, the outstanding principal balance. To do this divide I, the interest rate, as a decimal, by 12. In this example, Billy's interest rate is 6.8 percent. As a decimal, 6.8 percent is 0.068.

- 0.068 ÷ 12 = 0.005667

Step 2: Next, simplify the denominator of the fraction by which we multiply P. To do this divide I, the interest rate, as a decimal, by 12. Then, add one. Next, raise the sum of the two figures to the negative power that corresponds to the length of the repayment period in months. In this example, because we are amortizing a loan to calculate the monthly payment amount under the ICR plan, the applicable figure is 12 years, which is 144 months. Finally, subtract one from the result.

- 0.068 ÷ 12 = 0.005667
- 1 + 0.005667 = 1.005667
- 1.005667 ∧ -144 = 0.44319544
- 1 − 0.44319554 = 0.55680456

Step 3: Next, resolve the fraction by dividing the result from step one by the result from step two.

- 0.005667 ÷ 0.55680456 = 0.01017772

Step 4: Finally, solve for M, the monthly payment amount, by multiplying the outstanding principal balance of the loan by the result of step 3.

- $10,000 × 0.01017772 = $101.78

The remainder of the examples in this attachment will only show the results of the formula.

Example 1. Brenda is single with no dependents and has $15,000 in Direct Subsidized and Unsubsidized Loans. The interest rate on Brenda's loans is 6.80 percent, and she has an AGI of $27,359.

Step 1: Determine the total monthly payment amount based on what Brenda would pay over 12 years using standard amortization. To do this, use the formula that precedes Example 1. In this example, the monthly payment amount would be $152.67.

Step 2: Multiply the result of Step 1 by the income percentage factor shown in the income percentage factors table (see Attachment 1 to this notice) that corresponds to Brenda's AGI. In this example, an AGI of $27,359 corresponds to an income percentage factor of 71.89 percent.

- 0.7189 × $152.66 = $109.75

Step 3: Determine 20 percent of Brenda's discretionary income and divide by 12 (discretionary income is AGI minus the HHS Poverty Guideline amount for a borrower's family size and State of residence). For Brenda, subtract the Poverty Guideline amount for a family of one from her AGI, multiply the result by 20 percent, and then divide by 12:

- $27,359 − $11,490 = $15,869
- $15,869 × 0.20 = $3,173.80
- $3,173.80 ÷ 12 = $264.48

Step 4: Compare the amount from Step 2 with the amount from Step 3.

The lower of the two will be the monthly ICR payment amount. In this example, Brenda will be paying the amount calculated under Step 2 ($109.75).

Example 2. Joseph is married to Susan and has no dependents. Joseph has a Direct Loan balance of $10,000, and Susan has a Direct Loan balance of $15,000. The interest rate on all of the loans is 6.80 percent.

Joseph and Susan have a combined AGI of $77,269 and are repaying their loans jointly under the ICR plan (for general information regarding joint ICR payments for married couples, see the fifth and sixth bullets under the heading ''General notes about the examples in this attachment'').

Step 1: Add Joseph's and Susan's Direct Loan balances to determine their combined aggregate loan balance:

- $10,000 + $15,000 = $25,000

Step 2: Determine the combined monthly payment amount for Joseph and Susan based on what both borrowers would pay over 12 years using standard amortization. To do this use the formula that precedes Example 1. In this example, the combined monthly payment amount would be $254.44.

Step 3: Multiply the result of Step 2 by the income percentage factor shown in the income percentage factors table (see Attachment 1 to this notice) that corresponds to Joseph and Susan's combined AGI. In this example, the combined AGI of $77,269 corresponds to an income percentage factor of 109.40 percent.

- 1.094 × $254.44 = $278.36

Step 4: Determine 20 percent of Joseph and Susan's combined discretionary income (discretionary income is AGI minus the HHS Poverty Guideline amount for a borrower's family size and State of residence). To do this subtract the Poverty Guideline amount for a family of two from the combined AGI, multiply the result by 20 percent, and divide by 12:

- $77,269 − $15,510 = $61,759
- $61,759 × 0.20 = $12,351.80
- $12,351.80 ÷ 12 = $1,029.32

Step 5: Compare the amount from Step 3 with the amount from Step 4. The lower of the two will be Joseph and Susan's joint monthly payment amount. Joseph and Susan will jointly pay the amount calculated under Step 3 ($278.36).

Step 6: Because Joseph and Susan are jointly repaying their Direct Loans under the ICR plan, the monthly payment amount calculated under Step 4 applies to both Joseph and Susan's loans. To determine the amount for which each borrower will be responsible, prorate the amount calculated under Step 4 by each spouse's share of the combined Direct Loan debt. Joseph has a Direct Loan debt of $10,000 and Susan has a Direct Loan Debt of $15,000. For Joseph, the monthly payment amount will be:

- $10,000 ÷ ($10,000 + $15,000) = 40 percent
- 0.40 × $278.36 = $111.34

For Susan, the monthly payment amount will be:

- $15,000 ÷ ($10,000 + $15,000) = 60 percent
- 0.60 × $278.36 = $167.02

Example 3. David is single with no dependents and has $60,000 in Direct Subsidized and Unsubsidized Loans. The interest rate on all of the loans is 6.80 percent, and David's AGI is $32,552.

Step 1: Determine the total monthly payment amount based on what David would pay over 12 years using standard amortization. To do this use the formula that precedes Example 1. In this example, the monthly payment amount would be $610.66.

Step 2: Multiply the result of Step 1 by the income percentage factor shown in the income percentage factors table (see Attachment 1 to this notice) that corresponds to David's AGI. In this example, an AGI of $32,552 corresponds to an income percentage factor of 80.33 percent.

- 0.8033 × $610.66 = $490.54

Step 3: Determine 20 percent of David's discretionary income and divide by 12 (discretionary income is AGI minus the HHS Poverty Guideline amount for a borrower's family size and State of residence). To do this subtract the Poverty Guideline amount for a family of one from David's AGI, multiply the result by 20 percent, then divide by 12:

- $32,552 − $11,490 = $21,062
- $21,062 × 0.20 = $4,212.40
- $4,212.40 ÷ 12 = $351.03

Step 4: Compare the amount from Step 2 with the amount from Step 3. The lower of the two will be David's monthly payment amount. In this example, David will be paying the amount calculated under Step 3 ($351.03).

Interpolation. If an income is not included on the income percentage factor table, calculate the income percentage factor through linear interpolation. For example, assume that Joan is single with an income of $50,000.

Step 1: Find the closest income listed that is less than Joan's income ($50,000) and the closest income listed that is greater than Joan's income ($50,000).

Step 2: Subtract the lower amount from the higher amount (for this discussion we will call the result the ''income interval''):

- $51,280 − $40,888 = $10,392

Step 3: Determine the difference between the two income percentage factors that correspond to the incomes used in Step 2 (for this discussion, we will call the result the ''income percentage factor interval''):

- 100.00 percent − 88.77 percent = 11.23 percent

Step 4: Subtract from Joan's income the closest income shown on the chart that is less than Joan's income of $50,000:

- $50,000 − $40,888 = $9,112

Step 5: Divide the result of Step 4 by the income interval determined in Step 2:

- $9,112 ÷ $10,392 = 0.8768

Step 6: Multiply the result of Step 5 by the income percentage factor interval:

- 11.23 percent × 0.8768 = 9.846 percent

Step 7: Add the result of Step 6 to the lower of the two income percentage factors used in Step 3 to calculate the income percentage factor interval for $50,000 in income:

- 9.846 percent + 88.77 percent = 98.62 percent (rounded to the nearest hundredth)

The result is the income percentage factor that we will use to calculate Joan's monthly repayment amount under the ICR plan.

Attachment 3—Charts Showing Sample Repayment Amounts for Single and Married Borrowers

SAMPLE FIRST-YEAR MONTHLY REPAYMENT AMOUNTS FOR A SINGLE BORROWER AT VARIOUS INCOME AND DEBT LEVELS

Income	Family Size = 1									
	Direct Loan Debt									
	$10,000	$20,000	$30,000	$40,000	$50,000	$60,000	$70,000	$80,000	$90,000	$100,000
$10,000	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0

SAMPLE FIRST-YEAR MONTHLY REPAYMENT AMOUNTS FOR A SINGLE BORROWER AT VARIOUS INCOME AND DEBT LEVELS—Continued

Income	Family Size = 1									
	Direct Loan Debt									
	$10,000	$20,000	$30,000	$40,000	$50,000	$60,000	$70,000	$80,000	$90,000	$100,000
12,500	17	17	17	17	17	17	17	17	17	17
15,000	59	59	59	59	59	59	59	59	59	59
17,500	61	100	100	100	100	100	100	100	100	100
20,000	63	126	142	142	142	142	142	142	142	142
22,500	66	133	184	184	184	184	184	184	184	184
25,000	70	140	210	225	225	225	225	225	225	225
30,000	78	155	233	309	309	309	309	309	309	309
35,000	84	169	253	337	392	392	392	392	392	392
40,000	89	179	268	358	447	475	475	475	475	475
45,000	95	190	285	379	474	559	559	559	559	559
50,000	100	201	301	401	502	602	642	642	642	642
60,000	102	204	305	407	509	611	712	809	809	809
70,000	110	220	329	439	549	659	769	878	975	975
80,000	117	234	351	469	586	703	820	937	1,054	1,142
90,000	123	246	369	492	614	737	860	983	1,106	1,229
100,000	128	256	384	512	640	768	896	1,024	1,152	1,280

Sample repayment amounts are based on an interest rate of 6.80%

SAMPLE FIRST-YEAR MONTHLY REPAYMENT AMOUNTS FOR A MARRIED OR HEAD-OF-HOUSEHOLD BORROWER AT VARIOUS INCOME AND DEBT LEVELS

Income	Family Size = 3									
	Direct Loan Debt									
	$10,000	$20,000	$30,000	$40,000	$50,000	$60,000	$70,000	$80,000	$90,000	$100,000
$10,000	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0
12,500	0	0	0	0	0	0	0	0	0	0
15,000	0	0	0	0	0	0	0	0	0	0
17,500	0	0	0	0	0	0	0	0	0	0
20,000	8	8	8	8	8	8	8	8	8	8
22,500	50	50	50	50	50	50	50	50	50	50
25,000	67	91	91	91	91	91	91	91	91	91
30,000	73	147	175	175	175	175	175	175	175	175
35,000	80	161	241	258	258	258	258	258	258	258
40,000	88	176	263	341	341	341	341	341	341	341
45,000	94	188	282	377	425	425	425	425	425	425
50,000	100	200	301	401	501	508	508	508	508	508
60,000	102	204	305	407	509	611	675	675	675	675
70,000	107	214	321	428	534	641	748	841	841	841
80,000	113	226	339	452	565	678	791	904	1,008	1,008
90,000	119	238	357	476	596	715	834	953	1,072	1,175
100,000	125	250	376	501	626	751	877	1,002	1,127	1,252

Sample repayment amounts are based on an interest rate of 6.80%

[FR Doc. 2013–13193 Filed 6–3–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Applications for New Awards; School Leadership Program (CFDA Number 84.363A); Correction

AGENCY: Office of Innovation and Improvement, Department of Education.

ACTION: Notice; correction.

SUMMARY: On May 8, 2013, we published in the **Federal Register** (78 FR 26758) a notice inviting applications for new awards under the School Leadership Program. This notice corrects a typographical error in the applicant eligibility information for partnership applicants. Eligible applicants are high-need LEAs; consortia of high-need LEAs; and partnerships of high-need LEAs and either nonprofit organizations (which may be community- or faith-based organizations), or institutions of higher education.

DATES: Effective June 4, 2013.

SUPPLEMENTARY INFORMATION:

Correction

In the **Federal Register** of May 8, 2013, on page 26760, (78 FR 26760), in the middle column under the heading *III. Eligibility Information,* we correct the first paragraph to read:

''1. *Eligible Applicants:* High-need LEAs; consortia of high-need LEAs; and partnerships of high-need LEAs, nonprofit organizations (which may be community- or faith-based organizations), or institutions of higher education.''

Program Authority: 20 U.S.C. 6651(b).

FOR FURTHER INFORMATION CONTACT: Beatriz Ceja, U.S. Department of Education, 400 Maryland Avenue SW., Room 4C107, Washington, DC 20202–5930. Telephone: (202) 205–5009. FAX: (202) 401–8466 or by email: *Schoolleadershipmatters@ed.gov.*

If you use a telecommunications device for the deaf(TDD) or a text telephone (TTY), call the Federal Relay Service, toll free, at 1–800–877–8339.

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**.

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: May 29, 2013.

James H. Shelton, III,

Assistant Deputy Secretary for Innovation and Improvement.

[FR Doc. 2013–13192 Filed 6–3–13; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–478–000]

Columbia Gas Transmission, LLC; Notice of Application

Take notice that on May 10, 2013, Columbia Gas Transmission, LLC. (Columbia) filed with the Federal Energy Regulatory Commission an application under section 7 of the Natural Gas Act for a certificate authorizing the replacement of 18.52 miles of 20-inch-diameter bare steel pipeline on its Line 1570 between Columbia's existing Waynesburg Compressor Station (CS) and its Redd Farm Regulator Station in Washington County, PA, with new coated 24-inch-diameter steel pipeline. Columbia also proposes to replace three existing 1,080 horsepower (hp) turbine compressors with a new 4,700 hp turbine compressor at the Waynesburg CS. To transport gas for shippers supporting its proposal, Columbia proposes to use 6,400 hp (of the total 9,400hp) that is proposed in its concurrently filed Smithfield III Expansion Project in Docket No. CP13–477–000. Columbia's proposal is referred to as the Line 1570 Project and is estimated to cost approximately $121,739,422.00, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions regarding the application should be directed to Fredric J. George, Senior Counsel, Columbia Gas Transmission, LLC, P.O. Box 1273, Charleston, West Virginia, 25325–1273, by phone at 304–357–2359 or by email at *fgeorge@nisource.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit seven copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and seven copies of the protest or

intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

Comment Date: 5:00 p.m. Eastern Time on June 18, 2013.

Dated: May 24, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–13115 Filed 6–3–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP13–477–000]

Columbia Gas Transmission, LLC; Notice of Application

Take notice that on May 10, 2013, Columbia Gas Transmission, LLC (Columbia) filed with the Federal Energy Regulatory Commission an application under section 7 of the Natural Gas Act to construct, and operate a new 9,400 horsepower (hp) compressor station in Washington County, Pennsylvania (Redd Farm CS); two additional compressor units totaling 15,600 hp at its existing Glenville CS in Gilmer County, West Virginia; new station piping, control systems, and other appurtenant facilities at its existing Smithfield CS and Clendenin CS in Wetzel and Kanawah Counties respectively; and other minor appurtenances at several other sites on its system. Columbia's proposal, known as the Smithfield III Expansion Project, will provide an additional 444 MDth per day of delivery capacity from receipt points in Pennsylvania and West Virginia to an interconnection with Columbia Gulf located near Leach, Kentucky. The total cost of the project is estimated to be approximately $81,779,079.00, all as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC at *FERCOnlineSupport@ferc.gov* or call toll-free, (886) 208–3676 or TYY, (202) 502–8659.

Any questions regarding the application should be directed to Fredric J. George, Senior Counsel, Columbia Gas Transmission, LLC, P.O. Box 1273, Charleston, West Virginia 25325–1273, by phone at 304–357–2359 or by email at *fgeorge@nisource.com.*

Pursuant to section 157.9 of the Commission's rules, 18 CFR 157.9, within 90 days of this Notice the Commission staff will either: complete its environmental assessment (EA) and place it into the Commission's public record (eLibrary) for this proceeding; or issue a Notice of Schedule for Environmental Review. If a Notice of Schedule for Environmental Review is issued, it will indicate, among other milestones, the anticipated date for the Commission staff's issuance of the final environmental impact statement (FEIS) or EA for this proposal. The filing of the EA in the Commission's public record for this proceeding or the issuance of a Notice of Schedule for Environmental Review will serve to notify federal and state agencies of the timing for the completion of all necessary reviews, and the subsequent need to complete all federal authorizations within 90 days of the date of issuance of the Commission staff's FEIS or EA.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before the comment date stated below file with the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit seven copies of filings made in the proceeding with the Commission and must mail a copy to the applicant and to every other party. Only parties to the proceeding can ask for court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of a comment alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commentors will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commentors will not be required to serve copies of filed documents on all other parties. However, the non-party commentors will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission strongly encourages electronic filings of comments, protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and seven copies of the protest or intervention to the Federal Energy regulatory Commission, 888 First Street NE., Washington, DC 20426.

Comment Date: 5:00 p.m. Eastern Time on June 18, 2013.

Dated: May 24, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–13114 Filed 6–3–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13346–003]

Free Flow Power Corporation; Notice Soliciting Scoping Comments

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* Original Major License.

b. *Project No.:* P–13346–003.

c. *Date filed:* December 3, 2012.

d. *Applicant:* Free Flow Power Corporation (Free Flow Power), on behalf of its subsidiary PayneBridge, LLC.

e. *Name of Project:* Williams Dam Water Power Project.

f. *Location:* At the existing Williams dam owned by the Indiana Department

of Natural Resources on the East Fork White River in Lawrence County, Indiana. No federal lands are occupied by the project works or located within the project boundary.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)–825(r)

h. *Applicant Contact:* Ramya Swaminathan, Chief Operating Officer, Free Flow Power Corporation, 239 Causeway Street, Suite 300, Boston, MA 02114; or at (978) 283–2822.

Daniel Lissner, General Counsel, Free Flow Power Corporation, 239 Causeway Street, Suite 300, Boston, MA 02114; or at (978) 283–2822.

Alan Topalian, Regulatory Attorney, Free Flow Power Corporation, 239 Causeway Street, Suite 300, Boston, MA 02114; or at (978) 283–2822.

i. *FERC Contact:* Aaron Liberty at (202) 502–6862 or by email at *Aaron.Liberty@ferc.gov.*

j. The Scoping Document (SD) issued on April 26, 2013, specified May 27, 2013, as the deadline for filing scoping comments for the Williams Dam Water Power Project. The deadline for filing SD comments is being extended for a 30-day period from the issuance date of this notice. Therefore, the revised deadline for filing SD comments is: June 28, 2013.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and five copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedures require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. This application is not ready for environmental analysis at this time.

l. The proposed Williams Dam Water Power Project would be located in Lawrence County, Indiana at the existing Williams dam on the East Fork White River. The 21.3-foot-high, 294-foot-long Williams dam is currently owned by the Indiana Department of Natural Resources and impounds a 553-acre reservoir at a normal pool elevation of 472.2 North American Vertical Datum of 1988 (NAVD 88). In addition to the dam, proposed project facilities would include: (1) An 80-foot-long, 21.5-foot-high, 100-foot-wide intake structure with trashracks having 3-inch clear bar spacing; (2) a 126-foot-long, 81-foot-wide powerhouse integral to the dam; (3) four turbine-generator units with a combined installed capacity of 4.0 megawatts; (4) a 40-foot by 40-foot substation; (5) a 265-foot-long, three-phase, 12.5-kilovolt overhead transmission line connecting the project's substation to local utility distribution lines; and (6) other appurtenant facilities.

The proposed project would operate in a run-of-river mode and the water surface elevation of the impoundment would be maintained at the existing normal pool elevation (crest of the dam spillway) or above. The average annual generation would be about 17,850 megawatt-hours.

m. A copy of the application is available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. A copy is also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. *Scoping Process:*

The Commission staff intends to prepare a single Environmental

Assessment (EA) for the Williams Dam Water Power Project in accordance with the National Environmental Policy Act. The EA will consider both site-specific and cumulative environmental impacts and reasonable alternatives to the proposed action.

Commission staff does not propose to conduct any on-site scoping meetings at this time. Instead, we are soliciting comments, recommendations, and information, on the SD issued on April 26, 2013.

Copies of the SD outlining the subject areas to be addressed in the EA were distributed to the parties on the Commission's mailing list and the applicant's distribution list. Copies of the SD may be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field to access the document. For assistance, call 1–866–208–3676 or for TTY, (202) 502–8659.

Dated: May 29, 2013..

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–13153 Filed 6–3–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PF13–10–000]

CenterPoint Energy Gas Transmission Company, LLC; Notice of Intent To Prepare an Environmental Assessment for the Planned Central Arkansas Pipeline Enhancement Project and Request for Comments on Environmental Issues

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Central Arkansas Pipeline Enhancement Project involving construction or abandonment of facilities by CenterPoint Energy Gas Transmission Company, LLC (CEGT) in Pulaski and Faulkner Counties, Arkansas. This EA will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project. Your input will help the Commission staff determine what issues need to be evaluated in the EA. Please note that the scoping period will close on June 28, 2013. Further details on how to submit written comments are provided in the Public Participation section of this notice.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives are asked to notify their constituents of this

planned project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, you may be contacted by a pipeline company representative about the acquisition of an easement to construct, operate, and maintain the planned facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings where compensation would be determined in accordance with state law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' is available for viewing on the FERC Web site (*www.ferc.gov*). This fact sheet addresses a number of typically-asked questions, including the use of eminent domain and how to participate in the Commission's proceedings.

Summary of the Planned Project

CEGT is proposing the construction of approximately 28.5 miles of 12-inch-diameter natural gas pipeline and ancillary facilities in Pulaski and Faulkner Counties, Arkansas. The proposed pipeline would be constructed primarily on new right-of-way and would provide replacement transmission service for a portion of two existing CEGT pipelines, one of which would be transferred to a distribution affiliate (Line BT–14) and the other would be abandoned in place (Line B). The two existing pipelines to be abandoned/transferred are located in areas that have experienced substantial residential and commercial development since they were constructed. No new capacity is being proposed as part of this project.

The project would consist of the following facilities:

- 28.5 miles of new 12-inch-diameter natural gas pipeline (Line BT–39) extending from an interconnect north of State Highway 64 in Faulkner County to CEGT's existing Oak Grove Town Border Station in Pulaski County;
- 230 feet of 4-inch-diameter natural gas pipeline (Line BT–40) lateral extending from a tap on the proposed Line BT–39 to a new meter station along James Road;
- 1,400 feet of 4-inch-diameter natural gas pipeline (Line BT–41) extending from a tap on the proposed Line BT–39 to the existing Morgan Town Border Station; and
- the installation or expansion of metering facilities and appurtenances related to the new proposed pipelines.

In addition, the project would abandon in-place 21.7 miles of CEGT's existing 10-inch-diameter Line B pipeline; 1,024 feet of its existing 6-inch-diameter Line BT–19; 567 feet of its existing 6-inch-diameter Line BM–1; and 2,000 feet of its existing 4-inch-diameter Line BM–21.

The general location of the project facilities is shown in appendix 1.[1]

Land Requirements for Construction

Construction would require a total of 349.9 acres of which approximately 142.7 acres would be retained as new, permanent easement associated with operation of the planned replacement pipeline, aboveground facilities, and permanent access roads. The remaining 207.2 acres would be allowed to revert to pre-construction conditions and use following construction.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us [2] to discover and address concerns the public may have about proposals. This process is referred to as scoping. The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. All comments received will be considered during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the planned project under these general headings:

- geology and soils;
- land use;
- water resources, fisheries, and wetlands;
- cultural resources;
- vegetation and wildlife;
- air quality and noise;
- endangered and threatened species; and
- public safety.

We will also evaluate possible alternatives to the planned project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Although no formal application has been filed, we have already initiated our NEPA review under the Commission's pre-filing process. The purpose of the pre-filing process is to encourage early involvement of interested stakeholders and to identify and resolve issues before an application is filed with the FERC. As part of our pre-filing review, we have begun to contact some federal and state agencies to discuss their involvement in the scoping process and the preparation of the EA.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. Depending on the comments received during the scoping process, we may also publish and distribute the EA to the public for an allotted comment period. We will consider all comments on the EA before we make our recommendations to the Commission. To ensure your comments are considered, please carefully follow the instructions in the Public Participation section beginning on page 5.

With this notice, we are asking agencies with jurisdiction and/or special expertise with respect to environmental issues to formally cooperate with us in the preparation of the EA.[3] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice.

Consultations Under Section 106 of the National Historic Preservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with the Arkansas State Historic Preservation Office, and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[4] We will define the

[1] The appendices referenced in this notice are not being printed in the **Federal Register**. Copies of appendices were sent to all those receiving this notice in the mail and are available at *www.ferc.gov* using the link called ''eLibrary'' or from the Commission's Public Reference Room, 888 First Street NE., Washington, DC 20426, or call (202) 502–8371. For instructions on connecting to eLibrary, refer to the last page of this notice.

[2] ''We,'' ''us,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

[3] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, § 1501.6.

[4] The Advisory Council on Historic Preservation regulations are at Title 36, Code of Federal Regulations, Part 800. Those regulations define historic properties as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register of Historic Places.

project-specific Area of Potential Effects (APE) in consultation with the State Historic Preservation Office as the project develops. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA for this project will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that they will be received in Washington, DC on or before June 28, 2013. This is not your only public input opportunity; please refer to the Environmental Review Process Flowchart in appendix 2.

For your convenience, there are three methods you can use to submit your comments to the Commission. In all instances, please reference the project docket number (PF13–10–000) with your submission. The Commission encourages electronic filing of comments and has expert eFiling staff available to assist you at (202) 502–8258 or *efiling@ferc.gov*.

(1) You may file your comments electronically by using the Quick Comment feature, which is located at *www.ferc.gov* under the link called ''Documents and Filings''. A Quick Comment is an easy method for interested persons to submit text-only comments on a project;

(2) You may file your comments electronically by using the ''eFiling'' feature that is listed under the ''Documents and Filings'' link. eFiling involves preparing your submission in the same manner as you would if filing on paper, and then saving the file on your computer's hard drive. You will attach that file to your submission. New eFiling users must first create an account by clicking on the links called ''Sign up'' or ''eRegister''. You will be asked to select the type of filing you are making. A comment on a particular project is considered a ''Comment on a Filing''; or

(3) You may file a paper copy of your comments at the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426.

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the planned project.

If the EA is published for distribution, copies will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version or would like to remove your name from the mailing list, please return the attached Information Request (appendix 3).

Becoming an Intervenor

Once CEGT files its application with the Commission, you may want to become an ''intervenor'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the ''e-filing'' link on the Commission's Web site. Please note that the Commission will not accept requests for intervenor status at this time. You must wait until a formal application for the project is filed with the Commission.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number, excluding the last three digits in the Docket Number field (i.e., PF13–10). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm.*

Finally, public meetings or site visits will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Dated: May 29, 2013..

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–13154 Filed 6–3–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PF13–5–000]

Transcontinental Gas Pipe Line Company, LLC; Notice of Intent To Prepare an Environmental Assessment for the Planned Leidy Southeast Expansion Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetings

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the Leidy Southeast Expansion Project involving construction and operation of facilities by Transcontinental Gas Pipe Line Company, LLC (Transco) in Pennsylvania, New Jersey, Maryland, Virginia, and North Carolina. The Commission will use this EA in its decision-making process to determine whether the project is in the public convenience and necessity.

This notice announces the opening of the scoping process the Commission will use to gather input from the public and interested agencies on the project.

Your input will help the Commission staff determine what issues they need to evaluate in the EA. The Commission staff will also use the scoping process to help determine whether preparation of an environmental impact statement is more appropriate for this project based upon the potential significance of the anticipated levels of impact. Please note that the scoping period will close on June 24, 2013. This is not your only public input opportunity; please refer to the Environmental Review Process flow chart in appendix 1.[1]

You may submit comments in written form or verbally. Further details on how to submit written comments are in the Public Participation section of this notice. In lieu of or in addition to sending written comments, the Commission invites you to attend the public scoping meeting(s) scheduled as follows:

Date and time	Location
June 12, 2013, 7:00 PM.	The Woodlands Inn, 1073 Highway 315, Wilkes-Barre, PA 18702.
June 13, 2013, 7:00 PM.	Hillsborough Township Middle School, 260 Triangle Road, Hillsborough Township, NJ 08844.

The scoping meetings will commence at the times listed above; however, representatives from Transco will be present one hour before each meeting to describe their proposal, present maps, and answer questions.

This notice is being sent to the Commission's current environmental mailing list for this project. State and local government representatives should notify their constituents of this proposed project and encourage them to comment on their areas of concern.

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the Commission approves the project, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings where compensation would be determined in accordance with state law.

Transco provided landowners with a fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?''. This fact sheet addresses a number of typically-asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is also available for viewing on the FERC Web site (*www.ferc.gov*).

Summary of the Planned Project

Transco plans to build approximately 30.1 miles of 42-inch-diameter natural gas pipeline in four loop [2] segments, consisting of 6.4 miles in Mercer and Somerset Counties, New Jersey (Skillman Loop), 6.9 miles in Somerset and Hunterdon Counties, New Jersey (Pleasant Run Loop), 11.5 miles in Monroe and Luzerne Counties, Pennsylvania (Franklin Loop), and 5.3 miles in Luzerne County, Pennsylvania (Dorrance Loop). The new pipeline loops would primarily be installed adjacent to Transco's existing rights-of-way.

The project would also include installing an approximate total of 84,500 horsepower of compression and making other modifications at existing compressor stations in Mercer County, New Jersey and Luzerne, Columbia, and Lycoming Counties, Pennsylvania, and modifying various existing valve sites and meter stations along Transco's mainline system in Maryland, Virginia, and North Carolina. As designed, the project would enable Transco to provide an additional 525,000 dekatherms per day of natural gas transportation capacity from receipt points on Transco's Leidy Line in Pennsylvania to delivery points on Transco's mainline system as far south as Choctaw County, Alabama. A map depicting the general location of the project facilities is included in appendix 2.

Transco plans to begin construction of the project in late 2014 and place the facilities in service by December 2015.

Land Requirements for Construction and Operation

Transco is still in the planning phase for the project, and workspace requirements have not been finalized at this time. As currently planned, construction would disturb approximately 485 acres of land for the aboveground facilities and the pipeline loops. Following construction, about 95 acres outside of Transco's existing easement would be maintained for permanent operation of the project facilities. The remaining acreage would be restored and allowed to revert to former uses. As planned, the new pipeline loops would primarily be installed adjacent to Transco's existing pipeline system.

The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us [3] to discover and address concerns the public may have about proposals. This process is referred to as ''scoping.'' The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this notice, the Commission requests public comments on the scope of the issues to address in the EA. We will consider all filed comments during the preparation of the EA.

In the EA we will discuss impacts that could occur as a result of the construction and operation of the planned project under these general headings:

- Geology and soils;
- Water resources, fisheries, and wetlands;
- Vegetation, wildlife, and endangered and threatened species;
- Socioeconomics;
- Cultural resources;
- Land use and cumulative impacts;
- Air quality and noise; and
- Public safety.

We will also evaluate reasonable alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resource areas.

Although no formal application has been filed, we have already initiated our NEPA review under the Commission's Pre-filing Process. The purpose of the Pre-filing Process is to encourage early involvement of interested stakeholders and to identify and resolve issues before an application is filed with the FERC. As part of our pre-filing review, we have begun to contact some federal and state agencies to discuss their involvement in the scoping process and the preparation of the EA. In addition, representatives from FERC participated in the public

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[2] A pipeline loop is a segment of pipe constructed parallel (and is connected) to an existing pipeline to increase capacity.

[3] ''Us,'' ''we,'' and ''our'' refer to the environmental staff of the Commission's Office of Energy Projects.

open houses sponsored by Transco in the project area in April 2013 to explain the environmental review process to interested stakeholders.

The EA will present our independent analysis of the issues. The EA will be available in the public record through eLibrary. We will consider all comments on the EA before making our recommendations to the Commission. To ensure we have the opportunity to consider and address your comments, please carefully follow the instructions in the Public Participation section beginning on page 5.

With this notice, we are asking agencies with jurisdiction by law and/or special expertise with respect to the environmental issues of this project to formally cooperate with us in the preparation of the EA.[4] Agencies that would like to request cooperating agency status should follow the instructions for filing comments provided under the Public Participation section of this notice. Currently, the U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration has expressed its intention to participate as a cooperating agency in the preparation of the EA.

Consultations Under Section 106 of the National Historic Perservation Act

In accordance with the Advisory Council on Historic Preservation's implementing regulations for section 106 of the National Historic Preservation Act, we are using this notice to initiate consultation with applicable State Historic Preservation Offices (SHPO), and to solicit their views and those of other government agencies, interested Indian tribes, and the public on the project's potential effects on historic properties.[5] We will define the project-specific Area of Potential Effects (APE) in consultation with the SHPOs as the project is further developed. On natural gas facility projects, the APE at a minimum encompasses all areas subject to ground disturbance (examples include construction right-of-way, contractor/pipe storage yards, compressor stations, and access roads). Our EA for this project will document our findings on the impacts on historic properties and summarize the status of consultations under section 106.

Currently Identified Environmental Issues

We have already identified several issues that we think deserve attention based on a preliminary review of the planned facilities, the environmental information provided by Transco, and comments received by the public. This preliminary list of issues may be changed based on your comments and our analysis:

- Residential impacts, including the potential for decreased property values;
- Impacts on forest and unique habitats;
- Impacts on conservation lands;
- Impacts on water resources;
- The purpose and need for the project;
- Consideration of alternatives, including renewable energy sources; and
- Public safety.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. Your comments should focus on the potential environmental effects, reasonable alternatives, and measures to avoid or lessen environmental impacts. The more specific your comments, the more useful they will be. To ensure that your comments are timely and properly recorded, please send your comments so that they will be received in Washington, DC on or before June 24, 2013.

For your convenience, there are four methods you can use to submit your comments to the Commission. In all instances, please reference the project docket number (PF13–5–000) with your submission. The Commission encourages electronic filing of comments and has expert eFiling staff available to assist you at (202) 502–8258 or *efiling@ferc.gov*.

1. You can file your comments electronically by using the *eComment* feature, which is located on the Commission's Web site at *www.ferc.gov* under the link to *Documents and Filings*. This is an easy method for interested persons to submit brief, text-only comments on a project;

2. You can file your comments electronically by using the *eFiling* feature, which is located on the Commission's Web site at *www.ferc.gov* under the link to *Documents and Filings*. With eFiling, you can provide comments in a variety of formats by attaching them as a file with your submission. New eFiling users must first create an account by clicking on ''*eRegister.*'' You must select the type of filing you are making. If you are filing a comment on a particular project, please select ''Comment on a Filing'';

3. You can attend and provide either oral or written comments at a public scoping meeting. A transcript of each meeting will be made so that your comments will be accurately recorded and included in the public record; or

4. You can file a paper copy of your comments by mailing them to the following address: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Room 1A, Washington, DC 20426

Environmental Mailing List

The environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations) who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the project. We will update the environmental mailing list as the analysis proceeds to ensure that we send the information related to this environmental review to all individuals, organizations, and government entities interested in and/or potentially affected by the planned project.

When the EA is published for distribution, copies will be sent to the environmental mailing list for public review and comment. If you would prefer to receive a paper copy of the document instead of the CD version, or would like to remove your name from the mailing list, please return the attached Information Request (appendix 3).

Becoming an Intervenor

Once Transco files its application with the Commission, you may want to become an ''intervenor'' which is an official party to the Commission's proceeding. Intervenors play a more formal role in the process and are able to file briefs, appear at hearings, and be heard by the courts if they choose to appeal the Commission's final ruling. An intervenor formally participates in the proceeding by filing a request to intervene. Instructions for becoming an intervenor are included in the User's Guide under the ''e-Filing'' link on the Commission's Web site. Please note that

[4] The Council on Environmental Quality regulations addressing cooperating agency responsibilities are at Title 40, Code of Federal Regulations, Part 1501.6.

[5] The Advisory Council on Historic Preservation's regulations are at Title 36 of the Code of Federal Regulations, Part 800. Historic properties are defined in those regulations as any prehistoric or historic district, site, building, structure, or object included in or eligible for inclusion in the National Register for Historic Places.

the Commission will not accept requests for intervenor status at this time. You must wait until a formal application for the project is filed with the Commission.

Additional Information

Additional information about the project is available from the Commission's Office of External Affairs, at (866) 208–FERC, or on the FERC Web site (*www.ferc.gov*) using the eLibrary link. Click on the eLibrary link, click on ''General Search'' and enter the docket number, excluding the last three digits in the Docket Number field (i.e., PF13–5). Be sure you have selected an appropriate date range. For assistance, please contact FERC Online Support at *FercOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659. The eLibrary link also provides access to the text of formal documents issued by the Commission, such as orders, notices, and rulemakings.

In addition, the Commission offers a free service called eSubscription which allows you to keep track of all formal issuances and submittals in specific dockets. This can reduce the amount of time you spend researching proceedings by automatically providing you with notification of these filings, document summaries, and direct links to the documents. Go to *www.ferc.gov/esubscribenow.htm.*

Public meetings or site visits will be posted on the Commission's calendar located at *www.ferc.gov/EventCalendar/EventsList.aspx* along with other related information.

Finally, Transco has established a Web site for this project at *http://leidysoutheast.wordpress.com/.* The Web site includes a project overview, environmental information, and information for affected stakeholders.

Dated: May 24, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–13117 Filed 6–3–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project Nos. P–13404–002, P–13405–002, P–13406–002, P–13407–002, P–13408–002, and P–13411–002]

Clean River Power MR–1, LLC, Clean River Power MR–2, LLC, Clean River Power MR–3, LLC, Clean River Power MR–5, LLC, Clean River Power MR–6, LLC, Clean River Power MR–7, LLC; Notice of Scoping Meetings and Environmental Site Reviews and Soliciting Scoping Comments

a. *Type of Applications:* Original Major Licenses.

b. *Project Nos.* 13404–002, 13405–002, 13406–002, 13407–002, 13408–002, and 13411–002.

c. *Dated Filed:* October 31, 2012.

d. *Applicants:* Clean River Power MR–1, LLC; Clean River Power MR–2, LLC; Clean River Power MR–3, LLC; Clean River Power MR–5, LLC; Clean River Power MR–6, LLC; and Clean River Power MR–7, LLC (Clean River Power), subsidiaries of Free Flow Power Corporation.

e. *Names of Projects:* Beverly Lock and Dam Project, P–13404–002; Devola Lock and Dam Project, P–13405–002; Malta/McConnelsville Lock and Dam Project, P–13406–002; Lowell Lock and Dam Project, P–13407–002; Philo Lock and Dam Project, P–13408–002; and Rokeby Lock and Dam Project, P–13411–002.

f. *Location:* At existing locks and dams formally owned and operated by the U.S. Army Corps of Engineers but now owned and operated by the State of Ohio on the Muskingum River in Washington, Morgan, and Muskingum counties, Ohio (see table below for specific project locations).

Project No.	Projects	County(s)	City/town
P–13404	Beverly Lock and Dam	Washington	Upstream of the city of Beverly.
P–13405	Devola Lock and Dam	Washington	Near the city of Devola.
P–13406	Malta/McConnelsville Lock and Dam	Morgan	Southern shore of the town of McConnelsville.
P–13407	Lowell Lock and Dam	Washington	West of the city of Lowell.
P–13408	Philo Lock and Dam	Muskingum	North of the city of Philo.
P–13411	Rokeby Lock and Dam	Morgan	Near the city of Rokeby.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contacts:* Ramya Swaminathan, Chief Operating Officer, Free Flow Power Corporation, 239 Causeway Street, Suite 300, Boston, MA 02114; or at (978) 283–2822.

Daniel Lissner, General Counsel, Free Flow Power Corporation, 239 Causeway Street, Suite 300, Boston, MA 02114; or at (978) 283–2822.

Alan Topalian, Regulatory Attorney, Free Flow Power Corporation, 239 Causeway Street, Suite 300, Boston, MA 02114; or at (978) 283–2822.

i. *FERC Contact:* Aaron Liberty at (202) 502–6862; or email at *aaron.liberty@ferc.gov.*

j. *Deadline for filing scoping comments:* July 23, 2013.

All documents may be filed electronically via the Internet. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site *http://www.ferc.gov/docs-filing/efiling.asp.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *http://www.ferc.gov/docs-filing/ecomment.asp.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at 1–866–208–3676, or for TTY, (202) 502–8659. Although the Commission strongly encourages electronic filing, documents may also be paper-filed. To paper-file, mail an original and five copies to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all interveners filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervener files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

k. The applications are not ready for environmental analysis at this time.

l. The proposed Devola Lock and Dam Project would be located at the existing

Devola Lock and Dam on the Muskingum River at RM 5.8. The Devola dam is a 587-foot-long, 17-foot-high dam that impounds a 301-acre reservoir at a normal pool elevation of 592.87 feet North American Vertical Datum of 1988 (NAVD 88). The applicant proposes to remove 187 feet of the existing dam to construct a 154-foot-long overflow weir. The project would also consist of the following new facilities: (1) A 37-foot-long, 52-foot-high, 80-foot-wide intake structure with trash racks containing 2-inch clear bar spacing; (2) a 80-foot by 160-foot powerhouse located on the bank of the Muskingum River opposite the existing lock; (3) two turbine-generator units providing a combined installed capacity of 4.0 megawatts (MW); (4) a 65-foot-long, 80-foot-wide draft tube; (5) a 125-foot-long, 140-foot-wide tailrace; (6) a 40-foot by 40-foot substation; (7) a 3,600-foot-long, three-phase, overhead 69-kilovolt (kV) transmission line to connect the project substation to the local utility distribution lines; and (8) appurtenant facilities.

The proposed Lowell Lock and Dam Project would be located at the existing Lowell dam on the Muskingum River at RM 13.6. The Lowell dam is an 840-foot-long, 18-foot-high dam that impounds a 628-acre reservoir at a normal pool elevation of 607.06 feet NAVD 88. The applicant proposes to remove 204 feet of the existing dam to construct a 143.5-foot-long overflow weir. The project would also consist of the following new facilities: (1) A 37-foot-long, 23-foot-high, 80-foot-wide intake structure with trash racks that contain 2-inch clear bar spacing; (2) a 75-foot by 160-foot powerhouse located adjacent to the left bank of the dam; (3) two turbine-generator units providing a combined installed capacity of 5 MW; (4) a 65-foot-long, 75-foot-wide draft tube; (5) a 100-foot-long, 125-foot-wide tailrace; (6) a 40-foot by 40-foot substation; (7) a 1,200-foot-long, three-phase, overhead 69-kV transmission line to connect the project substation to the local utility distribution lines; and (8) appurtenant facilities.

The proposed Beverly Lock and Dam Project would be located at the existing Beverly Lock and Dam on the Muskingum River at RM 24.6. The Beverly dam is a 535-foot-long, 17-foot-high dam that impounds a 490-acre reservoir at a normal pool elevation of 616.36 feet NAVD 88. The project would also consist of the following new facilities: (1) A 37-foot-long, 52-foot-high, 88-foot-wide intake structure with trash racks containing 2-inch clear bar spacing; (2) a 75-foot by 160-foot powerhouse located downstream of the dam on the left bank of the Muskingum River; (3) two turbine-generator units providing a combined installed capacity of 3.0 MW; (4) a 65-foot-long, 75-foot-wide draft tube; (5) a 90-foot-long, 150-foot-wide tailrace; (6) a 40-foot by 40-foot substation; (7) a 970-foot-long, three-phase, overhead 69-kV transmission line to connect the project substation to the local utility distribution lines; and (8) appurtenant facilities.

The proposed Malta/McConnelsville Lock and Dam Project would be located at the existing Malta/McConnelsville dam on the Muskingum River at RM 49.4. The Malta/McConnelsville dam is a 605.5-foot-long, 15.2-foot-high dam that impounds a 442-acre reservoir at a normal pool elevation of 649.48 feet NAVD 88. The applicant proposes to remove 187.5 feet of the existing dam to construct a 100-foot-long overflow weir. The project would also consist of the following new facilities: (1) A 37-foot-long, 52-foot-high, 80-foot-wide intake structure with trash racks containing 2-inch clear bar spacing; (2) a 80-foot by 160-foot powerhouse located adjacent to the right bank of the dam; (3) two turbine-generator units providing a combined installed capacity of 4.0 MW; (4) a 65-foot-long, 80-footwide draft tube; (5) a 100-foot-long, 130-foot-wide tailrace; (6) a 40-foot by 40-foot substation; (7) a 1,500-foot-long, three-phase, overhead 69-kV transmission line to connect the project substation to the local utility distribution lines; and (8) appurtenant facilities.

The proposed Rokeby Lock and Dam Project would be located at the existing Rokeby dam on the Muskingum River at RM 57.4. The Rokeby dam is a 525-foot-long, 20-foot-high dam that impounds a 615-acre reservoir at a normal pool elevation of 660.3 feet NAVD 88. The project would also consist of the following new facilities: (1) A 37-foot-long, 52-foot-high, 80-foot-wide intake structure with trash racks that contain 2-inch clear bar spacing; (2) a 75-foot by 160-foot powerhouse located on the bank of the Muskingum River opposite the existing lock; (3) two turbine-generator units providing a combined installed capacity of 4 MW; (4) a 65-foot-long, 75-foot-wide draft tube; (5) a 160-foot-long, 200-foot-wide tailrace; (6) a 40-foot by 40-foot substation; (7) a 490-foot-long, three-phase, overhead 69-kV transmission line to connect the project substation to the local utility distribution lines; and (8) appurtenant facilities.

The proposed Philo Lock and Dam Project would be located at the existing Philo dam on the Muskingum River at RM 68.6. The Philo dam is a 730-foot-long, 17-foot-high dam that impounds a 533-acre reservoir at a normal pool elevation of 671.39 feet NAVD 88. The applicant proposes to remove 128 feet of the existing dam to construct a 40-foot-long flap gate. The project would also consist of the following new facilities: (1) A 37-foot-long, 52-foot-high, 80-foot-wide intake structure with trash racks that contain 2-inch clear bar spacing; (2) a 75-foot by 160-foot powerhouse located on the bank of the Muskingum River opposite the existing lock; (3) two turbine-generator units providing a combined installed capacity of 3 MW; (4) a 65-foot-long, 80-foot-wide draft tube; (5) a 140-foot-long, 180-foot-wide tailrace; (6) a 40-foot by 40-foot substation; (7) a 1,600-foot-long, three-phase, overhead 69-kV transmission line to connect the project substation to the local utility distribution lines; and (8) appurtenant facilities.

The applicant proposes to operate all six projects in a run-of-river mode, such that the water surface elevations within each project impoundment would be maintained at the crest of each respective dam spillway. The Beverly, Devola, Malta/McConnelsville, Lowell, Philo, and Rokeby Lock and Dam water power projects would have average annual energy production values of 17,850 megawatt-hours (MWh), 20,760 MWh, 21,900 MWh, 31,000 MWh, 15,960 MWh, 17,180 MWh, respectively.

m. A copy of the applications are available for review at the Commission in the Public Reference Room or may be viewed on the Commission's Web site at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, contact FERC Online Support. Copies are also available for inspection and reproduction at the address in item h above.

You may also register online at *http://www.ferc.gov/docs-filing/esubscription.asp* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

n. *Scoping Process:*

The Commission intends to prepare a multi-development Environmental assessment (EA) on the projects in accordance with the National Environmental Policy Act. The EA will consider both site-specific and cumulative environmental impacts and reasonable alternatives to the proposed actions.

Scoping Meetings

FERC staff will conduct once agency scoping meeting and two public meetings. The agency scoping meeting will focus on resource agency and non-governmental organization (NGO) concerns, while the public scooping meetings are primarily for public input. All interested individuals, organizations, and agencies are invited to attend one or all of the meetings, and to assist the staff in identifying the scope of the environmental issues that should be analyzed in the EA. The times and locations of these meetings are as follows:

Agency Scoping Meeting

Date: Wednesday, June 26, 2013
Time: 9:00 a.m.
Place: Holiday Inn Express
Address: 1101 Spring Street, Zanesville, Ohio 43701

Public Scoping Meetings

Date: Tuesday, June 25, 2013
Time: 7:00 p.m.
Place: Twin City Opera House
Address: 15 W. Main Street, McConnelsville, Ohio 43756
Date: Wednesday, June 26, 2013
Time: 7:00 p.m.
Place: Holiday Inn Express
Address: 1101 Spring Street, Zanesville, Ohio 43701.

Copies of the Scoping Document (SD1) outlining the subject areas to be addressed in the EA were distributed to the parties on the Commission's mailing list. Copies of the SD1 will be available at the scoping meetings or may be viewed on the web at *http://www.ferc.gov* using the ''eLibrary'' link (see item m above).

Environmental Site Reviews

The Applicant and FERC staff will conduct project Environmental Site Reviews beginning at 9:00 a.m. on Tuesday, June 25, 2013. All interested individuals, organizations, and agencies are invited to attend. We will also conduct site reviews of the Lowell Lock and Dam, Beverly Lock and Dam, and Malta/McConnelsville Lock and Dam, following at approximately 10 a.m., 11 a.m., and 12 p.m., respectively. Depending upon the level of interest, we will continue the site reviews for the Philo Lock and Dam and Rokeby Lock and Dam on Wednesday, June 26, 2013, at approximately 12 p.m. and 1 p.m., respectively, between the scheduled daytime and evening scoping meetings. All participants are responsible for their own transportation to the site. Attendees wishing to attend any or all of the site reviews should assemble at the specified times and locations provided below. Anyone with questions about the Environmental Site Reviews should contact Mr. Dan Lissner of Free Flow Power at (978) 283–2822.

Project: Devola Lock and Dam
Date & Time: Tuesday, June 25, 2013 at 9:00 a.m.
Location: Ohio DNR parking lot at the end of River Road, Devola, Ohio 45750

Project: Lowell Lock and Dam
Date & Time: Tuesday, June 25, 2013 at 10:00 a.m.
Location: Ohio DNR parking lot just beyond 7969 Muskingum River Road, Lowell, Ohio 45744

Project: Beverly Lock and Dam
Date & Time: Tuesday, June 25, 2013 at 11:00 a.m.
Location: Ohio DNR parking lot at the Muskingum River Park Lock 4 and Canal on 3rd Street, Beverly, Ohio 45715

Project: Malta/McConnelsville Lock and Dam
Date & Time: Tuesday, June 25, 2013 at 12:00 p.m.
Location: Ohio DNR parking lot on N. Riverside Drive at 14th Street, McConnelsville, Ohio 43756

Project: Philo Lock and Dam
Date & Time: Wednesday, June 26, 2013 at 12:00 p.m.
Location: Duncan Falls-Philo Branch Library, 222 Main Street, Duncan Falls, Ohio 43734

Project: Rokeby Lock and Dam
Date & Time: Wednesday, June 26, 2013 at 1:00 p.m.
Location: Ohio DNR parking lot at the intersection of Main Street and N. Greer Road, near 8911 Ohio 60, McConnelsville, Ohio 43756

Objectives

At the scoping meetings, the staff will: (1) Summarize the environmental issues tentatively identified for analysis in the EA; (2) solicit from the meeting participants all available information, especially quantifiable data, on the resources at issue; (3) encourage statements from experts and the public on issues that should be analyzed in the EA, including viewpoints in opposition to, or in support of, the staff's preliminary views; (4) determine the resource issues to be addressed in the EA; and (5) identify those issues that require a detailed analysis, as well as those issues that do not require a detailed analysis.

Procedures

The meetings are recorded by a stenographer and become part of the formal record of the Commission proceeding on the project.

Individuals, organizations, and agencies with environmental expertise and concerns are encouraged to attend the meeting and to assist the staff in defining and clarifying the issues to be addressed in the EA.

Dated: May 24, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–13116 Filed 6–3–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ID–5369–002]

Brelinsky, Mary Anne; Notice of Filing

Take notice that on May 28, 2013, Mary Anne Brelinsky submitted for filing, an application for authority to hold interlocking positions, pursuant to section 305(b) of the Federal Power Act, 16 U.S.C. 825d (b) and Part 45 of Title 18 of the Code of Federal Regulations, 18 CFR Part 45.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211, 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. Such notices, motions, or protests must be filed on or before the comment date. On or before the comment date, it is not necessary to serve motions to intervene or protests on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the ''eFiling'' link at *http://www.ferc.gov.* Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street NE., Washington, DC 20426.

This filing is accessible on-line at *http://www.ferc.gov,* using the ''eLibrary'' link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an ''eSubscription'' link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email

FERCOnlineSupport@ferc.gov, or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern Time on June 18, 2013.

Dated: May 29, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–13155 Filed 6–3–13; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. OR13–22–000; OR13–23–000]

Targa Badlands LLC; Notice of Petitions for Temporary Waiver of Filing and Reporting Requirements

Take notice that on May 16, 2013, pursuant to Rule 204 of the Commission's Rules of Practice and Procedure, 18 CFR 385.204 (2012), Targa Badlands LLC (''Targa Badlands'') filed two petitions requesting that the Commission grant a temporary waiver of the tariff filing and reporting requirements applicable to interstate oil pipelines under sections 6 and 20 of the Interstate Commerce Act (''ICA'') and parts 341 and 357 of the Commission's regulations. These requests pertain to new pipeline facilities (Stanley Facilities) in Docket No. OR13–22–000, and new gathering facilities (Myrmidon Facilities) in Docket No. OR13–23–000, for Bakken crude oil production, as more particularly described in the petitions.

Any person desiring to intervene or to protest in this proceedings must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) on or before 5:00 p.m. Eastern time on the specified comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Anyone filing a motion to intervene or protest must serve a copy of that document on the Applicant. In reference to filings initiating a new proceeding, interventions or protests submitted on or before the comment deadline need not be served on persons other than the Applicant.

The Commission encourages electronic submission of protests and interventions in lieu of paper, using the FERC Online links at *http://www.ferc.gov.* To facilitate electronic service, persons with Internet access who will eFile a document and/or be listed as a contact for an intervenor must create and validate an eRegistration account using the eRegistration link. Select the eFiling link to log on and submit the intervention or protests.

Persons unable to file electronically should submit an original and 5 copies of the intervention or protest to the Federal Energy Regulatory Commission, 888 First St. NE., Washington, DC 20426.

The filings in the above proceedings are accessible in the Commission's eLibrary system by clicking on the appropriate link in the above list. They are also available for review in the Commission's Public Reference Room in Washington, DC. There is an eSubscription link on the Web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC Online service, please email *FERCOnlineSupport@ferc.gov,* or call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

Comment Date: 5:00 p.m. Eastern time on June 12, 2013.

Dated: May 29, 2013.

Kimberly D. Bose,

Secretary.

[FR Doc. 2013–13156 Filed 6–3–13; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OECA–2013–0019, 0301–0302, 0310, 0313–0314, 0316, 0318, 0329, 0331–0342, 0345–0346; FRL–9819–4]

Proposed Information Collection Request; Comment Request; See Item Specific ICR Titles Provided in the Text

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency is planning to submit an information collection request (ICR) (See item specific ICR title, EPA ICR Number, and OMB Control Number provided in the text) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, see expiration date for each ICR provided in the text. 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.

DATES: Comments must be submitted on or before August 5, 2013.

ADDRESSES: Submit your comments, referencing the Docket ID numbers provided for each item in the text, online using *www.regulations.gov* (our preferred method), by email to *docket.oeca@epa.gov,* or by mail to: EPA Docket Center, Environmental Protection Agency, Mail Code 28221T, 1200 Pennsylvania Ave. NW., Washington, DC 20460.

EPA's policy is that all comments received will be included in the public docket without change including any personal information provided, unless the comment includes profanity, threats, information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute.

FOR FURTHER INFORMATION CONTACT: Learia Williams, Compliance Assessment and Media Programs Division, Office of Compliance, Mail Code 2227A, Environmental Protection Agency, 1200 Pennsylvania Ave. NW., Washington, DC 20460; telephone number: (202) 564–4113; fax number: (202) 564–0050; email address: *williams.learia@epa.gov*.

SUPPLEMENTARY INFORMATION: Supporting documents which explain in detail the information that the EPA will be collecting are available in the public docket for this ICR. The docket can be viewed online at *www.regulations.gov* or in person at the EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave. NW., Washington, DC. The telephone number for the Docket Center is 202–566–1744. For additional information about EPA's public docket, visit *http://www.epa.gov/dockets.*

Pursuant to section 3506(c)(2)(A) of the PRA, EPA is soliciting comments and information to enable it to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the Agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (iii) enhance the quality, utility, and clarity of the information to be collected; and (iv) 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. EPA will consider the comments received and amend the ICR as appropriate. The final ICR package will then be submitted to OMB for review and approval. At that time, EPA will issue another **Federal Register** notice to announce the submission of the ICR to OMB and the opportunity to submit additional comments to OMB.

(1) Docket ID Number: EPA–HQ–OECA–2013–0337; Title: NESHAP for Portland Cement (40 CFR Part 63, Subpart LLL); ICR Numbers: EPA ICR Number 1801.12, OMB Control Number 2060–0416; ICR Status: This ICR is scheduled to expire on October 31, 2013.

Abstract: The NESHAP for Portland Cement (40 CFR Part 63, Subpart LLL) were proposed June 16, 2008, promulgated September 9, 2010, and amended January 18, 2011. Owners or operators of the affected facilities must submit a one-time-only report of any physical or operational changes, initial performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required semiannually at a minimum.

Form Numbers: None.

Respondents/affected entities: Owners or operators of any existing or new facility engaged in portland cement manufacturing.

Respondent's obligation to respond: mandatory (40 CFR part 63, subpart LLL).

Estimated number of respondents: 87 (total).

Frequency of response: Semiannually.

Total estimated burden: 643 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $182,182 (per year), includes $120,155 annualized capital or operation & maintenance costs.

Changes in Estimates: There is an increase of hours in the total estimated respondent burden compared with the ICR currently approved by OMB. The increase in burden is primarily due to the additional recordkeeping and reporting costs attributable to the final amendments. Additionally, there is an increase in burden costs due to an adjustment in labor rates.

(2) Docket ID Number: EPA–HQ–OECA–2013–0338; Title: NESHAP for the Manufacture of Amino/Phenolic Resins (40 CFR Part 63, Subpart OOO); ICR Numbers: EPA ICR Number 1869.07, OMB Control Number 2060–0434; ICR Status: This ICR is scheduled to expire on October 31, 2013.

Abstract: The NESHAP for the Manufacture of Amino/Phenolic Resins were proposed on December 14, 1998, and promulgated on January 20, 2000. The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the Provisions specified at 40 CFR part 63, subpart KKKK. Owners or operators of the affected facilities must submit a one-time-only report of any physical or operational changes, initial performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required semiannually at a minimum.

Form Numbers: None.

Respondents/affected entities: Amino/phenolic resins manufacturing facilities.

Respondent's obligation to respond: mandatory (40 CFR part 63, subpart OOO).

Estimated number of respondents: 40 (total).

Frequency of response: Initially, occasionally, quarterly, semiannually, and annually.

Total estimated burden: 24,044 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $2,290,320 (per year), includes $16,000 annualized capital or operation & maintenance costs.

Changes in Estimates: There is no change in the respondent labor hours in this ICR compared to the previous ICR. This is due to two considerations: (1) The regulations have not changed over the past three years, are not anticipated to change over the next three years; and (2) the growth rate for the respondents is very low, negative or non-existent. Therefore, the labor hours in the previous ICR reflect the current burden to the respondents and are reiterated in this ICR. However, there is an increase in burden costs due to an adjustment in labor rates.

(3) Docket ID Number: EPA–HQ–OECA–2013–0336; Title: NESHAP for Off-Site Waste and Recovery Operations (40 CFR Part 63, Subpart DD); ICR Numbers: EPA ICR Number 1717.08, OMB Control Number 2060–0313; ICR Status: This ICR is scheduled to expire on October 31, 2013.

Abstract: The NESHAP for Off-Site Waste and Recovery Operations were proposed on October 13, 1994, and promulgated on July 1, 1996. The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the Provisions specified at 40 CFR part 63, subpart DD. Owners or operators of the affected facilities must submit a one-time-only report of any physical or operational changes, initial performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required semiannually at a minimum.

Form Numbers: None.

Respondents/affected entities: Offsite waste and recovery operations.

Respondent's obligation to respond: mandatory (40 CFR part 63, subpart DD).

Estimated number of respondents: 236 (total).

Frequency of response: Initially, occasionally, and semiannually.

Total estimated burden: 155,212 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $14,686,728 (per year), includes $5,360 annualized capital or operation & maintenance costs.

Changes in Estimates: There is no change in the respondent labor hours in this ICR compared to the previous ICR. This is due to two considerations: (1) the regulations have not changed over the past three years, and are not anticipated to change over the next three years; and (2) the growth rate for the respondents is very low, negative or non-existent. Therefore, the labor hours in the previous ICR reflect the current burden to the respondents and are reiterated in this ICR. However, there is an increase in burden costs due to an adjustment in labor rates.

(4) Docket ID Number: EPA–HQ–OECA–2013–0345; Title: NESHAP for Metal Can Manufacturing Surface Coating (40 CFR Part 63, Subpart KKKK); ICR Numbers: EPA ICR Number 2079.05, OMB Control Number 2060–0541; ICR Status: This ICR is scheduled to expire on October 31, 2013.

Abstract: The affected entities are subject to the General Provisions of the NESHAP for Metal Can Manufacturing Surface Coating at 40 CFR part 63, subpart A, and any changes, or additions, to the Provisions specified at 40 CFR part 63, subpart KKKK. Owners or operators of the affected facilities must submit a one-time-only report of

any physical or operational changes, initial performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required semiannually at a minimum.

Form Numbers: None.

Respondents/affected entities: Metal can manufacturing surface coating.

Respondent's obligation to respond: mandatory (40 CFR part 63, subpart KKKK).

Estimated number of respondents: 71 (total).

Frequency of response: Initially, occasionally, and semiannually.

Total estimated burden: 27,517 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $2,687,973 (per year), includes $85,200 annualized capital or operation & maintenance costs.

Changes in Estimates: There is no change in the labor hours in this ICR compared to the previous ICR. This is due to two considerations: (1) the regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate for the respondents is very low, negative or non-existent. Therefore, the labor hours in the previous ICR reflect the current burden to the respondents and are reiterated in this ICR. However, there is an increase in burden costs due to an adjustment in labor rates.

(5) Docket ID Number: EPA–HQ–OECA–2013–0334; Title: NSPS for Secondary Brass and Bronze Production (40 CFR Part 60, Subpart M), Primary Copper Smelters (40 CFR Part 60, Subpart P), Primary Zinc Smelters (40 CFR Part 60, Subpart Q), Primary Lead Smelters (40 CFR Part 60, Subpart R), Primary Aluminum Reduction Plants (40 CFR Part 60, Subpart S), and Ferroalloy Production Facilities (40 CFR Part 60, Subpart Z); ICR Numbers: EPA ICR Number 1604.10, OMB Control Number 2060–0110; ICR Status: This ICR is scheduled to expire on October 31, 2013.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A and any changes, or additions to the Provisions specified at 40 CFR part 60, subparts M, P, Q, R, S and Z. Owners or operators of the affected facilities must make an initial notification, performance tests, periodic reports, and maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required semiannually at a minimum.

Form Numbers: None.

Respondents/affected entities: Owners or operators of secondary brass and bronze production facilities, primary copper smelters, primary zinc smelters, primary lead smelters, primary aluminum reduction plants, and ferroalloy production facilities.

Respondent's obligation to respond: mandatory (40 CFR part 60, subpart M, P, Q, R, S, and Z).

Estimated number of respondents: 18 (total).

Frequency of response: Initially, occasionally, semiannually, and annually.

Total estimated burden: 4,923 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $597,254 (per year), includes $131,600 annualized capital or operation & maintenance costs.

Changes in Estimates: There is no change in the labor hours in this ICR compared to the previous ICR. This is due to two considerations: (1) the regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate for the respondents is very low, negative or non-existent. Therefore, the labor hours in the previous ICR reflect the current burden to the respondents and are reiterated in this ICR. However, there is an increase in burden costs due to an adjustment in labor rates.

(6) Docket ID Number: EPA–HQ–OECA–2013–0339; Title: NESHAP for Boat Manufacturing (40 CFR Part 63, Subpart VVVV); ICR Numbers: EPA ICR Number 1966.05, OMB Control Number 2060–0546; ICR Status: This ICR is scheduled to expire on October 31, 2013.

Abstract: The NESHAP for Boat Manufacturing (40 CFR Part 63, Subpart VVVV) covers resin and gel coat operations at fiberglass boat manufacturers, paint and coating operations at aluminum boat manufacturers, and carpet and fabric adhesive operations at all boat manufacturers. Owners or operators of boat manufacturing facilities are required to submit initial notification, performance tests, and periodic reports. Respondents are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Semiannual reports are also required. These notifications, reports, and records are essential in determining compliance; and are required, in general, of all sources subject to NESHAP.

Form Numbers: None.

Respondents/affected entities: Boat manufacturing.

Respondent's obligation to respond: mandatory (40 CFR part 63, subpart VVVV).

Estimated number of respondents: 144 (total).

Frequency of response: Initially, quarterly, and semiannually.

Total estimated burden: 23,543 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $2,227,693 (per year), includes $800 annualized capital or operation & maintenance costs.

Changes in Estimates: There is no change in the labor hours in this ICR compared to the previous ICR. This is due to two considerations: (1) the regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate for the respondents is very low, negative or non-existent. Therefore, the labor hours in the previous ICR reflect the current burden to the respondents and are reiterated in this ICR. However, there is an increase in burden costs due to an adjustment in labor rates.

(7) Docket ID Number: EPA–HQ–OECA–2013–0341; Title: NESHAP for Plywood and Composite Products (40 CFR Parts 63, Subpart DDDD and Part 429); ICR Numbers: EPA ICR Number 1984.05, OMB Control Number 2060–0552; ICR Status: This ICR is scheduled to expire on October 31, 2013.

Abstract: The NESHAP for Plywood and Composite Products covers both new and existing plywood and composite wood products (PCWP) facilities. Plywood and composite products include, but are not limited to plywood, veneer, particleboard, oriented strand board, hardboard, fiberboard, medium density fiberboard, laminated strand lumber, laminated veneer lumber, wood I-joists, kiln-dried lumber and glue-laminated beams. Owners/operators of plywood and composite products facilities are required to submit initial notification, performance tests, and compliance status reports. Also, respondents are required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Semiannual reports are required.

Form Numbers: None.

Respondents/affected entities: Plywood and composite products.

Respondent's obligation to respond: mandatory (40 CFR part 63, subpart DDDD and part 429).

Estimated number of respondents: 228 (total).

Frequency of response: Initially and semiannually.

Total estimated burden: 11,680 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $1,120,813 (per year), includes $15,960 annualized capital or operation & maintenance costs.

Changes in Estimates: There is no change in the labor hours in this ICR compared to the previous ICR. This is due to two considerations: (1) the regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate for the respondents is very low, negative or non-existent. Therefore, the labor hours in the previous ICR reflect the current burden to the respondents and are reiterated in this ICR. However, there is an increase in burden costs due to an adjustment in labor rates.

(8) Docket ID Number: EPA–HQ–OECA–2013–0340; Title: NESHAP for Stationary Reciprocating Internal Combustion Engines (40 CFR Part 63, Subpart ZZZZ); ICR Numbers: EPA ICR Number 1975.09, OMB Control Number 2060–0548; ICR Status: This ICR is scheduled to expire on November 30, 2013.

Abstract: The respondents to this information collection are owners or operators of existing spark ignition (SI) engines that have a site rating of less than or equal to 500 brake hp and located at major sources of hazardous air pollutants (HAP) and existing stationary SI engines located at area sources of HAP emissions. The information is requested by the Agency to determine compliance with the rule. The information will then be used by enforcement agencies to verify that sources subject to the standards are meeting the emission reductions mandated by the Clean Air Act (CAA). Other sizes/types of stationary reciprocating internal combustion engines (RICE) have been regulated under previous actions. Thus, this final action fulfills the requirements of section 112 of the CAA, which requires EPA to promulgate standards for stationary RICE, by adding requirements for the remaining engines.

Form Numbers: None.

Respondents/affected entities: Owners or operators of existing stationary SI RICE.

Respondent's obligation to respond: mandatory (40 CFR part 63, subpart ZZZZ).

Estimated number of respondents: 62,167 (total).

Frequency of response: Initially and semiannually.

Total estimated burden: 967,246 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $99,825,375 (per year), includes $13,828,278 annualized capital or operation & maintenance costs.

Changes in Estimates: There is an expected decrease in the overall burden for this ICR as compared to the previous ICR. The previous ICR accounted for the burden associated with the 2010 final rule. This ICR accounts for the burden associated with on-going compliance after the initial three-year period.

(9) Docket ID Number: EPA–HQ–OECA–2013–0318; Title: NSPS for Magnetic Tape Coating Facilities (40 CFR Part 60, Subpart SSS); ICR Numbers: EPA ICR Number 1135.11, OMB Control Number 2060–0170; ICR Status: This ICR is scheduled to expire on November 30, 2013.

Abstract: The NSPS for the Magnetic Tape Coating Facilities (40 CFR part 60, subpart SSS) were proposed on January 22, 1986, and promulgated on October 3, 1988. The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A and any changes, or additions to the Provisions specified at 40 CFR part 60, subpart SSS. Owners or operators of the affected facilities must make an initial notification, performance tests, periodic reports, and maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required semiannually at a minimum.

Form Numbers: None.

Respondents/affected entities: Magnetic tape coating facilities.

Respondent's obligation to respond: mandatory (40 CFR part 60, subpart SSS).

Estimated number of respondents: 6 (total).

Frequency of response: Initially, occasionally, quarterly, and semiannually.

Total estimated burden: 2,017 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $277,224 (per year), includes $86,400 annualized capital or operation & maintenance costs.

Changes in Estimates: There is no change in the labor hours in this ICR compared to the previous ICR. This is due to two considerations: (1) The regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate for the respondents is very low, negative or non-existent. Therefore, the labor hours in the previous ICR reflect the current burden to the respondents and are reiterated in this ICR. However, there is an increase in burden costs due to an adjustment in labor rates.

(10) Docket ID Number: EPA–HQ–OECA–2013–0313; Title: NSPS for Stationary Gas Turbines (40 CFR Part 60, Subpart GG); ICR Numbers: EPA ICR Number 1071.11, OMB Control Number 2060–0028; ICR Status: This ICR is scheduled to expire on December 31, 2013.

Abstract: The NSPS for Stationary Gas Turbines were proposed on October 3, 1977, and promulgated on September 10, 1979. Owners and operators of stationary gas turbines must submit a one-time-only notification of construction/reconstruction, modification, and startup date, initial performance test date, physical or operational changes, and demonstration of a continuous monitoring system. They also must provide a report on initial performance test result, monitoring results, and any excess emissions. Records must be maintained of: startups, shutdowns, and malfunctions; periods when the continuous monitoring system is inoperative; sulfur and nitrogen content of the fuel; fuel to water ratio; rate of fuel consumption; and ambient conditions. Semiannual reports are also required.

Form Numbers: None.

Respondents/affected entities: Stationary gas turbines.

Respondent's obligation to respond: mandatory (40 CFR part 60, subpart GG).

Estimated number of respondents: 535 (total).

Frequency of response: Initially and semiannually.

Total estimated burden: 68,447 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $6,474,328 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in Estimates: There is no change in the labor hours in this ICR compared to the previous ICR. This is due to two considerations: (1) The regulations have not changed over the

past three years and are not anticipated to change over the next three years; and (2) the growth rate for the respondents is very low, negative or non-existent. Therefore, the labor hours in the previous ICR reflect the current burden to the respondents and are reiterated in this ICR. However, there is an increase in burden costs due to an adjustment in labor rates.

(11) Docket ID Number: EPA–HQ–OECA–2013–0335; Title: NESHAP for Aerospace Manufacturing and Rework Facilities (40 CFR Part 63, Subpart GG); ICR Numbers: EPA ICR Number 1687.09, OMB Control Number 2060–0314; ICR Status: This ICR is scheduled to expire on December 31, 2013.

Abstract: Respondents are owners or operators of aerospace manufacturing and rework operations. Respondents must submit one-time reports of initial performance tests and semiannual reports of noncompliance. Record keeping and parameters related to air pollution control technologies is required. The reports and records will be used to demonstrate compliance with the standards.

Form Numbers: None.

Respondents/affected entities: Aerospace manufacturing and rework facilities.

Respondent's obligation to respond: mandatory (40 CFR part 63, subpart GG).

Estimated number of respondents: 136 (total).

Frequency of response: Initially, semiannually, and occasionally.

Total estimated burden: 141,010 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $13,430,729 (per year), includes $136,000 annualized capital or operation & maintenance costs.

Changes in Estimates: There is no change in the labor hours in this ICR compared to the previous ICR. This is due to two considerations: (1) The regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate for the respondents is very low, negative or non-existent. Therefore, the labor hours in the previous ICR reflect the current burden to the respondents and are reiterated in this ICR. However, there is an increase in burden costs due to an adjustment in labor rates.

(12) Docket ID Number: EPA–HQ–OECA–2013–0333; Title: Standards of Performance for Air Emission Standards for Tanks, Surface Impoundments and Containers (40 CFR Part 264, Subpart CC and 40 CFR Part 265, Subpart CC); ICR Numbers: EPA ICR Number 1593.09, OMB Control Number 2060–0318; ICR Status: This ICR is scheduled to expire on December 31, 2013.

Abstract: This ICR renewal is being submitted for the Air Emission Standards for Tanks, Surface Impoundments and Containers (40 CFR Part 264, Subpart CC and 40 CFR Part 265, Subpart CC), which were promulgated on December 6, 1994. The requirements of this subpart apply to owners and operators of all facilities that treat, store, or dispose of hazardous wastes in tanks, surface impoundments and containers that are subject to subparts I, J or K of these parts, except for Sections 264.1 and 265.1 and those management units identified at Sections 264.1080(b) and 265.1080(b). Also, the requirements of this subpart apply to large quantity generators that manage hazardous wastes in either tanks, or containers (262.34(a)(1)(i and ii)). The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A and any changes, or additions to the General Provisions specified at 40 CFR part 264, subpart CC and 40 CFR part 265, subpart CC.

Form Numbers: None.

Respondents/affected entities: Tanks, surface impoundments and containers.

Respondent's obligation to respond: mandatory (40 CFR part 264, subpart CC and 40 CFR part 265, subpart CC).

Estimated number of respondents: 6,209 (total).

Frequency of response: Occasionally, annually, and semiannually.

Total estimated burden: 711,400 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $80,708,869 (per year), includes $12,418,000 annualized capital or operation & maintenance costs.

Changes in Estimates: There is no change in the labor hours in this ICR compared to the previous ICR. This is due to two considerations: (1) the regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate for the respondents is very low, negative or non-existent. Therefore, the labor hours in the previous ICR reflect the current burden to the respondents and are reiterated in this ICR. However, there is an increase in burden costs due to an adjustment in labor rates.

(13) Docket ID Number: EPA–HQ–OECA–2013–0346; Title: NESHAP for Acrylic/Modacrylic Fibers Production, Carbon Black Production, Chemical Mfg: Chromium Compounds, Flexible Polyurethane Foam Production/Fabrication, Lead Acid Battery Manufacturing, Wood Preserving (40 CFR Part 63, Subparts LLLLLL, MMMMMM, NNNNNN, OOOOOO, PPPPPP, and QQQQQQ); ICR Numbers: EPA ICR Number 2256.04, OMB Control Number 2060–0598; ICR Status: This ICR is scheduled to expire on December 31, 2013.

Abstract: EPA is finalizing six national emission standards for hazardous air pollutants (NESHAP) for seven area source categories. The proposed requirements for two area source categories (Flexible Polyurethane Foam Production and Flexible Polyurethane Foam Fabrication) are combined in one subpart. The standards include emissions limitations and work practice requirements for new and existing plants based on the generally available control technology or management practices (GACT) for each area source category. Potential respondents include one existing acrylic and modacrylic production facility, two existing chromium product manufacturing facilities, 500 existing flexible polyurethane foam production and fabrication facilities, 60 existing lead acid battery manufacturing facilities, and 393 existing wood preserving facilities. The total annual responses attributable to this ICR for existing sources are two one-time notifications; some existing facilities may be required to prepare a startup, shutdown, and malfunction plan, perform additional monitoring and recordkeeping, and/or conduct an initial performance test. The owner or operator of a new area source would be required to comply with all requirements of the General Provisions (40 CFR part 63, subpart A). No burden estimates are provided for new area sources because no new facilities are expected during the next 3 years.

Form Numbers: None.

Respondents/affected entities: Acrylic and Modacrylic Fibers Production, Carbon Black Production, Chemical Manufacturing: Chromium Compounds, Flexible Polyurethane Foam Production and Fabrication, Lead Acid Battery Manufacturing, and Wood Preserving

Respondent's obligation to respond: mandatory (40 CFR part 63, subparts LLLLLL, MMMMMM, NNNNNN, OOOOOO, PPPPPP, and QQQQQQ).

Estimated number of respondents: 319 (total).

Frequency of response: Initially, semiannually, and occasionally.

Total estimated burden: 4,233 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $399,523 (per year), includes no annualized capital or operation & maintenance costs.

Changes in Estimates: There is no change in the labor hours in this ICR compared to the previous ICR as the growth rate for the respondents is very low, negative or non-existent. Therefore, the labor hours in the previous ICR reflect the current burden to the respondents and are reiterated in this ICR. However, there is an increase in burden costs due to an adjustment in labor rates.

(14) Docket ID Number: EPA–HQ–OECA–2013–0331; Title: NSPS for New Residential Wood Heaters (40 CFR Part 60, Subpart AAA); ICR Numbers: EPA ICR Number 1176.11, OMB Control Number 2060–0160; ICR Status: This ICR is scheduled to expire on January 31, 2014.

Abstract: Manufacturers and accredited laboratories are required to make several one-time and periodic reports necessary for the implementation and enforcement of the rule. Also, laboratories, manufacturers, distributors and retailers are required to retain certain records.

Form Numbers: None.

Respondents/affected entities: New residential wood heaters.

Respondent's obligation to respond: mandatory (40 CFR part 60, subpart AAA).

Estimated number of respondents: 934 (total).

Frequency of response: Occasionally.

Total estimated burden: 9,729 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $2,260,853 (per year), includes $1,348,000 annualized capital or operation & maintenance costs.

Changes in Estimates: There is an expected increase in the total burden to reflect additional burden associated with the recent amendment. In addition, the burden associated with ongoing compliance with the rule is expected to differ from those during the initial three-year period. Therefore, the overall burden hours and costs differ as compared to the previous ICR.

(15) Docket ID Number: EPA–HQ–OECA–2013–0019; Title: NSPS for Electric Utility Steam Generating Units (40 CFR Part 60, Subpart Da); ICR Numbers: EPA ICR Number 1053.11, OMB Control Number 2060–0023; ICR Status: This ICR is scheduled to expire on March 31, 2014.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 60, subpart A, and any changes, or additions to the Provisions specified at 40 CFR part 60, subpart Da. Owners or operators of the affected facilities must submit a one-time-only report of any physical or operational changes, initial performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required semiannually at a minimum.

Form Numbers: None.

Respondents/affected entities: Owners or operators of electric utility steam generating units.

Respondent's obligation to respond: mandatory (40 CFR part 60, subpart Da).

Estimated number of respondents: 667 (total).

Frequency of response: Initially, quarterly and semiannually.

Total estimated burden: 160,839 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $27,445,813 (per year), includes $12,355,000 annualized capital or operation & maintenance costs.

Changes in Estimates: There is an increase in both respondent and Agency burden costs from the most recently approved ICR is due to an adjustment in the number of new or modified sources, and in the labor rates.

(16) Docket ID Number: EPA–HQ–OECA–2013–0310; Title: NSPS for Sewage Sludge Treatment Plants (40 CFR Part 60, Subpart O); ICR Numbers: EPA ICR Number 1063.12, OMB Control Number 2060–0035; ICR Status: This ICR is scheduled to expire on March 31, 2014.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A and any changes, or additions to the Provisions specified at 40 CFR part 60, subpart O. Owners or operators of the affected facilities must make an initial notification, performance tests, periodic reports, and maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required semiannually at a minimum.

Form Numbers: None.

Respondents/affected entities: Sewage sludge treatment plant incinerators.

Respondent's obligation to respond: mandatory (40 CFR part 60, subpart O).

Estimated number of respondents: 112 (total).

Frequency of response: Initially, occasionally, and semiannually.

Total estimated burden: 12,464 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $5,138,948 (per year), includes $3,960,000 annualized capital or operation & maintenance costs.

Changes in Estimates: There is an increase in both respondent and Agency burden costs from the most recently approved ICR is due to an adjustment in the number of new or modified sources, and also an adjustment in labor rates.

(17) Docket ID Number: EPA–HQ–OECA–2013–0301; Title: NESHAP for Beryllium (40 CFR Part 61, Subpart C); ICR Numbers: EPA ICR Number 0193.11, OMB Control Number 2060–0092; ICR Status: This ICR is scheduled to expire on March 31, 2014.

Abstract: The sources subject to this rule (i.e., extraction plants, ceramic plants, foundries, incinerators, propellant plants and machine shops which process beryllium and its derivatives) complying with the one-time only stack test, would be required to submit initial notifications and a one-time report with the emission limit determination. The sources complying with the alternative ambient air quality limit by operating a continuous monitor in the vicinity of the affected facility are required to submit a monthly report of all measured concentrations. Records shall be retained for two years.

Form Numbers: None.

Respondents/affected entities: Beryllium.

Respondent's obligation to respond: mandatory (40 CFR part 61, subpart C).

Estimated number of respondents: 33 (total).

Frequency of response: Monthly, and on occasion.

Total estimated burden: 2,627 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $281,442 (per year), includes $35,000 annualized capital or operation & maintenance costs.

Changes in Estimates: There is no change in the labor hours in this ICR compared to the previous ICR. This is due to two considerations: (1) The regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate for the respondents is very low, negative or non-existent. Therefore, the labor hours in the previous ICR reflect the current burden to the respondents and are reiterated in this ICR. However, there is an increase in burden costs due to an adjustment in labor rates.

(18) Docket ID Number: EPA–HQ–OECA–2013–0302; Title: NSPS for Graphic Arts Industry (40 CFR Part 60, Subpart QQ); ICR Numbers: EPA ICR Number 0657.11, OMB Control Number 2060–0105; ICR Status: This ICR is scheduled to expire on March 31, 2014.

Abstract: The New Source Performance Standards (NSPS) for the Graphic Arts Industry (40 CFR part 60, subpart QQ) were proposed on October 28, 1980, and promulgated on November 8, 1982. The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A and any changes, or additions to the Provisions specified at 40 CFR part 60, subpart QQ. Owners or operators of the affected facilities must make an initial notification, performance tests, periodic reports, and maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required semiannually at a minimum.

Form Numbers: None.

Respondents/affected entities: Graphic arts facilities.

Respondent's obligation to respond: mandatory (40 CFR part 60, subpart QQ).

Estimated number of respondents: 19 (total).

Frequency of response: Initially, occasionally, and semiannually.

Total estimated burden: 1,718 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $163,005 (per year), includes $0 annualized capital or operation & maintenance costs.

Changes in Estimates: There is an increase in both respondent and Agency burden costs from the most recently approved ICR is due to an adjustment in the number of new or modified sources, and an adjustment in labor rates.

(19) Docket ID Number: EPA–HQ–OECA–2013–0314; Title: NSPS for Phosphate Rock Plants (40 CFR Part 60, Subpart NN); ICR Numbers: EPA ICR Number 1078.10, OMB Control Number 2060–0111; ICR Status: This ICR is scheduled to expire on March 31, 2014.

Abstract: The affected entities are subject to the General Provisions of the NSPS at 40 CFR part 60, subpart A, and any changes, or additions to the Provisions specified at 40 CFR part 60, subpart NN. Owners or operators of the affected facilities must submit a one-time-only report of any physical or operational changes, initial performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required semiannually at a minimum.

Form Numbers: None.

Respondents/affected entities: Owners or operators of phosphate rock plants.

Respondent's obligation to respond: mandatory (40 CFR part 60, subpart NN).

Estimated number of respondents: 13 (total).

Frequency of response: Initially and semiannually.

Total estimated burden: 1,602 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $274,536 (per year), includes $124,182 annualized capital or operation & maintenance costs.

Changes in Estimates: There is an increase in both respondent and Agency burden costs from the most recently approved ICR is due to an adjustment in the number of new or modified sources, and an adjustment in labor rates.

(20) Docket ID Number: EPA–HQ–OECA–2013–0316; Title: NSPS for Onshore Natural Gas Processing Plants (40 CFR Part 60, Subparts KKK and LLL); ICR Numbers: EPA ICR Number 1086.10, OMB Control Number 2060–0120; ICR Status: This ICR is scheduled to expire on March 31, 2014.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 60, subpart A, and any changes, or additions to the Provisions specified at 40 CFR part 60, subparts KKK & LLL. Owners or operators of the affected facilities must submit a one-time-only report of any physical or operational changes, initial performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required semiannually at a minimum.

Form Numbers: None.

Respondents/affected entities: Owners or operators of onshore natural gas processing plants.

Respondent's obligation to respond: mandatory (40 CFR part 60, subparts KKK and LLL).

Estimated number of respondents: 563 (total).

Frequency of response: Initially, semiannually and occasionally.

Total estimated burden: 149,180 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $14,335,639 (per year), includes $338,700 annualized capital or operation & maintenance costs.

Changes in Estimates: There is an increase in both respondent and Agency burden costs from the most recently approved ICR is due to an increase in the number of new or modified sources, and an adjustment in the labor rates.

(21) Docket ID Number: EPA–HQ–OECA–2013–0329; Title: NSPS for Rubber Tire Manufacturing (40 CFR Part 60, Subpart BBB); ICR Numbers: EPA ICR Number 1158.11, OMB Control Number 2060–0156; ICR Status: This ICR is scheduled to expire on March 31, 2014.

Abstract: Respondents are owners or operators of rubber tire manufacturing plants which include each under-tread cementing operation, each sidewall cementing operation, each tread end cementing operation, each bead cementing operating, each green tire spraying operation, each Michelin-A operation, each Michelin-B operation, and each Michelin-C automatic operation. The standards require the submission of notification when conducting performance tests and periodic reporting including semiannual reports of excess emissions and annual reports of Method 24 formulation data.

Form Numbers: None.

Respondents/affected entities: Rubber tire manufacturing.

Respondent's obligation to respond: Mandatory (40 CFR part 60, subpart BBB).

Estimated number of respondents: 41 (total).

Frequency of response: Initially, annually, and semiannually.

Total estimated burden: 13,323 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $1,266,476 (per year), includes $16,400 annualized capital or operation & maintenance costs.

Changes in Estimates: There is no change in the labor hours in this ICR compared to the previous ICR. This is due to two considerations: (1) The regulations have not changed over the past three years and are not anticipated to change over the next three years; and (2) the growth rate for the respondents is very low, negative or non-existent. Therefore, the labor hours in the previous ICR reflect the current burden to the respondents and are reiterated in this ICR. However, there is an increase in burden costs due to an adjustment in labor rates.

(22) Docket ID Number: EPA–HQ–OECA–2013–0332; Title: NSPS for Small Industrial-Commercial-Institutional Steam Generating Units (40 CFR Part 60, Subpart Dc); ICR Numbers: EPA ICR Number 1564.09, OMB Control Number 2060–0202; ICR Status: This ICR is scheduled to expire on March 31, 2014.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 60, subpart A, and any changes, or additions to the Provisions specified at 40 CFR part 60, subpart Dc. Owners or operators of the affected facilities must submit a one-time-only report of any physical or operational changes, initial performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required semiannually at a minimum.

Form Numbers: None.

Respondents/affected entities: Owners or operators of small industrial-commercial-institutional steam generating units.

Respondent's obligation to respond: mandatory (40 CFR part 60, subpart Dc).

Estimated number of respondents: 235 (total).

Frequency of response: Initially, semiannually and occasionally.

Total estimated burden: 159,972 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $24,455,624 (per year), includes $9,446,145 annualized capital or operation & maintenance costs.

Changes in Estimates: There is an increase in both respondent and Agency burden costs from the most recently approved ICR is due to an increase in the number of new or modified sources, and an adjustment in labor rates.

(23) Docket ID Number: EPA–HQ–OECA–2013–0342; Title: NESHAP for Lime Manufacturing (40 CFR Part 63, Subpart AAAAA); ICR Numbers: EPA ICR Number 2072.05, OMB Control Number 2060–0544; ICR Status: This ICR is scheduled to expire on March 31, 2014.

Abstract: The affected entities are subject to the General Provisions of the NESHAP at 40 CFR part 63, subpart A, and any changes, or additions to the General Provisions specified at 40 CFR part 63, subpart AAAAA. Owners or operators of the affected facilities must submit a one-time-only report of any physical or operational changes, initial performance tests, and periodic reports and results. Owners or operators are also required to maintain records of the occurrence and duration of any startup, shutdown, or malfunction in the operation of an affected facility, or any period during which the monitoring system is inoperative. Reports are required semiannually at a minimum.

Form Numbers: None.

Respondents/affected entities: Lime manufacturing plants.

Respondent's obligation to respond: mandatory (40 CFR part 63, subpart AAAAA).

Estimated number of respondents: 62 (total).

Frequency of response: Initially, occasionally, and semiannually.

Total estimated burden: 14,723 hours (per year). Burden is defined at 5 CFR 1320.03(b).

Total estimated cost: $1,509,024 (per year), includes $124,408 annualized capital or operation & maintenance costs.

Changes in Estimates: There is an increase in both respondent and Agency burden costs from the most recently approved ICR is due to an increase in the number of new or modified sources and an adjustment in labor rates.

Dated: May 20, 2013.

Lisa C. Lund,

Director, Office of Compliance.

[FR Doc. 2013–13067 Filed 6–3–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL—9819–3]

Notification of a Public Meeting of the Science Advisory Board Environmental Justice Technical Guidance Review Panel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The EPA Science Advisory Board (SAB) Staff Office announces a public meeting of the SAB Environmental Justice Technical Guidance Review Panel to provide advice through the chartered SAB on the agency's *Draft Technical Guidance for Assessing Environmental Justice in Regulatory Analysis (May 1, 2013).*

DATES: The Environmental Justice Technical Guidance (EJTG) Review Panel public meeting will be held on Wednesday June 19, 2013 from 9:00 a.m. to 5:00 p.m. (Eastern Time) and on Thursday June 20, 2013 from 9:00 a.m. to 4:00 p.m. (Eastern Time).

ADDRESSES: The public meeting will be held at The EPA Potomac Yards Conference Center, One Potomac Yard, 2777 S. Crystal Drive, Room S–1204/06, Arlington, VA 22202.

FOR FURTHER INFORMATION CONTACT: Any member of the public who wants further information concerning the public meeting may contact Dr. Sue Shallal, Designated Federal Officer (DFO), via telephone at (202) 564–2057 or email at *shallal.suhair@epa.gov.* General information concerning the SAB can be found on the EPA Web site at *http://www.epa.gov/sab.*

SUPPLEMENTARY INFORMATION:

The SAB was established pursuant to the Environmental Research, Development, and Demonstration Authorization Act (ERDDAA), codified at 42 U.S.C. 4365, to provide independent scientific and technical advice to the Administrator on the technical basis for Agency positions and regulations. The SAB is a Federal Advisory Committee chartered under the Federal Advisory Committee Act (FACA), 5 U.S.C., App. 2. The SAB will comply with the provisions of FACA and all appropriate SAB Staff Office procedural policies. Pursuant to FACA and EPA policy, notice is hereby given that the SAB Environmental Justice Technical Guidance Review Panel will hold a public meeting to discuss the agency's draft technical document that provides information on how to consider environmental justice in regulatory analysis. This SAB panel will provide advice to the Administrator through the chartered SAB.

Background

The EPA has released for public comment its *Draft Technical Guidance for Assessing Environmental Justice in Regulatory Analysis* (*May 1, 2013)* (see *https://www.federalregister.gov/articles/2013/05/09/2013-11165/technical-guidance-for-assessing-environmental-justice-in-regulatory-analysis*) The purpose of this draft guidance is to provide EPA analysts with technical information on how to consider environmental justice (EJ) in regulatory analyses. This draft guidance takes into account the EPA's past experience in integrating environmental justice into the rulemaking process, and supports the EPA's ongoing commitment to ensuring the fair treatment and meaningful involvement of all people with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. The EPA is seeking the advice of the SAB on the scientific soundness of the guidance provided in this document.

This draft guidance complements the EPA's *Interim Guidance on Considering Environmental Justice During the Development of an Action,* (*http://www.epa.gov/environmentaljustice/resources/policy/considering-ej-in-rulemaking-guide-07-2010.pdf*), issued in July 2010, which provides direction on when EJ should be considered during

the rulemaking process. In contrast, the *Draft Technical Guidance for Assessing Environmental Justice in Regulatory Analysis* begins to address the issue of how to analytically consider EJ in regulatory analysis.

The SAB Staff Office announced to the public through a **Federal Register** notice published on February 14, 2011 (76 FR 8366) and a second **Federal Register** notice published on June 3, 2011 (76 FR 32202) that it was soliciting nominations of nationally and internationally recognized scientists to serve on this panel. Additional background on this SAB advisory activity is provided in these notices and at the following URL *http://yosemite.epa.gov/sab/sabproduct.nsf/fedrgstr_activites/EJ%20Technical%20Guidance?OpenDocument.*

Technical Contacts: Any technical questions concerning EPA's draft technical document should be directed to Kelly Maguire at 202.566.2273 or by email at *maguire.kelly@epa.gov.*

Availability of Meeting Materials: Prior to the meeting, the review documents, agenda and other materials will be accessible through the calendar link on the blue navigation bar at *http://www.epa.gov/sab/.*

Procedures for Providing Public Input: Public comment for consideration by EPA's federal advisory committees and panels has a different purpose from public comment provided to EPA program offices. Therefore, the process for submitting comments to a federal advisory committee is different from the process used to submit comments to an EPA program office. Federal advisory committees and panels, including scientific advisory committees, provide independent advice to EPA. Interested members of the public may submit relevant written or oral information on the topic of this advisory activity, and/or the group conducting the activity, for the SAB to consider during the advisory process. Input from the public to the SAB will have the most impact if it provides specific scientific or technical information or analysis for SAB committees to consider or if it relates to the clarity or accuracy of the technical information. Members of the public wishing to provide comment should contact the DFO directly. *Oral Statements:* In general, individuals or groups requesting an oral presentation at a public meeting will be limited to five minutes. Interested parties should contact Dr. Sue Shallal, DFO, in writing (preferably via email) at the contact information noted above by June 12, 2013, to be placed on the list of public speakers for the meeting. *Written Statements:* Written statements should be supplied to the DFO via email at the contact information noted above by June 12, 2013 for the meeting so that the information may be made available to the Committee members for their consideration. Written statements should be supplied in one of the following electronic formats: Adobe Acrobat PDF, MS Word, MS PowerPoint, or Rich Text files in IBM–PC/Windows 98/2000/XP format. It is the SAB Staff Office general policy to post written comments on the Web page for the advisory meeting or teleconference. Submitters are requested to provide an unsigned version of each document because the SAB Staff Office does not publish documents with signatures on its Web sites. Members of the public should be aware that their personal contact information, if included in any written comments, may be posted to the SAB Web site. Copyrighted material will not be posted without explicit permission of the copyright holder.

Accessibility: For information on access or services for individuals with disabilities, please contact Dr. Sue Shallal at (202) 564–2057 or *shallal.suhair@epa.gov.* To request accommodation of a disability, please contact Dr. Shallal preferably at least ten days prior to the meeting to give EPA as much time as possible to process your request.

Dated: May 22, 2013.

Thomas H. Brennan,

Deputy Director, EPA Science Advisory Board Staff Office.

[FR Doc. 2013–13188 Filed 6–3–13; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request (3064–0174)

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: The FDIC, 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 the renewal of an existing information collection, as required by the Paperwork Reduction Act of 1995 (44 U.S.C. chapter 35). On March 19, 2013 (78 FR 16853), the FDIC solicited public comment for a 60-day period on renewal without change of its ''Interagency Policy Statement on Funding and Liquidity Risk Management'' (OMB No. 3064–0139). No comments were received. Therefore, the FDIC hereby gives notice of submission of its request for renewal to OMB for review.

DATES: Comments must be submitted on or before July 5, 2013.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html.*
- *Email: comments@fdic.gov* Include the name of the collection in the subject line of the message.
- *Mail:* Gary A. Kuiper (202.898.3877), Counsel, Room NYA–5046, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Gary A. Kuiper, at the FDIC address above.

SUPPLEMENTARY INFORMATION: Proposal to renew the following currently-approved collection of information:

Title: Interagency Policy Statement on Funding and Liquidity Risk Management.

OMB Number: 3064–0174.

Form Number: None.

Affected Public: Insured state nonmember banks.

Estimated Number of Respondents:

Number of respondents: 4,510 total (11 large (over $20 billion in assets), 298 mid-size ($1–$20 billion), 4,201 small (less than $1 billion)).

Frequency of Response: Annual.

Estimated Annual Burden Hours per Response:

Burden under Section 14: 720 hours per large respondent, 240 hours per mid-size respondent, and 80 hours per small respondent.

Burden under Section 20: 4 hours per month.

Total estimated annual burden: 552,560 hours

General Description of Collection: The policy statement summarizes the principles of sound liquidity risk

management that the agencies have issued in the past and, when appropriate, supplements them with the ''Principles for Sound Liquidity Risk Management and Supervision'' issued by the Basel Committee on Banking Supervision in September 2008.1 This policy statement emphasizes supervisory expectations for all depository institutions including banks, thrifts, and credit unions.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 30th day of May 2013.
Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2013–13142 Filed 6–3–13; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Agency Information Collection Activities: Submission for OMB Review; Comment Request Re Interagency Charter and Federal Deposit Insurance Application

AGENCY: Federal Deposit Insurance Corporation (FDIC).

ACTION: Notice and request for comment.

SUMMARY: In accordance with the requirements of the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. chapter 35), the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The FDIC, 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 renewal of an existing information collection, as required by the PRA. On March 19, 2013 (78 FR 16853), the FDIC solicited public comment for a 60-day period on renewal without change of its ''Interagency Charter and Federal Deposit Insurance Application'' information collection (OMB No. 3064–0001). No comments were received. Therefore, the FDIC hereby gives notice of submission of its request for renewal to OMB for review.

DATES: Comments must be submitted on or before July 5, 2013.

ADDRESSES: Interested parties are invited to submit written comments to the FDIC by any of the following methods:

- *http://www.FDIC.gov/regulations/laws/federal/notices.html.*
- *Email: comments@fdic.gov* Include the name of the collection in the subject line of the message.
- *Mail:* Leneta G. Gregorie (202–898–3719), Counsel, Room NY–5050, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.
- *Hand Delivery:* Comments may be hand-delivered to the guard station at the rear of the 17th Street Building (located on F Street), on business days between 7:00 a.m. and 5:00 p.m.

All comments should refer to the relevant OMB control number. A copy of the comments may also be submitted to the OMB desk officer for the FDIC: Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Leneta Gregorie, at the FDIC address above.

SUPPLEMENTARY INFORMATION:

Proposal to renew the following currently approved collection of information:

Title: Interagency Charter & Federal Deposit Insurance Application.

OMB Number: 3064–0001.

Frequency of Response: Once.

Affected Public: Banks or savings associations wishing to become FDIC-insured depository institutions.

Estimated Number of Respondents: 143.

Estimated Time per Response: 125 hours.

Total Annual Burden: 17,875 hours.

General Description of Collection: The Federal Deposit Insurance Act requires proposed financial institutions to apply to the FDIC to obtain deposit insurance. This collection provides the FDIC with the information needed to evaluate the applications.

Request for Comment

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the FDIC's functions, including whether the information has practical utility; (b) the accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology. All comments will become a matter of public record.

Dated at Washington, DC, this 30th day of May, 2013.
Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2013–13175 Filed 6–3–13; 8:45 am]

BILLING CODE 6714–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Notice of a Matter To Be Deferred From the Agenda for Consideration at an Agency Meeting

Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that the following matter will be deferred from the ''Summary agenda'' for consideration at the open meeting of the Board of Directors of the Federal Deposit Insurance Corporation scheduled to be held at 10:00 a.m. on Tuesday, June 4, 2013, in the Board Room on the sixth floor of the FDIC Building located at 550—17th Street NW., Washington, DC:

Memorandum and resolution re: Proposed Revisions to the Authority of the Case Review Committee.

Requests for further information concerning the meeting may be directed to Mr. Robert E. Feldman, Executive Secretary of the Corporation, at (202) 898–7122.

Dated: May 31, 2013.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Executive Secretary.

[FR Doc. 2013–13326 Filed 5–31–13; 4:15 pm]

BILLING CODE P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS13–15]

Appraisal Subcommittee Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of Meeting.

Description: In accordance with Section 1104 (b) of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) will meet in closed session:

Location: OCC—400 7th Street SW., Washington, DC 20024.

Date: June 12, 2013.

Time: Immediately following the ASC open session.

Status: Closed.

Matters to be Considered:

May 21, 2013 minutes—Closed Session

Preliminary discussion of State Compliance Reviews

Dated: May 30, 2013.

James R. Park,

Executive Director.

[FR Doc. 2013–13200 Filed 6–3–13; 8:45 am]

BILLING CODE 6701–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

[Docket No. AS13–14]

Appraisal Subcommittee Notice of Meeting

AGENCY: Appraisal Subcommittee of the Federal Financial Institutions Examination Council.

ACTION: Notice of meeting.

Description: In accordance with Section 1104 (b) of Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as amended, notice is hereby given that the Appraisal Subcommittee (ASC) will meet in open session for its regular meeting:

Location: OCC—400 7th Street SW., Washington, DC 20024.

Date: June 12, 2013.

Time: 10:30 a.m.

Status: Open

Matters To Be Considered

Summary Agenda

May 21, 2013 minutes—Open Session

(No substantive discussion of the above items is anticipated. These matters will be resolved with a single vote unless a member of the ASC requests that an item be moved to the discussion agenda.)

Discussion Agenda

Illinois Compliance Update

Appraisal Foundation February 2013 Grant Reimbursement Request

Appraisal Foundation March 2013 Grant Reimbursement Request

Virgin Islands Compliance Review

West Virginia Compliance Review

Florida Compliance Review

Acknowledgement

How to Attend and Observe an ASC meeting: Email your name, organization and contact information to *meetings@asc.gov.* You may also send a written request via U.S. Mail, fax or commercial carrier to the Executive Director of the ASC, 1401 H Street NW., Ste 760, Washington, DC 20005. The fax number is 202–289–4101. Your request must be received no later than 4:30 p.m., ET, on the Monday prior to the meeting. Attendees must have a valid government-issued photo ID and must agree to submit to reasonable security measures. The meeting space is intended to accommodate public attendees. However, if the space will not accommodate all requests, the ASC may refuse attendance on that reasonable basis. The use of any video or audio tape recording device, photographing device, or any other electronic or mechanical device designed for similar purposes is prohibited at ASC meetings.

Dated: May 30, 2013.

James R. Park,

Executive Director.

[FR Doc. 2013–13201 Filed 6–3–13; 8:45 am]

BILLING CODE 6700–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Announcement of Requirements and Registration for ''Blue Button Co-Design Challenge''

AGENCY: Office of the National Coordinator for Health Information Technology, HHS.

ACTION: Notice.

Award Approving Official: Farzad Mostashari, National Coordinator for Health Information Technology.

SUMMARY: *Blue Button Plus* represents the technical standards and policy levers that help patients make use of their clinical and financial data in technology such as personal health records and health apps. All patients whose providers use Meaningful Use Stage 2 certified technology have the ability to view, download, and securely transmit their clinical data from their provider's Electronic Health Record into another product or holding place of their choice. This is an enormous opportunity for patient-facing, data receiver applications that previously struggled to collect complete and accurate clinical data without manual patient entry.

As part of the Department of Health and Human Services digital services strategy, the Office of the National Coordinator for Health Information Technology (ONC) is launching the Blue Button Co-Design Challenge, intended to increase the number of priority patient-facing applications able to receive clinical data via Blue Button Plus. The Challenge will also uniquely engage the patient community to teach us what patients most want to do with their clinical data by crowdsourcing application ideas and incorporating patients in product design.

The Blue Button Co-Design Challenge builds upon previous ONC activities to support consumer health and patient access to their data. These include Challenges such as *Blue Button for All Americans,* the *Blue Button Mash Up Challenge,* and the *Health Design Challenge.*

The statutory authority for this challenge competition is Section 105 of the America COMPETES Reauthorization Act of 2010 (Pub. L. 111–358).

DATES: Patient Applications category:

- June 3: Challenge announced at Health DataPalooza
- August 5: End of Patient Applications submission period
- September: Announce Patient Applications winners

Open Source Developer Tools category:

- June 3: Challenge announced at Health DataPalooza
- July 8: End of Developer Tools submission period
- July 22–26: Announce Developer Tools winners

FOR FURTHER INFORMATION CONTACT: Adam Wong, 202–720–2866.

SUPPLEMENTARY INFORMATION:

Subject of Challenge Competition

The goals of the Blue Button Co-Design Challenge are:

- Build support for Blue Button Plus by engaging three crucial communities:

a. Patients through crowd sourcing of application ideas, co-design, and public voting on winning products

b. Companies and application builders through a public competition and prize money

c. Developers by rewarding open source developer tools that make it easier to build Blue Button Plus enabled applications

- Expand our understanding of how patients want to use their clinical data, and what products they want to see developed.
- Increase the number of fully enabled, Blue Button Plus tools and applications in areas of high priority for patients.

In order to accomplish these goals, the challenge will award prizes in two separate categories:

1. The Patient Applications category will use crowd sourced application ideas as the topics for application development. From the launch of the challenge to June 7, anyone may post ideas for applications (no more than 75 words), focusing on the use of patient data enabled by Blue Button, on the ideation forum. Concurrently, the public will have until June 11 to vote on their favorite ideas, the top three of which will be announced as the topics for the patient applications and integrated into the submission review criteria. Submissions must be posted on a co-design Web site where entrants will participate in the co-design process, incorporating public input and feedback with potential end users, patients, and patient advocates. First, second, and third place awards will be given to the three best applications.

To be eligible to receive a prize, applications submitted must:

- Demonstrate use of Blue Button Plus to receive patient clinical or financial data into an existing or new application
- Display the Blue Button logo
- Include a slide deck that describes how patients would use this application, which of the crowdsourced product ideas inspired this application, and how patient co-design impacted the final product.

2. The Open Source Developer Tools category is intended to ease the implementation of Blue Button Plus for future applications, and engage developers around standards such as consolidated CDA and DIRECT. Three winners will receive awards and the winning tools will be made available through open source licenses.

Eligibility Rules for Participating in the Competition

To be eligible to win a prize under this challenge, an individual or entity—

(1) Shall have registered to participate in the competition under the rules promulgated by the Office of the National Coordinator for Health Information Technology.

(2) Shall have complied with all the requirements under this section.

(3) In the case of a private entity, shall be incorporated in and maintain a primary place of business in the United States, and in the case of an individual, whether participating singly or in a group, shall be a citizen or permanent resident of the United States.

(4) May not be a Federal entity or Federal employee acting within the scope of their employment.

(5) Shall not be an HHS employee working on their applications or submissions during assigned duty hours.

(6) Shall not be an employee of Office of the National Coordinator for Health IT.

(7) Federal grantees may not use Federal funds to develop COMPETES Act challenge applications unless consistent with the purpose of their grant award.

(8) Federal contractors may not use Federal funds from a contract to develop COMPETES Act challenge applications or to fund efforts in support of a COMPETES Act challenge submission.

An individual or entity shall not be deemed ineligible because the individual or entity used Federal facilities or consulted with Federal employees during a competition if the facilities and employees are made available to all individuals and entities participating in the competition on an equitable basis.

Entrants must agree to assume any and all risks and waive claims against the Federal Government and its related entities, except in the case of willful misconduct, for any injury, death, damage, or loss of property, revenue, or profits, whether direct, indirect, or consequential, arising from my participation in this prize contest, whether the injury, death, damage, or loss arises through negligence or otherwise.

Entrants must also agree to indemnify the Federal Government against third party claims for damages arising from or related to competition activities.

Registration Process for Participants

To register for this challenge participants can access either the *http://www.challenge.gov* Web site and search for the challenge's title, or the ONC Investing in Innovation Challenge Web site at *http://www.health2con.com/devchallenge/challenges/onc-i2-challenges/.*

Amount of the Prize

- Total prizes: $50,000
- Patient Applications:
  - First Place: $20,000
  - Second Place: $10,000
  - Third Place: $5,000
- Developer Tools: $5,000 each to the three best solutions

Awards may be subject to Federal income taxes and HHS will comply with IRS withholding and reporting requirements, where applicable.

Payment of the Prize

Prize will be paid by contractor.

Basis Upon Which Winner Will Be Selected

The review panel will make selections based upon the following criteria:

Open Source Developer Tools

- Code readability, maintainability, and extensibility
- Quality of code documentation
- Value added by the tool

The winners of the Patient Applications category will be determined by a combination of the review panel (two-thirds) and public voting (one-third); public voting will be enabled on the co-design site upon closing of the submission period on August 5.

Patient Applications

- Innovative use and integration of Blue Button Plus
- Innovative use of Blue Button patient data
- Application design and ease-of-use
- Relevance to crowd-sourced ideas and participation in co-design

In order for an entry to be eligible to win this Challenge, it must meet the following requirements:

1. General—Contestants must provide continuous access to the application, a detailed description of the application, instructions on how to install and operate the application, and system requirements required to run the application (collectively, ''Submission'').

2. Blue Button Plus—Blue Button Plus must be fully enabled within the application, and the Blue Button logo displayed.

3. HHS, ONC logo—The tool must not use HHS' or ONC's logos or official seals in the Submission, and must not claim endorsement.

4. Acceptable platforms—The tool must be designed for use with existing web, mobile, voice, electronic health record, or other platform for supporting interactions of the content provided with other capabilities.

5. Section 508 Compliance—Contestants must acknowledge that they understand that, as a pre-requisite to any subsequent acquisition by FAR contract or other method, they may be required to make their proposed solution compliant with Section 508 accessibility and usability requirements at their own expense. Any electronic information technology that is ultimately obtained by HHS for its use, development, or maintenance must meet Section 508 accessibility and usability standards. Past experience has demonstrated that it can be costly for solution-providers to ''retrofit'' solutions if remediation is later needed. The HHS Section 508 Evaluation Product Assessment Template, available at *http://www.hhs.gov/web/508/contracting/technology/vendors.html,* provides a useful roadmap for developers to review. It is a simple, web-based checklist utilized by HHS officials to allow vendors to document how their products do or do not meet the various Section 508 requirements.

6. Functionality/Accuracy—A Submission may be disqualified if the application fails to function as expressed in the description provided by the user, or if the application provides inaccurate or incomplete information.

7. Security—Submissions must be free of malware. Contestant agrees that ONC may conduct testing on the application to determine whether malware or other security threats may be present. ONC may disqualify the application if, in ONC's judgment, the application may damage government or others' equipment or operating environment.

Additional Information

Ownership of intellectual property is determined by the following:

- Patient Application category entrants retain title and full ownership in and to their submission. Entrants expressly reserve all intellectual property rights not expressly granted under the challenge agreement.
- Developer Tools category entrants are required to post their tools on GitHub to be made available via open source.
- By participating in the challenge, each entrant hereby irrevocably grants to Sponsor and Administrator a limited, non-exclusive, royalty-free, worldwide license and right to reproduce, publically perform, publically display, and use the Submission to the extent necessary to administer the challenge, and to publically perform and publically display the Submission, including, without limitation, for advertising and promotional purposes relating to the challenge.

Authority: 15 U.S.C. 3719

Dated: May 28, 2013.

Farzad Mostashari,

National Coordinator for Health Information Technology.

[FR Doc. 2013–13128 Filed 6–3–13; 8:45 am]

BILLING CODE 4150–45–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Assistant Secretary for Planning and Evaluation; Advisory Council on Alzheimer's Research, Care, and Services

AGENCY: Office of the Assistant Secretary for Planning and Evaluation, Department of Health and Human Services.

ACTION: Request for Nominations.

SUMMARY: HHS is soliciting nominations for a new, non-Federal member of the Advisory Council on Alzheimer's Research, Care, and Services. Specifically, the position is for someone with a diagnosis of Alzheimer's disease or a related dementia. Nominations should include the nominee's contact information (current mailing address, email address, and telephone number) and current curriculum vitae or resume. Nominations submitted within the past 6 months for other positions on the Advisory Council on Alzheimer's Research, Care, and Services will be considered for this position.

DATES: Submit nominations by email or FedEx or UPS before COB on June 14, 2013.

ADDRESSES: Nominations should be sent to Helen Lamont at *helen.lamont@hhs.gov;* Helen Lamont, Ph.D., Office of the Assistant Secretary for Planning and Evaluation, Room 424E Humphrey Building, Department of Health and Human Services, 200 Independence Avenue SW., Washington, DC 20201.

FOR FURTHER INFORMATION CONTACT: Helen Lamont (202) 690–7996, *helen.lamont@hhs.gov.*

SUPPLEMENTARY INFORMATION: The Advisory Council on Alzheimer's Research, Care, and Services meets quarterly to discuss programs that impact people with Alzheimer's disease and related dementias and their caregivers. The Advisory Council makes recommendations about ways to reduce the financial impact of Alzheimer's disease and related dementias and to improve the health outcomes of people with these conditions. The Advisory Council provides feedback on the National Plan to Address Alzheimer's Disease. On an annual basis, the Advisory Council shall evaluate the implementation of the recommendations through an updated national plan.

The Advisory Council consists of designees from Federal agencies including the Centers for Disease Control and Prevention, Administration on Aging, Centers for Medicare and Medicaid Services, Indian Health Service, Office of the Director of the National Institutes of Health, National Science Foundation, Department of Veterans Affairs, Food and Drug Administration, Agency for Healthcare Research and Quality, and the Surgeon General. The Advisory Council also consists of 13 non-federal members selected by the Secretary who are Alzheimer's patient advocates (2), Alzheimer's caregivers (2), health care providers (2), representatives of State health departments (2), researchers with Alzheimer's-related expertise in basic, translational, clinical, or drug development science (2), voluntary health association representatives (2), and a person with a diagnosis of Alzheimer's disease or a related dementia. Members serve as Special Government Employees. This announcement is seeking nominations for a person with a diagnosis of Alzheimer's disease or a related dementia who is not a Federal employee. This person will serve a two-year term.

Dated: May 28, 2013.

Donald B. Moulds,

Acting Assistant Secretary for Planning and Evaluation.

[FR Doc. 2013–13127 Filed 6–3–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0271]

Availability of Masked and De-identified Non-Summary Safety and Efficacy Data; Request for Comments

ACTION: Notice; request for comments.

AGENCY: Food and Drug Administration, HHS.

SUMMARY: The Food and Drug Administration (FDA) is seeking public comments from interested persons on the proposed availability of de-identified and masked data derived from medical product applications. Improving the efficiency and

effectiveness of medical product development is a national priority. The ability to make available de-identified and masked clinical and preclinical data derived from marketing applications could make an important contribution to that goal by providing scientific data that may be of value in the generation of new knowledge to facilitate innovation in the development and evaluation of critically needed medical products. The contribution of patients who participate in clinical trials should be maximized for the benefit of society. The Agency invites comments on the issues to be considered with regard to such availability and on any limitations that should be placed on the availability of these data.

DATES: Submit either electronic or written comments by August 5, 2013.

ADDRESSES: Submit electronic comments to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. All comments should be identified with the docket number found in brackets at the heading of this document.

FOR FURTHER INFORMATION CONTACT: Nancy B. Sager, Center for Drug Evaluation and Research, Food and Drug Administration, 10001 New Hampshire Ave., HILL–3110, Silver Spring, MD 20993, 301–796–3603, FAX: 301–431–6351, *Nancy.sager@fda.hhs.gov;* or Stephen Ripley, Center for Biologics Evaluation and Research (HFM–17), Food and Drug Administration, 1401 Rockville Pike, suite 200N, Rockville, MD 20852–1448, 301–827–6210; or Aaliyah Eaves-Leanos, Center for Devices and Radiological Health, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 66, rm. 5435, 301–796–2948, FAX: 301–847–8510. *Aaliyah.Eaves-Leanos@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Commissioner of Food and Drugs Margaret Hamburg has emphasized FDA's role as a public health Agency (Ref. 1). In accordance with its responsibility to promote the public health, FDA has, in collaboration with the National Institutes of Health, launched the Regulatory Science Initiative, a call to action to enhance the science and knowledge critical to improving the development, manufacture, evaluation, and safe use of critically needed new therapies. In addition, the Food and Drug Administration Safety and Innovation Act (FDASIA), enacted on July 9, 2012, contains important new authorities that will enhance the Agency's ability to promote innovation across industry, research and clinical care settings, including new provisions that require the development of a plan for advancing regulatory science for medical products in order to promote the public health and advance innovation in regulatory decision making. (See, e.g., section 1124 of FDASIA (Pub. L. 112–144).)

The development of new knowledge and insights from clinical and preclinical study data is an important regulatory science opportunity. These data have a tremendous potential to help address critical challenges and provide new opportunities for innovation in medical product development, including for human drugs, medical devices, and biological products. Safety and effectiveness data from multiple studies have been used in the past to address key hurdles in drug development. Analysis of data from multiple clinical and preclinical studies has been used to identify potentially valid endpoints for clinical trials, understand the predictive value of preclinical models, clarify how medical products work in different diseases, and inform development of novel clinical designs and endpoints to the benefit of patients.

For example, the primary endpoint for chronic hepatitis C trials has been based on detection of hepatitis C virus at week 24 of follow up. Evidence suggested that assessing the response at earlier follow up time points may provide an equivalent measurement of drug response. FDA scientists conducted an analysis of the combined data from 15 clinical trials and 3 pediatric trials from 5 drug development programs to determine whether assessments conducted at earlier time points could provide results that were predictive of the outcomes at 24 weeks of follow up (Ref. 2). The sustained virologic response measurements at 12 and 24 weeks of follow up were concordant across a large population database involving multiple trials, viral genotypes, treatment regimens, and durations. The sustained virologic response at 12 weeks of follow up was determined to be suitable as a primary endpoint in clinical trials and allows for hepatitis C virus treatment options to be available earlier for patients suffering from this disease. The sustained virologic response at 4 weeks of follow up may have utility in guiding dose and treatment strategies when designing registration trials. The use of earlier time points for key regulatory decisions and dose selection may facilitate drug development for additional therapeutics under investigation.

In addition to identification of additional endpoints for clinical studies, pooled data (both preclinical and clinical) have also been applied to the analysis of safety issues. An analysis of 199 clinical trials of 11 antiepileptic drugs by FDA helped quantify the increased risk of suicidal behavior or ideation for patients and prescribers. (Statistical Review and Evaluation: Antiepileptic Drugs and Suicidality (May 23, 2008): *http://www.fda.gov/downloads/Drugs/DrugSafety/PostmarketDrugSafetyInformationforPatientsandProviders/UCM192556.pdf.*) An independent analysis of data on 5 potential biomarkers of kidney injury by the Predictive Safety Testing Consortium led to their qualification for inclusion in pre-clinical safety data submissions (Ref. 3). These markers are now being evaluated for their utility as more sensitive markers of early kidney damage in human clinical trials. Thus, advances in regulatory science can arise from analysis of diverse data submitted as part of marketing applications, including, for example data related to clinical outcomes, safety, biomarker status, drug disposition, drug action, or patient reported outcomes. (See, e.g., 21 CFR 314.50 (specifying the content of new drug applications).)

FDA has considerable expertise in analyzing individual patient level and aggregated clinical trial data, but recognizes the potential to further advance regulatory science by allowing other experts the opportunity to contribute to these efforts. To fully realize the potential of these data, experts outside of FDA would need to become actively engaged in the research. FDA is considering approaches to providing access by non-FDA experts and other interested parties to data that have research value in a way that would both safeguard the privacy interests of patients enrolled in clinical trials, and appropriately protect the commercial investments of sponsors.

Consistent with and in furtherance of the objectives and mission of Commissioner Hamburg's Transparency Initiative, FDA intends to consider the extent and nature of public availability of de-identified and masked subject level data necessary to achieve specific aims. For more information on the Transparency Initiative, see *http://www.fda.gov/AboutFDA/Transparency/TransparencyInitiative/default.htm.*

FDA uses the term ''masked data'' in this notice to refer to data with information removed that could link it to a specific product or application. The Agency will consider different strategies

to minimize the ability to identify specific products and the impact of any such strategies. Such strategies might include making available certain data from a random sample or appropriately chosen subset of subjects, restricting the data fields made available or pooling data where possible from studies of multiple members of a product class, without identifying the specific product.

For the purposes of this notice, de-identified data refers to data that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual. Cf. 45 CFR 164.514(a) (although FDA references the standard used in the Privacy Rule here, the Agency notes that it is not a covered entity for the purposes of that Rule). The Agency has an unwavering commitment to protecting the privacy of research subjects' identities. As such, consistent with FDA's regulations at 21 CFR 20.63(a), any data that might be made available under this proposal would be stripped of any information which could identify patients or research subjects, either directly or through combination with other publicly available information. See id. (''The names and other information which would identify patients or research subjects . . . shall be deleted before the record is made available for public disclosure.'') This same regulation also directs outside parties to remove such personal identifiers from records prior to submission to FDA. (See § 20.63(b).)

De-identified and masked data could be used to advance public health. For example, a model of disease progression in control arms of future studies could be based on pooled control group data from past studies of the same disease or indication and would not require identification of a product or even product class nor would there be personal identifiers associated with the data. Similarly, characterization of risk factors might only involve control group data. On the other hand, validating a biomarker as a surrogate for a clinical outcome or as a predictive classifier of potential treatment response might require identification of products by class or analysis across a class to show consistency.

We note that this proposal contemplates the availability of certain data after appropriate steps have been taken to de-identify it and remove the data's link to a specific product, study, or application. This proposal does not pertain to unmasked safety and effectiveness data, (i.e., data that can be linked to a specific, identified application) including full study reports; the circumstances under which this information is disclosed is already specifically set forth in the Federal Food Drug and Cosmetic Act and FDA's regulations. Further, FDA will not make available business-related confidential commercial information contained in product applications, including but not limited to information concerning licensing agreements and information identifying suppliers, unless such information has already been publicly disclosed by the sponsor. Nor will the Agency make available trade secret information under this proposal. Such information will continue to be treated in a manner consistent with sections 301(j), 505(*l*), 520(c), 535(d), and 537(e) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 331(j), 351(*l*), 360j(c), 360*ll*(d), and 360nn); the Trade Secrets Act (18 U.S.C. 1905); and FDA's regulations (21 CFR 20.61, 314.430, 601.51, and 814.9).

II. Request for Comments

FDA is interested in receiving comments from the public on the following topics: (1) What factors should be considered in masking study data (e.g., data fields from regulatory submissions to remove or modify, number of different products to pool within a product class), (2) what limitations, if any, should there be on the Agency's ability to make available the masked data as described previously, (3) are there any additional factors FDA should consider in de-identifying data in addition to FDA's requirement to remove any names and other information (e.g., birth date, death date, local geographic information, contact information) which would identify patients or research subjects before disclosing information, (4) would regulatory changes facilitate implementation of such a proposal, and if so, what changes would be most useful, and (5) which situations do you believe disclosing masked data would be most useful to advance public health?

Interested persons may submit either electronic comments regarding this document to *http://www.regulations.gov* or written comments to the Division of Dockets Management (see **ADDRESSES**). It is only necessary to send one set of comments. Identify the question your comment addresses by the number assigned to that question. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

III. References

The following references have been placed on display in the Division of Dockets Management (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday, and are available electronically at *http://www.regulations.gov.* (FDA has verified all the Web site addresses in this reference section, but we are not responsible for any subsequent changes to the Web sites after this document publishes in the **Federal Register**.)

1. Hamburg, M. A. and J. M. Sharfstein, ''The FDA as a Public Health Agency,'' *New England Journal of Medicine,* 2009 June 11; 360(24):2493–5.

2. Chen J., J. Florian, W. Carter, et al. ''Earlier Sustained Virologic Response End Points for Regulatory Approval and Dose Selection of Hepatitis C Therapies.'' *Gastroenterology,* 2013 March 4 *http://www.sciencedirect.com/science/article/pii/S0016508513002886*

3. Dieterle, F., et al., ''Renal Biomarker Qualification Submission: A Dialog Between the FDA–EMEA and Predictive Safety Testing Consortium,'' *Nature Biotechnology,* 2010 May; 28(5):455–62.

Dated: May 29, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–13083 Filed 6–3–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0001]

Arthritis Advisory Committee; Notice of Meeting

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

This notice announces a forthcoming meeting of a public advisory committee of the Food and Drug Administration (FDA). The meeting will be open to the public.

Name of Committee: Arthritis Advisory Committee.

General Function of the Committee: To provide advice and recommendations to the Agency on FDA's regulatory issues.

Date and Time: The meeting will be held on July 23, 2013, from 8 a.m. to 5:30 p.m.

Location: FDA White Oak Campus, 10903 New Hampshire Ave., Bldg. 31 Conference Center, the Great Room (rm.

1503), Silver Spring, MD 20993–0002. Information regarding special accommodations due to a disability, visitor parking, and transportation may be accessed at: *http://www.fda.gov/AdvisoryCommittees/default.htm;* under the heading ''Resources for You,'' click on ''Public Meetings at the FDA White Oak Campus.'' Please note that visitors to the White Oak Campus must enter through Building 1.

Contact Person: Cindy Hong, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 31, rm. 2417, Silver Spring, MD 20993–0002, 301–796–9001, Fax: 301–847–8533, email: *AAC@fda.hhs.gov,* or FDA Advisory Committee Information Line, 1–800–741–8138 (301–443–0572 in the Washington, DC area). A notice in the **Federal Register** about last minute modifications that impact a previously announced advisory committee meeting cannot always be published quickly enough to provide timely notice. Therefore, you should always check the Agency's Web site at *http://www.fda.gov/AdvisoryCommittees/default.htm* and scroll down to the appropriate advisory committee link, or call the advisory committee information line to learn about possible modifications before coming to the meeting.

Agenda: On July 23, 2013, during the morning session, the committee will discuss supplemental biologics license application (sBLA) 125057, HUMIRA (adalimumab) injection, by AbbVie Inc., for the proposed indication of reducing signs and symptoms in adult patients with active non-radiographic axial spondyloarthritis with objective signs of inflammation by elevated C-reactive protein or magnetic resonance imaging, who have had an inadequate response to, or are intolerant to, a nonsteroidal anti-inflammatory drug.

During the afternoon session, the committee will discuss sBLA 125160, certolizumab injection, by UCB, Inc., for the proposed indication of treatment of adult patients with active axial spondyloarthritis, including patients with ankylosing spondylitis.

FDA intends to make background material available to the public no later than 2 business days before the meeting. If FDA is unable to post the background material on its Web site prior to the meeting, the background material will be made publicly available at the location of the advisory committee meeting, and the background material will be posted on FDA's Web site after the meeting. Background material is available at *http://www.fda.gov/AdvisoryCommittees/Calendar/default.htm.* Scroll down to the appropriate advisory committee link.

Procedure: Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Written submissions may be made to the contact person on or before July 8, 2013. Oral presentations from the public will be scheduled between approximately 10:35 a.m. to 11:05 a.m., and 3:45 p.m. to 4:15 p.m. Those individuals interested in making formal oral presentations should notify the contact person and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time requested to make their presentation on or before June 27, 2013. Time allotted for each presentation may be limited. If the number of registrants requesting to speak is greater than can be reasonably accommodated during the scheduled open public hearing session, FDA may conduct a lottery to determine the speakers for the scheduled open public hearing session. The contact person will notify interested persons regarding their request to speak by June 28, 2013.

Persons attending FDA's advisory committee meetings are advised that the Agency is not responsible for providing access to electrical outlets.

FDA welcomes the attendance of the public at its advisory committee meetings and will make every effort to accommodate persons with physical disabilities or special needs. If you require special accommodations due to a disability, please contact Cindy Hong at least 7 days in advance of the meeting.

FDA is committed to the orderly conduct of its advisory committee meetings. Please visit our Web site at *http://www.fda.gov/AdvisoryCommittees/AboutAdvisoryCommittees/ucm111462.htm* for procedures on public conduct during advisory committee meetings.

Notice of this meeting is given under the Federal Advisory Committee Act (5 U.S.C. app. 2).

Dated: May 28, 2013.

Jill Hartzler Warner,

Acting Associate Commissioner for Special Medical Programs.

[FR Doc. 2013–13082 Filed 6–3–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2012–N–0212]

Tobacco Product Analysis; Scientific Workshop; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public workshop; request for comments.

The Food and Drug Administration (FDA), Center for Tobacco Products, is announcing a scientific workshop to obtain input on the chemical analysis of tobacco products. The analyses of tobacco products include developing test methods and evaluating method performance to ensure the results of the analyses are reliable and accurate. This scientific workshop will focus on understanding the testing of tobacco filler and smoke from cigarettes, roll-your-own (RYO) tobacco, and smokeless tobacco products for specific chemicals. FDA is also opening a public docket to receive comments on these topics.

Dates and Times: The public workshop will be held on July 30, 2013, from 8:30 a.m. to 5:30 p.m., and on July 31, 2013, from 8:30 a.m. to 4 p.m. Individuals who wish to attend the public workshop must register by close of business on July 1, 2013. Submit either electronic or written comments to the docket by September 30, 2013.

Location: The public workshop will be held at 9200 Corporate Blvd., Rockville, MD 20850, 1–877–287–1373.

Contact Person: Janie Kim, Office of Science, Center for Tobacco Products, Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD, 20850, 1–877–287–1373, FAX: 240–276–3761, email: *workshop.CTPOS@fda.hhs.gov.*

Registration to Attend the Workshop and Requests for Oral Presentations: If you wish to attend the workshop, make an oral presentation at the workshop, or view the free webcast, you must register by submitting an electronic or written request by July 1, 2013. Please submit electronic requests to *http://surveymonkey.com/s/3RGVYFT.* A confirmation email will be sent to your registered email at least 2 weeks prior to the workshop date. Those without email access may register by contacting Janie Kim (see *Contact Person*). Please provide contact information for each attendee, including name, title, affiliation, address, email address, and telephone number. Registration is free, but early registration is recommended because seating is limited. FDA may limit the number of participants from

each organization as well as the total number of participants based on space limitations. Registrants will receive confirmation once they have been accepted for the workshop. Onsite registration on the day of the workshop will be based on space availability. If registration reaches maximum capacity, FDA will post a notice closing registration for the workshop at *http://www.fda.gov/TobaccoProducts/NewsEvents/ucm238308.htm.*

There will be opportunities for audience participation at this workshop. FDA has included topics for comment in section II of this document. FDA will do its best to accommodate requests to speak during the workshop sessions, although questions from the audience may be limited. In addition, we strongly encourage submitting comments to the docket (see *Comments*).

If you need special accommodations due to a disability, please contact Janie Kim (see *Contact Person*) at least 7 days before the workshop.

Comments: Regardless of attendance at the public workshop, interested persons may submit comments on any of the topics for discussion in section II of this document by September 30, 2013. Submit electronic comments to *http://www.regulations.gov.* Submit written comments to the Division of Dockets Management (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Room 1061, Rockville, MD 20852. It is only necessary to send one set of comments. Identify comments with the docket number found in brackets in the heading of this document. Received comments may be seen in the Division of Dockets Management between 9 a.m. and 4 p.m., Monday through Friday, and will be posted to the docket at *http://www.regulations.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

In April 2012, FDA held a scientific workshop that focused on understanding how tobacco reference products and general testing methods are used to analyze tobacco products (77 FR 14814, March 13, 2012; for more information see *http://www.fda.gov/TobaccoProducts/NewsEvents/ucm291530.htm*). The scientific workshop that will be held on July 30 and July 31, 2013, will focus on understanding the testing of tobacco filler and smoke from cigarettes, RYO tobacco, and smokeless tobacco products for tar, nicotine, and carbon monoxide (TNCO), tobacco-specific nitrosamines (TSNAs), and polycyclic aromatic hydrocarbons (PAHs). The workshop will include discussion of the analytical methods used for measuring these constituents in tobacco products and smoke.

The workshop will include scientific experts who will present scientific and technical information on the testing of tobacco products. Such experts could include, but are not limited to, scientists from governmental agencies, academia, tobacco product manufacturers, and contract testing laboratories.

FDA is interested in receiving scientific information at the workshop and in the docket. Information from the scientific workshop may assist us in developing future scientific workshops regarding the analysis of tobacco products.

II. Workshop Topics for Discussion

The scientific workshop will include discussion of the analytical methods for measuring the following constituents in tobacco products and smoke:

- TNCO in cigarette smoke;
- TSNAs (total TSNAs, N-nitrosonornicotine) (NNN), and 4-(methylnitrosamino)-1-(-pyridyl)-1-butanone (NNK)) in smoke and tobacco filler (*i.e.,* cigarette, RYO, smokeless); and
- PAHs (benzo[a]pyrene, naphthalene, chrysene, benz[j]aceanthrylene, benzo[a]anthracene, benzo[b]fluoranthene, benzo[k]fluoranthene, benzo[c]phenanthrene, cyclopenta[cd]pyrene, dibenz[a,h]anthracene, dibenzo[a,e]pyrene, dibenzo[a,h]pyrene, dibenzo[a,i]pyrene, dibenzo[a,l]pyrene, indeno[1,2,3-cd]pyrene, and 5-methylchrysene) in smoke and tobacco filler (*i.e.,* cigarette, RYO, smokeless).

FDA would like to engage in detailed discussions on chemical test methods to understand the principles and aspects of these analyses. Aspects of analytical methods encompass solution preparation, extraction, separation, detection, and method performance parameters with criteria.

FDA will explore all or some of the following topics during this scientific workshop:

A. TNCO in Cigarette Smoke

1. A description of the different extraction steps used when analyzing cigarette smoke for TNCO.

2. Typical concentration ranges for TNCO and the potential method adjustments to accommodate different cigarette strengths and physical parameters.

3. The optimal solvents, extraction solution, standards, and reference tobacco product(s) typically used when analyzing TNCO.

4. The method variability and whether or not it is dependent upon different products in your portfolio.

5. The specific method challenges and limitations when testing TNCO, such as environmental moisture, water measurement variability, and extraction efficiency.

6. The major sources of variability (*e.g.,* smoking machine or regimen, sample preparation, separation, and detection).

B. TSNAs (Total, NNN, and NNK) in Tobacco Filler (Cigarette, RYO, Smokeless) and Cigarette Smoke

7. The different extraction steps used when analyzing TSNAs in tobacco filler, smokeless tobacco, and cigarette smoke particulate.

8. The optimal solvents, extraction solutions, standards, and reference tobacco product(s) needed during the extraction of TSNAs from tobacco filler or, as applicable, a Cambridge filter pad.

9. The rationale for using isotopically labeled internal standards, instead of targeted surrogates or external standards for TSNAs. The number of isotopically labeled internal standards needed to calculate the amount of TSNAs in a sample.

10. The challenges with isotopically labeled internal standards, including: (a) The commercial availability of internal standards or their analogs; (b) individual versus (vs.) mixture of internal standards; cost of internal standards; (c) deuterated vs. ^{13}C labeled internal standards; and (d) concerns of proton exchange with deuterated labeled internal standards.

11. The typical concentration ranges for total TSNAs, NNN, and NNK and any potential method adjustments to accommodate for different cigarette strengths and physical parameters.

12. The major sources of method variability, *e.g.,* include sources from the smoking machine or regimen, sample preparation, separation, and detection of different tobacco product types and strengths.

13. The specific method challenges and limitations when testing NNN and NNK.

14. The differences in separation, detection, and limits of detection/quantitation when comparing liquid chromatography/mass spectrometry and gas chromatography/thermal energy analyzer for TSNA analysis.

C. PAHs in Tobacco Filler (Cigarette, RYO, Smokeless) and Cigarette Smoke

For the PAHs benzo[a]pyrene, naphthalene, chrysene,

benz[j]aceanthrylene, benzo[a]anthracene, benzo[b]fluoranthene, benzo[k]fluoranthene, benzo[c]phenanthrene, cyclopenta[cd]pyrene, dibenz[a,h]anthracene, dibenzo[a,e]pyrene, dibenzo[a,h]pyrene, dibenzo[a,i]pyrene, dibenzo[a,l]pyrene, indeno[1,2,3-cd]pyrene, and 5-methylchrysene:

15. The different extraction steps used when analyzing PAHs in tobacco filler, smokeless tobacco, and cigarette smoke particulate and any applicable cleanup techniques used.

16. The optimal solvents, extraction solutions, standards, and reference tobacco product(s) needed during the extraction of PAHs from tobacco filler or, as applicable, a Cambridge filter pad.

17. The rationale for using isotopically labeled internal standards instead of targeted surrogates or external standards for PAHs. The number of isotopically labeled internal standards needed to calculate the amount of PAHs in a sample.

18. The challenges with isotopically labeled internal standards, including: (a) The commercial availability of internal standards or their analogs; (b) individual vs. mixture of internal standards, cost of internal standards; (c) deuterated vs. ^{13}C labeled internal standards; and (d) concerns of proton exchange with deuterated labeled internal standards.

19. The typical concentration ranges for each of the PAHs listed in this document and any potential method adjustments to accommodate for different cigarette strengths and physical parameters.

20. The major sources of method variability, *e.g.,* include sources from the smoking machine or regimen, sample preparation, separation, and detection of different tobacco product types and strengths.

21. The different methods necessary to separate and detect for PAHs. Provide the number of methods and steps typically used for each from extraction to detection.

22. The specific method challenges and limitations when analyzing testing PAHs, including: (a) Isomer separation and identification, (b) effects of tobacco blend, and (c) low vs. high molecular weight PAHs (volatility and sensitivity).

23. The differences in separation, detection, and limits of detection/quantitation when comparing gas chromatography/mass spectrometry, liquid chromatography/ultraviolet detection, and liquid chromatography/mass spectrometry for PAH analysis.

D. General Method Testing for TNCO, TSNAs, and PAHs in Tobacco Filler (Cigarette, RYO, Smokeless) and Cigarette Smoke

24. The solution stability for prepared solutions and procedures to ensure their integrity.

25. The typical storage conditions and shelf life (*i.e.,* expiration dates) for tobacco product standards and samples.

26. The standard, reference, or known sample solutions used as blanks or for quality control (QC), working, and check standards when testing TNCO, TSNAs, and PAHs.

27. The system suitability and acceptance criteria for each test method. The discussion may include calibration, QC, working, bracketing, and verification standards, confirmation ion ratio for mass spectrometry, chromatographic parameters (*i.e.,* retention times, tailing factor, or peak resolution), injector precision, and blanks.

28. The critical system suitability parameters that are critical when testing TNCO, TSNAs, and PAHs.

29. The actions taken when any system suitability criterion fails, including standards, QC, and subsequent sample analyses.

30. The typical run sequence when testing samples for TNCO, TSNAs, and PAHs.

31. The equations to calculate sample concentrations for TNCO, TSNAs, and PAHs.

32. Examples of chromatograms of reference standards and for measured TNCO, TSNAs, and PAHs in tobacco products.

E. Validation or Method Performance for TNCO, TSNAs, and PAHs in Tobacco Filler (Cigarette, RYO, Smokeless) and Cigarette Smoke

33. The specific details when evaluating each validation parameter, which may include limit of detection, limit of quantification, method detection limit, accuracy, recovery, linearity, range, precision (repeatability), and specificity.

34. The determination of each criterion for each validation parameter when evaluating TNCO, TSNAs, and PAHs.

35. The steps taken when validation parameter criteria are not met.

36. The validation parameters that are performed with reference tobacco products or standards.

37. The types and strengths of tobacco product samples used during validation and method development.

38. The process taken to revalidate a test method when changes to the method (*i.e.,* solvent, extraction method, or column) are made.

39. The validation process when using a rotary and linear smoking machine with a non-intense and intense smoking regimen.

40. The robustness or ruggedness tests that are conducted for extraction efficiency, solution stability, and small changes in instrument parameters.

III. Transcripts

Please be advised that as soon as a transcript is available, it will be accessible at *http://www.regulations.gov.* It may be viewed at the Division of Dockets Management (see *Comments*). A transcript will also be available in either hard copy or on CD–ROM, after submission of a Freedom of Information request. Written requests are to be sent to Division of Freedom of Information (HFI–35), Office of Management Programs, Food and Drug Administration, 5600 Fishers Lane, rm. 6–30, Rockville, MD 20857.

Dated: May 24, 2013.

Leslie Kux,

Assistant Commissioner for Policy.

[FR Doc. 2013–13084 Filed 6–3–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2013–N–0559]

Eli Lilly and Co.; Withdrawal of Approval of a New Drug Application for ORAFLEX

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is withdrawing approval of a new drug application (NDA) for ORAFLEX (benoxaprofen) Tablets, held by Eli Lilly and Co. (Lilly), Lilly Corporate Center, Indianapolis, IN 46285. Lilly has voluntarily requested that approval of this application be withdrawn, and has waived its opportunity for a hearing.

DATES: Effective June 4, 2013.

FOR FURTHER INFORMATION CONTACT: Martha Nguyen, Center for Drug Evaluation and Research, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 51, rm. 6250, Silver Spring, MD 20993–0002, 301–796–3601.

SUPPLEMENTARY INFORMATION: On April 19, 1982, FDA approved ORAFLEX (benoxaprofen) Tablets, a nonsteroidal

anti-inflammatory drug indicated for the treatment of arthritis. On August 4, 1982, Lilly voluntarily withdrew ORAFLEX (benoxaprofen) Tablets from the market because of postmarketing reports of severe liver toxicity in patients who took ORAFLEX. In a letter dated February 6, 2013, Lilly requested that FDA withdraw approval of NDA 18–250 for ORAFLEX (benoxaprofen) Tablets under § 314.150(d) (21 CFR 314.150(d)). In that letter, Lilly waived any opportunity for a hearing otherwise provided under § 314.150(a). In FDA's letter of February 15, 2013, the Agency acknowledged Lilly's agreement to permit FDA to withdraw approval of ORAFLEX (benoxaprofen) Tablets under § 314.150(d) and waive its opportunity for a hearing.

Therefore, under section 505(e) of the Federal Food, Drug, and Cosmetic Act (FD&C Act) (21 U.S.C. 355(e)) and § 314.150(d), and under authority delegated by the Commissioner of Food and Drugs to the Director, Center for Drug Evaluation and Research, approval of NDA 18–250, and all amendments and supplements thereto, is withdrawn (see DATES). Distribution of this product in interstate commerce without an approved application is illegal and subject to regulatory action (see sections 505(a) and 301(d) of the FD&C Act (21 U.S.C. 355(a) and 331(d)).

Dated: May 28, 2013.

Janet Woodcock,

Director, Center for Drug Evaluation and Research.

[FR Doc. 2013–13053 Filed 6–3–13; 8:45 am]

BILLING CODE 4160–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Eunice Kennedy Shriver National Institute of Child Health & Human Development; Notice of Meeting

Pursuant to section 10(a) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of a meeting of the National Children's Study Advisory Committee.

The meeting will be open to the public, with attendance limited to space available. Registration is required since space is limited and will begin at 8:00 a.m. Please visit the conference Web site for information on meeting logistics and to register for the meeting at meeting *http://www.cvent.com/d/3cq6zz.* Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should notify the Contact Person listed below in advance of the meeting.

Name of Committee: National Children's Study Advisory Committee.

Date: July 23, 2013.

Time: 9:00 a.m. to 4:30 p.m.

Agenda: The Committee will receive an update on the current status of Vanguard Study and will discuss general data collection methods and retention strategy and methods.

Place: National Institutes of Health, Natcher Conference Center, Room E1/E2, 45 Center Drive, Bethesda, MD 20892.

Contact Person: Kate Winseck, MSW, Executive Secretary, National Children's Study, Eunice Kennedy Shriver National Institute of Child Health and Human Development, NIH, 6100 Executive Blvd., Room 5C01, Bethesda, MD 20892, (703) 902–1339, *ncs@circlesolutions.com.*

Any interested person may file written comments with the committee by forwarding the statement to the Contact Person listed on this notice. The statement should include the name, address, telephone number and when applicable, the business or professional affiliation of the interested person. For additional information about the Federal Advisory Committee meeting, please contact Circle Solutions at *ncs@circlesolutions.com.*

In the interest of security, NIH has instituted stringent procedures for entrance onto the NIH campus. All visitor vehicles, including taxicabs, hotel, and airport shuttles will be inspected before being allowed on campus. Visitors will be asked to show one form of identification (for example, a government-issued photo ID, driver's license, or passport) and to state the purpose of their visit.

(Catalogue of Federal Domestic Assistance Program Nos. 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research; 93.209, Contraception and Infertility Loan Repayment Program, National Institutes of Health, HHS)

Dated: May 29, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–13123 Filed 6–3–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings. The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Systemic Injury by Environmental Exposure.

Date: June 11, 2013.

Time: 1:00 p.m. to 2:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency Bethesda, One Bethesda Metro Center, 7400 Wisconsin Avenue, Bethesda, MD 20814.

Contact Person: Bonnie L Burgess-Beusse, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2182, MSC 7818, Bethesda, MD 20892, 301–435–1783, b*eusseb@mail.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Stroke, Spinal Cord Injury, and Neuroimmunology.

Date: June 14, 2013.

Time: 2:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Samuel C Edwards, Ph.D., IRG CHIEF, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5210, MSC 7846, Bethesda, MD 20892, (301) 435–1246, *edwardss@csr.nih.gov.*

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: May 29, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–13124 Filed 6–3–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; ''Clinical Trials Units for NIAID Networks'' (Meeting 3).

Date: June 26, 2013.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6700B Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Dharmendar Rathore, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institutes of Health/NIAID, 6700B Rockledge Drive, MSC 7616, Rm 3134, Bethesda, MD 20892–7616, 301–435–2766, *rathored@mail.nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Clinical Trials Units for NIAID Networks (UM1).

Date: June 27, 2013.

Time: 9:00 a.m. to 12:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 2C07, 1041 Fernwood Drive, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Eugene R. Baizman, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, NIAID/NIH/DHHS, 6700B Rockledge Drive, MSC 7616, Bethesda, MD 20892, 301–402–1464, *eb237e@nih.gov.*

Name of Committee: National Institute of Allergy and Infectious Diseases Special Emphasis Panel; Clinical Trials Units for NIAID Networks.

Date: June 28, 2013.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6700A Rockledge Drive, Bethesda, MD 20817, (Telephone Conference Call).

Contact Person: Robert C. Unfer, Ph.D., Scientific Review Officer, Scientific Review Program, DEA/NIAID/NIH/DHHS, 6700–B Rockledge Dr., MSC–7616, Bethesda, MD 20892–7616, 301–496–2550, *robert.unfer@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: May 29, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–13120 Filed 6–3–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed 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: Heart, Lung, and Blood Initial Review Group; Clinical Trials Review Committee.

Date: June 24–25, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Courtyard by Marriott, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Keary A Cope, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7190, Bethesda, MD 20892–7924, 301–435–2222, *copeka@mail.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; Cardiovascular Risk Reduction.

Date: June 24, 2013.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: The William F. Bolger Center, 9600 Newbridge Drive, Potomac, MD 20854.

Contact Person: Giuseppe Pintucci, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7192, Bethesda, MD 20892, 301–435–0287, *Pintuccig@nhlbi.nih.gov.*

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel; NHLBI T32 Institutional Training Grants.

Date: June 25, 2013.

Time: 11:00 a.m. to 1:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Stephanie L Constant, Ph.D., Scientific Review Officer, Office of Scientific Review/DERA, National Heart, Lung, and Blood Institute, 6701 Rockledge Drive, Room 7189, Bethesda, MD 20892, 301–443–8784, *constantsl@nhlbi.nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: May 29, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–13122 Filed 6–3–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Population Sciences and Epidemiology.

Date: June 27–28, 2013.

Time: 9:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Mary Ann Guadagno, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3170, MSC 7770, Bethesda, MD 20892, (301) 451–8011, *guadagma@csr.nih.gov.*

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflict: Neurodegenerative and Neurodevelopmental Disorders.

Date: June 28, 2013.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Alexander Yakovlev, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5206, MSC 7846, Bethesda, MD 20892, 301–435–1254, *yakovleva@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Development of Appropriate Pediatric Formulations and Pediatric Drug Delivery System.

Date: June 28, 2013.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Robert C Elliott, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 3130, MSC 7850, Bethesda, MD 20892, 301–435–3009, *elliotro@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: May 29, 2013.

David Clary,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–13125 Filed 6–3–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. App.), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel; PAR Panel: Selected Topics in Transfusion Medicine.

Date: June 24–25, 2013.

Time: 11:30 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Virtual Meeting).

Contact Person: Bukhtiar H Shah, DVM, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4120, MSC 7802, Bethesda, MD 20892, 301–806–7314, *shahb@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Resource Center: Proteomics.

Date: July 1–3, 2013.

Time: 7:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hilton Madison Monona Terrace, 9th East Wilson Street, Madison, WI 53703.

Contact Person: Maria DeBernardi, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 6158, MSC 7892, Bethesda, MD 20892, 301–435–1355, *debernardima@csr.nih.gov*.

Name of Committee: Center for Scientific Review Special Emphasis Panel; Member Conflicts: Kidney and Urological Sciences.

Date: July 2, 2013.

Time: 1:00 p.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, 6701 Rockledge Drive, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Atul Sahai, Ph.D., Scientific Review Officer, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 2188, MSC 7818, Bethesda, MD 20892, 301–435–1198, *sahaia@csr.nih.gov*.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine; 93.333, Clinical Research, 93.306, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: May 29, 2013.

Michelle Trout,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2013–13121 Filed 6–3–13; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Substance Abuse and Mental Health Services Administration

Current List of Laboratories and Instrumented Initial Testing Facilities Which Meet Minimum Standards To Engage in Urine Drug Testing for Federal Agencies

AGENCY: Substance Abuse and Mental Health Services Administration, HHS.

ACTION: Notice.

SUMMARY: The Department of Health and Human Services (HHS) notifies Federal agencies of the Laboratories and Instrumented Initial Testing Facilities (IITF) currently certified to meet the standards of the Mandatory Guidelines for Federal Workplace Drug Testing Programs (Mandatory Guidelines). The Mandatory Guidelines were first published in the **Federal Register** on April 11, 1988 (53 FR 11970), and subsequently revised in the **Federal Register** on June 9, 1994 (59 FR 29908); September 30, 1997 (62 FR 51118); April 13, 2004 (69 FR 19644); November 25, 2008 (73 FR 71858); December 10, 2008 (73 FR 75122); and on April 30, 2010 (75 FR 22809).

A notice listing all currently certified Laboratories and Instrumented Initial Testing Facilities (IITF) is published in the **Federal Register** during the first week of each month. If any Laboratory/IITF's certification is suspended or revoked, the Laboratory/IITF will be omitted from subsequent lists until such time as it is restored to full certification under the Mandatory Guidelines.

If any Laboratory/IITF has withdrawn from the HHS National Laboratory Certification Program (NLCP) during the past month, it will be listed at the end and will be omitted from the monthly listing thereafter.

This notice is also available on the Internet at *http://www.workplace.samhsa.gov* and *http://www.drugfreeworkplace.gov.*

FOR FURTHER INFORMATION CONTACT: Mrs. Giselle Hersh, Division of Workplace Programs, SAMHSA/CSAP, Room 2–1042, One Choke Cherry Road, Rockville, Maryland 20857; 240–276–2600 (voice), 240–276–2610 (fax).

SUPPLEMENTARY INFORMATION: The Mandatory Guidelines were initially developed in accordance with Executive Order 12564 and section 503 of Public Law 100–71. The ''Mandatory Guidelines for Federal Workplace Drug Testing Programs'', as amended in the revisions listed above, requires strict standards that Laboratories and

Instrumented Initial Testing Facilities (IITF) must meet in order to conduct drug and specimen validity tests on urine specimens for Federal agencies.

To become certified, an applicant Laboratory/IITF must undergo three rounds of performance testing plus an on-site inspection. To maintain that certification, a Laboratory/IITF must participate in a quarterly performance testing program plus undergo periodic, on-site inspections.

Laboratories and Instrumented Initial Testing Facilities (IITF) in the applicant stage of certification are not to be considered as meeting the minimum requirements described in the HHS Mandatory Guidelines. A Laboratory/IITF must have its letter of certification from HHS/SAMHSA (formerly: HHS/NIDA) which attests that it has met minimum standards.

In accordance with the Mandatory Guidelines dated November 25, 2008 (73 FR 71858), the following Laboratories and Instrumented Initial Testing Facilities (IITF) meet the minimum standards to conduct drug and specimen validity tests on urine specimens:

Instrumented Initial Testing Facilities (IITF)

None.

Laboratories

ACL Laboratories, 8901 W. Lincoln Ave., West Allis, WI 53227, 414–328–7840/800–877–7016, (Formerly: Bayshore Clinical Laboratory).

ACM Medical Laboratory, Inc., 160 Elmgrove Park, Rochester, NY 14624, 585–429–2264.

Aegis Analytical Laboratories, 345 Hill Ave., Nashville, TN 37210, 615–255–2400, (Formerly: Aegis Sciences Corporation, Aegis Analytical Laboratories, Inc.).

Alere Toxicology Services, 1111 Newton St., Gretna, LA 70053, 504–361–8989/800–433–3823, (Formerly: Kroll Laboratory Specialists, Inc., Laboratory Specialists, Inc.).

Alere Toxicology Services, 450 Southlake Blvd., Richmond, VA 23236, 804–378–9130, (Formerly: Kroll Laboratory Specialists, Inc., Scientific Testing Laboratories, Inc.; Kroll Scientific Testing Laboratories, Inc.).

Baptist Medical Center-Toxicology Laboratory, 11401 I–30, Little Rock, AR 72209–7056, 501–202–2783, (Formerly: Forensic Toxicology Laboratory Baptist Medical Center).

Clinical Reference Lab, 8433 Quivira Road, Lenexa, KS 66215–2802, 800–445–6917.

Doctors Laboratory, Inc., 2906 Julia Drive, Valdosta, GA 31602, 229–671–2281.

DrugScan, Inc., 200 Precision Road, Suite 200, Horsham, PA 19044, 800–235–4890.

ElSohly Laboratories, Inc., 5 Industrial Park Drive, Oxford, MS 38655, 662–236–2609.

Fortes Laboratories, Inc., 25749 SW Canyon Creek Road, Suite 600, Wilsonville, OR 97070, 503–486–1023.

Gamma-Dynacare Medical Laboratories*, A Division of the Gamma-Dynacare Laboratory Partnership, 245 Pall Mall Street, London, ONT, Canada N6A 1P4, 519–679–1630.

Laboratory Corporation of America Holdings, 7207 N. Gessner Road, Houston, TX 77040, 713–856–8288/800–800–2387.

Laboratory Corporation of America Holdings, 69 First Ave., Raritan, NJ 08869, 908–526–2400/800–437–4986, (Formerly: Roche Biomedical Laboratories, Inc.).

Laboratory Corporation of America Holdings, 1904 Alexander Drive, Research Triangle Park, NC 27709, 919–572–6900/800–833–3984, (Formerly: LabCorp Occupational Testing Services, Inc., CompuChem Laboratories, Inc.; CompuChem Laboratories, Inc., A Subsidiary of Roche Biomedical Laboratory; Roche CompuChem Laboratories, Inc., A Member of the Roche Group).

Laboratory Corporation of America Holdings, 1120 Main Street, Southaven, MS 38671, 866–827–8042/800–233–6339, (Formerly: LabCorp Occupational Testing Services, Inc.; MedExpress/National Laboratory Center).

LabOne, Inc. d/b/a Quest Diagnostics, 10101 Renner Blvd., Lenexa, KS 66219, 913–888–3927/800–873–8845, (Formerly: Quest Diagnostics Incorporated; LabOne, Inc.; Center for Laboratory Services, a Division of LabOne, Inc.).

MedTox Laboratories, Inc., 402 W. County Road D, St. Paul, MN 55112, 651–636–7466/800–832–3244.

MetroLab-Legacy Laboratory Services, 1225 NE 2nd Ave., Portland, OR 97232, 503–413–5295/800–950–5295.

Minneapolis Veterans Affairs Medical Center, Forensic Toxicology Laboratory, 1 Veterans Drive, Minneapolis, MN 55417, 612–725–2088.

National Toxicology Laboratories, Inc., 1100 California Ave., Bakersfield, CA 93304, 661–322–4250/800–350–3515.

One Source Toxicology Laboratory, Inc., 1213 Genoa-Red Bluff, Pasadena, TX 77504, 888–747–3774, (Formerly: University of Texas Medical Branch, Clinical Chemistry Division; UTMB Pathology-Toxicology Laboratory).

Pacific Toxicology Laboratories, 9348 DeSoto Ave., Chatsworth, CA 91311, 800–328–6942, (Formerly: Centinela Hospital Airport Toxicology Laboratory).

Pathology Associates Medical Laboratories, 110 West Cliff Dr., Spokane, WA 99204, 509–755–8991/800–541–7891x7.

Phamatech, Inc., 10151 Barnes Canyon Road, San Diego, CA 92121, 858–643–5555.

Quest Diagnostics Clinical Laboratories d/b/a Advanced Toxicology Network, 3560 Air Center Cove, Suite 101, Memphis, TN 38118, 901–794–5770/888–290–1150, (Formerly: Advanced Toxicology Network).

Quest Diagnostics Incorporated, 1777 Montreal Circle, Tucker, GA 30084, 800–729–6432, (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).

Quest Diagnostics Incorporated, 400 Egypt Road, Norristown, PA 19403, 610–631–4600/877–642–2216, (Formerly: SmithKline Beecham Clinical Laboratories; SmithKline Bio-Science Laboratories).

Quest Diagnostics Incorporated, 8401 Fallbrook Ave., West Hills, CA 91304, 818–737–6370, (Formerly: SmithKline Beecham Clinical Laboratories).

Redwood Toxicology Laboratory, 3650 Westwind Blvd., Santa Rosa, CA 95403, 707–570–4434.

South Bend Medical Foundation, Inc., 530 N. Lafayette Blvd., South Bend, IN 46601, 574–234–4176 x1276.

Southwest Laboratories, 4625 E. Cotton Center Boulevard, Suite 177, Phoenix, AZ 85040, 602–438–8507/800–279–0027.

STERLING Reference Laboratories, 2617 East L Street, Tacoma, Washington 98421, 800–442–0438.

Toxicology & Drug Monitoring Laboratory, University of Missouri Hospital & Clinics, 301 Business Loop 70 West, Suite 208, Columbia, MO 65203, 573–882–1273.

U.S. Army Forensic Toxicology Drug Testing Laboratory, 2490 Wilson St.,

* The Standards Council of Canada (SCC) voted toend its Laboratory Accreditation Program for Substance Abuse (LAPSA) effective May 12, 1998. Laboratories certified through that program were accredited to conduct forensic urine drug testing as required by U.S. Department of Transportation (DOT) regulations. As of that date, the certification of those accredited Canadian laboratories will continue under DOT authority. The responsibility for conducting quarterly performance testing plus periodic on-site inspections of those LAPSA-accredited laboratories was transferred to the U.S. HHS, with the HHS' NLCP contractor continuing to

Fort George G. Meade, MD 20755–5235, 301–677–7085.

Upon finding a Canadian laboratory to be qualified, HHS will recommend that DOT certify the laboratory (**Federal Register**, July 16, 1996) as meeting the minimum standards of the Mandatory Guidelines published in the **Federal Register** on April 30, 2010 (75 FR 22809). After receiving DOT certification, the laboratory will be included in the monthly list of HHS-certified laboratories and participate in the NLCP certification maintenance program.

Janine Denis Cook,

Chemist, Division of Workplace Programs, Center for Substance Abuse Prevention, SAMHSA.

[FR Doc. 2013–13160 Filed 6–3–13; 8:45 am]

BILLING CODE 4160–20–P

DEPARTMENT OF THE INTERIOR

[FWS–R4–FHC–2013–N108; FVHC98130406900–XXX–FF04G01000]

Deepwater Horizon Oil Spill; Notice of Intent To Prepare a Programmatic Environmental Impact Statement for a Phase III Early Restoration Plan and Early Restoration Project Types, and To Conduct Scoping Meetings

AGENCY: Department of the Interior.

ACTION: Notice of Intent to conduct scoping.

SUMMARY: The federal and state natural resource trustees for the *Deepwater Horizon* oil spill (Trustees) intend to prepare a PEIS under the National Environmental Policy Act (NEPA) to evaluate the environmental consequences of early restoration project types, as well as the early restoration projects that the Trustees intend to propose in an upcoming Phase III Draft Early Restoration Plan (DERP). The Trustees intend to evaluate early restoration project types programmatically in the PEIS in order to allow the Trustees to better analyze cumulative effects of early restoration, and to tier NEPA analyses for future early restoration plans to the PEIS, where appropriate.

DATES: Public comments must be received by August 2, 2013. Public scoping meetings will be held as listed below. The Trustees will announce specific meeting locations and addresses to the public prior to the meetings, and will post the information on the web at *www.gulfspillrestoration.noaa.gov.*

Date	Location
June 24, 2013	Galveston, Texas.
June 27, 2013	Mobile, Alabama.
July 16, 2013	Long Beach, Mississippi.
July 18, 2013	Houma, Louisiana.
July 23, 2013	Washington, DC.
July 25, 2013	Pensacola, Florida.

ADDRESSES: *Submitting Comments:* You may submit scoping comments on the PEIS by any of the following methods:

- *Via the Web: http://www.gulfspillrestoration.noaa.gov.*
- *For electronic submission of comments containing attachments, email to: earlyrestorationcomments@fws.gov*
- *U.S. Mail:* c/o U.S. Fish and Wildlife Service, P.O, Box 2099, Fairhope, Alabama 36533. All written scoping comments must be received by the close of the scoping period to be considered.

FOR FURTHER INFORMATION CONTACT: Nanciann Regalado at *Nanciann_Regalado@fws.gov.*

SUPPLEMENTARY INFORMATION:

Introduction

On or about April 20, 2010, the mobile offshore drilling unit *Deepwater Horizon,* which was being used to drill a well for BP Exploration and Production Inc. (BP), in the Macondo prospect (Mississippi Canyon 252–MC252), exploded, caught fire and subsequently sank in the Gulf of Mexico, resulting in an unprecedented volume of oil and other discharges from the rig and from the wellhead on the seabed. The *Deepwater Horizon* oil spill is the largest oil spill in U.S. history, discharging millions of barrels of oil over a period of 87 days. In addition, well over one million gallons of dispersants were applied to the waters of the spill area in an attempt to disperse the spilled oil. An undetermined amount of natural gas was also released to the environment as a result of the spill.

The state and federal natural resource trustees (Trustees) are conducting the natural resource damage assessment (NRDA) for the *Deepwater Horizon* oil spill under the Oil Pollution Act 1990 (OPA; 33 U.S.C. 2701 et seq.). Pursuant to OPA, federal and state agencies act as trustees on behalf of the public to assess natural resource injuries and losses and to determine the actions required to compensate the public for those injuries and losses. OPA further instructs the designated trustees to develop and implement a plan for the restoration, rehabilitation, replacement, or acquisition of the equivalent of the injured natural resources under their trusteeship, including the loss of use and services from those resources from the time of injury until the time restoration to baseline (the resource quality and conditions that would exist if the spill had not occurred) is complete. Pursuant to the process articulated in the Framework Agreement for Early Restoration Addressing Injuries Resulting from the *Deepwater Horizon* Oil Spill (Framework Agreement), the Trustees have previously selected, and BP has agreed to fund, a total of ten early restoration projects, expected to cost a total of approximately $71 million, through the Phase I Early Restoration Plan/Environmental Assessment (Phase I ERP) and Phase II Early Restoration Plan/Environmental Review (Phase II ERP). These plans are available at: *http://www.gulfspillrestoration.noaa.gov/restoration/early-restoration/.*

The Trustees are:

- U.S. Department of the Interior (DOI), as represented by the National Park Service, U.S. Fish and Wildlife Service, and Bureau of Land Management;
- National Oceanic and Atmospheric Administration (NOAA), on behalf of the U.S. Department of Commerce;
- U.S. Department of Agriculture (USDA);
- U.S. Department of Defense (DOD);[1]
- U.S. Environmental Protection Agency (USEPA);
- State of Louisiana Coastal Protection and Restoration Authority, Oil Spill Coordinator's Office, Department of Environmental Quality, Department of Wildlife and Fisheries, and Department of Natural Resources;
- State of Mississippi Department of Environmental Quality;
- State of Alabama Department of Conservation and Natural Resources and Geological Survey of Alabama;
- State of Florida Department of Environmental Protection and Fish and Wildlife Conservation Commission; and
- For the State of Texas, Texas Parks and Wildlife Department, Texas General Land Office, and Texas Commission on Environmental Quality.

Background on Early Restoration

On April 20, 2011, BP agreed to provide up to $1 billion to fund early

have an active role in the performance testing and laboratory inspection processes. Other Canadian laboratories wishing to be considered for the NLCP may apply directly to the NLCP contractor just as U.S. laboratories do.

[1] Although a trustee under OPA by virtue of the proximity of its facilities to the *Deepwater Horizon* oil spill, DOD is not a member of the Trustee Council and does not participate in Trustee decision-making.

restoration projects in the Gulf of Mexico to begin addressing injuries to natural resources caused by the *Deepwater Horizon* oil spill. The Framework Agreement represents a preliminary step toward the restoration of injured natural resources and replacement of the lost use of those resources and their services. The Framework Agreement is intended to expedite the start of restoration in the Gulf in advance of the completion of the injury assessment process. The Framework Agreement provides a mechanism through which the Trustees and BP can work together ''to commence implementation of early restoration projects that will provide meaningful benefits to accelerate restoration in the Gulf as quickly as practicable'' prior to the resolution of the Trustees' natural resource damages claim. Early restoration is not intended to, and does not fully address all injuries caused by the Spill. Restoration beyond early restoration projects will be required to fully compensate the public for natural resource losses from the Spill.

The Trustees' key objective in pursuing early restoration is to secure tangible recovery of natural resources and natural resource services for the public's benefit while the longer-term process of fully assessing injury and damages is underway. As the first step in this accelerated process, the Trustees released, after public review of a draft, a Phase I ERP in April 2012. In December 2012, after public review of a draft, the Trustees released a Phase II ERP. Collectively, the Phase I and Phase II ERPs include a total of ten projects that were selected by the Trustees and, after negotiations in accordance with the terms of the Framework Agreement, agreed to by BP. Those restoration actions include nine separate projects that are ready for implementation, and one project that the Trustees have selected for completion for project design and final NEPA review. The Trustees have begun implementing many of the projects selected in the Phase I and Phase II ERPs.

Phase III Early Restoration

On May 6, 2013, NOAA issued a public notice in the **Federal Register** on behalf of the Trustees. The public notice announced the Trustees' intent to propose additional future early restoration projects for the purpose of continuing the process of using early restoration funding to restore natural resources, ecological services, and human use services injured or lost as a result of the *Deepwater Horizon* oil spill disaster. The Trustees expect to propose those early restoration projects, and potentially additional early restoration projects, to the public in a Phase III DERP, which will evaluate restoration alternatives under OPA, the Framework Agreement, and all applicable legal requirements. The Trustees intend to consider both ecological and human use restoration projects to restore injuries caused by the *Deepwater Horizon* oil spill, addressing the physical and biological environment as well as the relationship people have with the environment.

As noted above, the Trustees intend to prepare a PEIS in accordance with NEPA to evaluate the environmental consequences of restoration projects that the Trustees intend to propose in a Phase III DERP. In addition, the Trustees intend to evaluate early restoration project types in the PEIS in order to allow the Trustees to tier NEPA analyses for future early restoration projects to the PEIS, where appropriate. Examples of the early restoration project types the Trustees intend to evaluate in the PEIS could include: Create and improve wetlands; protect shorelines and reduce erosion; restore barrier islands and beaches; restore submerged aquatic vegetation; restore oysters; restore and protect finfish and shellfish; restore and protect birds; restore and protect sea turtles; enhance public access to natural resources for recreational use; enhance recreational experiences; promote environmental and cultural stewardship, education, and outreach; enhance management of recreational uses; and, remove and reduce land-based and marine debris.

Throughout the early restoration process, the Trustees have actively solicited public input on restoration project ideas through a variety of mechanisms, including public meetings, electronic communication, and creation of a Trustee-wide public Web site and database to share information and receive public project submissions. The Trustees received extensive comments and restoration project ideas during the scoping process for a comprehensive Gulf Spill Restoration PEIS prepared by NOAA on behalf of the Trustees in 2011 (76 FR 9327–9328). NOAA's preparation of a draft comprehensive Gulf Spill Restoration PEIS on behalf of the Trustees is intended to apply to all natural resource restoration following the completion of the NRDA, which is still underway. The PEIS that is the subject of this Notice of Intent is specifically and more narrowly focused on early restoration.

The purpose of the scoping process is to identify the concerns of the affected public and federal agencies, states, and Indian tribes, involve the public in the decision making process, facilitate efficient early restoration planning and environmental review, define the issues and alternatives that will be examined in detail, and save time by ensuring that draft documents adequately address relevant issues. The scoping process reduces paperwork and delay by ensuring that important issues are considered early in the decision making process. Following the scoping process, the Trustees will prepare a draft PEIS and Phase III DERP, at which time the public will be encouraged to comment on the document(s). Similar to the scoping process, public comment meetings will be held at that time to gather public input on the document(s).

Invitation To Comment

The Trustees seek public involvement in the scoping process and development of the PEIS. The Trustees invite public comment during the 60-day public comment period regarding the scope, content, and any significant issues the Trustees should consider in the PEIS.

Next Steps

Following scoping, the Trustees intend to release the draft PEIS and Phase III DERP by late 2013 or early 2014. At that time, the Trustees will invite public review and comment on the document(s).

Administrative Record

The documents comprising the Administrative Record can be viewed electronically at the following location: *http://www.doi.gov/deepwaterhorizon*.

Authority

The authority of this action is the National Environmental Policy Act (42 U.S.C. 4321 et seq.), the Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.), and the implementing Natural Resource Damage Assessment regulations found at 15 CFR part 990.

Kevin D Reynolds,

Acting DOI Authorized Official.

[FR Doc. 2013–13249 Filed 5–31–13; 11:15 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Wildland Fire Executive Council Meeting Schedule

AGENCY: Office of the Secretary, Interior.

ACTION: Notice of meeting.

SUMMARY: In accordance with the requirements of the Federal Advisory

Committee Act, 5 U.S.C. App., 2, the U.S. Department of the Interior, Office of the Secretary, Wildland Fire Executive Council (WFEC) will meet as indicated below.

DATES: The next meeting will be held June 25–26, 2013.

ADDRESSES: The meetings will be held from 9:00 a.m. to 5:00 p.m. on June 25–26, 2013 at the National Association of Counties, 25 Massachusetts Avenue NW., Suite 500, Washington, DC 20001.

FOR FURTHER INFORMATION CONTACT: Shari Eckhoff, Designated Federal Officer, 300 E Mallard Drive, Suite 170, Boise, Idaho 83706; telephone (208) 334–1552; fax (208) 334–1549; or email *Shari_Eckhoff@ios.doi.gov*.

SUPPLEMENTARY INFORMATION: The WFEC is established as a discretionary advisory committee under the authorities of the Secretary of the Interior and Secretary of Agriculture, in furtherance of 43 U.S.C. 1457 and provisions of the Fish and Wildlife Act of 1956 (16 U.S.C. 742a-742j), the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1701 *et. seq*), the National Wildlife Refuge System improvement Act of 1997 (16 U.S.C. 668dd-668ee), and the National Forest Management Act of 1976 (16 U.S.C. 1600 *et.seq*) and in accordance with the provisions of the Federal Advisory Committee Act, as amended, 5 U.S.C. App. 2. The Secretary of the Interior and Secretary of Agriculture certify that the formation of the WFEC is necessary and is in the public interest.

The purpose of the WFEC is to provide advice on coordinated national-level wildland fire policy and to provide leadership, direction, and program oversight in support of the Wildland Fire Leadership Council. Questions related to the WFEC should be directed to Shari Eckhoff (Designated Federal Officer) at *Shari_Eckhoff@ios.doi.gov* or (208) 334–1552 or 300 E. Mallard Drive, Suite 170, Boise, Idaho, 83706–6648.

Meeting Agenda: The meeting agenda will include: (1) Welcome and introduction of Council members; (2) Presentation and Deliberation on the Cohesive Strategy National Trade-off Analysis; (3) Public comments which will be scheduled for 4:30 p.m. to 5:00 p.m. each day; and (4) closing remarks. Participation is open to the public.

Public Input: All WFEC meetings are open to the public. Members of the public who wish to participate must notify Shari Eckhoff at *Shari_Eckhoff@ios.doi.gov* no later than the Friday preceding the meeting. Those who are not committee members and wish to present oral statements or obtain information should contact Shari Eckhoff via email no later than the Friday preceding the meeting. Depending on the number of persons wishing to comment and time available, the time for individual oral comments may be limited.

Questions about the agenda or written comments may be emailed or submitted by U.S. Mail to: Department of the Interior, Office of the Secretary, Office of Wildland Fire, Attention: Shari Eckhoff, 300 E. Mallard Drive, Suite 170, Boise, Idaho 83706–6648. WFEC requests that written comments be received by the Friday preceding the scheduled meeting. 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 Ms. Eckhoff at (202) 527–0133 at least seven calendar days prior to the meeting.

Dated: May 23, 2013.

Shari Eckhoff,

Designated Federal Officer.

[FR Doc. 2013–13131 Filed 6–3–13; 8:45 am]

BILLING CODE 4310–J4–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[FWS–R1–R–2013–N048; 12560–0000–10137 S3]

Bear Lake National Wildlife Refuge, Bear Lake County, ID, and Oxford Slough Waterfowl Production Area, Franklin and Bannock Counties, ID; Final Comprehensive Conservation Plan and Finding of No Significant Impact

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the availability of the final Comprehensive Conservation Plan (CCP) and Finding of No Significant Impact (FONSI) for the Environmental Assessment (EA) for the Bear Lake National Wildlife Refuge (NWR, refuge), 7 miles south of Montpelier, Idaho; the refuge-managed Thomas Fork Unit (Unit) in Montpelier; and the Oxford Slough Waterfowl Production Area (WPA) in Oxford, Idaho. The final CCP describes how we will manage the refuge and WPA for the next 15 years.

ADDRESSES: You may view or obtain copies of the final CCP and FONSI by any of the following methods. You may request a hard copy or a CD of the document.

Agency Web site: Download the final CCP and FONSI at *http://www.fws.gov/bearlake/refuge_planning.html.*

Email: *FW1PlanningComments@fws.gov.* Include ''Bear Lake NWR CCP'' in the subject line of the message.

U.S. Mail: Annette de Knijf, Refuge Manager, Bear Lake NWR, Box 9, Montpelier, ID 83254.

In-Person Viewing or Pickup: Call 208–847–1757 to make an appointment during regular business hours at the Refuge Headquarters at 322 North 4th St. (Oregon Trail Center), Montpelier, ID. For more information on locations for viewing or obtaining documents, see ''Public Availability of Documents'' under **SUPPLEMENTARY INFORMATION.**

FOR FURTHER INFORMATION CONTACT: Annette de Knijf, Refuge Manager, Bear Lake NWR, 322 North 4th St. (Oregon Trail Center), Montpelier, ID 83254; phone (208) 847–1757.

SUPPLEMENTARY INFORMATION:

Introduction

With this notice, we finalize the CCP process for Bear Lake National Wildlife Refuge in Bear Lake County, Idaho, and the Oxford Slough Waterfowl Production Area in Franklin and Bannock Counties, Idaho. We started this process through a notice in the **Federal Register** (75 FR 35829; June 23, 2010). We released the draft CCP/EA to the public, announcing and requesting comments in a notice of availability in the **Federal Register** (77 FR 59639; September 28, 2012). For more information about the history and purposes of the refuge and WPA, see that notice.

We announce our decision and the availability of the FONSI for the CCP for Bear Lake NWR and Oxford Slough WPA in accordance with National Environmental Policy Act (NEPA) (40 CFR 1506.6(b)) requirements. We completed a thorough analysis of impacts on the human environment, which we included in the draft CCP/EA.

The final CCP will guide us in managing and administering the refuge and WPA for the next 15 years. Alternative 3, as we described in the draft CCP/EA, forms the basis of the final CCP.

Background

The CCP Process

The National Wildlife Refuge System Administration Act of 1966, as amended by the National Wildlife Refuge System Improvement Act of 1997 (together referred to as the Refuge Administration Act), 16 U.S.C. 668dd–668ee, requires us to develop a CCP for each national

wildlife refuge. The purpose for developing a CCP is to provide refuge managers with a 15-year plan for achieving refuge purposes and contributing toward the mission of the National Wildlife Refuge System, consistent with sound principles of fish and wildlife management, conservation, legal mandates, our policies, and NEPA. In addition to outlining broad management direction on conserving wildlife and their habitats, CCPs identify compatible wildlife-dependent recreational opportunities available to the public, including opportunities for hunting, fishing, wildlife observation and photography, and environmental education and interpretation. We will review and update each CCP at least every 15 years in accordance with the Refuge Administration Act. Implementing a CCP is subject to the availability of funding and any additional compliance requirements.

CCP Selected Alternative

To address issues identified during our CCP planning process, we developed and evaluated alternatives and identified the preferred alternative for the refuge and WPA. The preferred alternative, which was selected for the CCP, is briefly summarized below. For full details of all the alternatives, please review the draft CCP/EA (see the Public Availability of Documents section for ways to view or obtain the CCP/EA).

Selected Alternative (Alternative 3)

Under the Selected Alternative we will continue to provide habitat for waterfowl breeding and fall migration at Bear Lake NWR. We will use water level manipulations and other strategies to provide a variety of wetland habitats that benefit a wide range of priority species. Water in the individual wetland units of Bear Lake NWR will be managed to simulate natural hydrologic variability (normal, drought, and flood conditions), while providing a consistent annual acreage of wetland habitat types across the refuge. We will continue to work with PacifiCorp to manage water levels on the refuge for wildlife and habitat while abiding by the stipulations of the Bear River Compact and the 1968 Agreement between PacifiCorp and the Service. We will reduce meadow and upland haying operations on Bear Lake NWR, the Thomas Fork Unit, and Oxford Slough WPA by 44 percent (3,533 acres to 1,492 acres) over the next 15 years, with three 5-year cycles. Farming will be reduced from 214 acres to 154 acres. Former cropland and hayed areas will be restored to native wet meadow or grassland communities.

We will work in partnership with PacifiCorp and other stakeholders to study and consult on the effects, desirability, and feasibility of reducing sediment loading in the Mud Lake Complex of Bear Lake NWR. We will analyze the feasibility of, and make recommendations on, techniques to exclude carp and non-native game fish within the Mud Lake Complex, and work in partnership with PacifiCorp and the Idaho Department of Fish and Game to study and consult on the effects of fish passage at irrigation diversions and water control structures within the Refuge.

We will manage water at the Thomas Fork Unit to simulate natural hydrologic variability (normal, drought, and flood conditions), restore stream habitat on the Thomas Fork Unit for spawning Bonneville cutthroat trout, and pursue increased reliability of late season water at Oxford Slough WPA to benefit nesting waterfowl and waterbirds.

Public uses that are currently allowed on the refuge and WPA will continue. The Thomas Fork Unit will continue to be closed to public use. We will construct additional facilities to support wildlife observation, photography, environmental education, interpretation, and fishing at Bear Lake NWR. Plans for a combined refuge office and small visitor contact station with an environmental education classroom on or near the refuge will be developed within 5 years of CCP completion, and we will seek funding to construct these facilities. We will establish a visitor services position in the Southeast Idaho Complex that will serve all refuges in the Complex. This will allow the refuge to recruit and train volunteers that would assist in providing expanded wildlife-dependent recreation opportunities.

Hunting of waterfowl, small game (cottontails), and upland birds (gray partridge, grouse, ring-necked pheasant) will continue to be allowed on 7,450 acres (40 percent) of Bear Lake NWR, with enhancements to improve access. Hunting of waterfowl, small game, upland game birds, big game, and trapping of furbearers will continue to be allowed on the Oxford Slough WPA in accordance with State regulations.

Comments

We solicited public comments on the draft CCP/EA for 30 days, from September 28 to October 29, 2012 (77 FR 59639). We received comments from 14 entities. To address public comments received on the draft CCP/EA, responsive changes and clarifications were made to the final CCP where appropriate. These changes are summarized in the FONSI. The major changes follow.

- The strategy ''In partnership with PacifiCorp, Idaho Department of Fish and Game, and other partners, construct four fish passage ladder projects on the Rainbow bridge; Paris Creek, Paris Dike, and Bloomington Creek to increase fish spawning passage and reconnect the two most genetically viable populations of Bonneville cutthroat trout in the Bear River by 2027'' was changed to: ''Throughout the lifetime of the CCP, work in partnership with PacifiCorp and the Idaho Department of Fish and Game to study and consult on the effects of fish passage at irrigation diversions and water control structures within the refuge.''
- The strategy ''Implement feasibility and engineering studies on techniques to further reduce sediment loading within the Mud Lake Complex. By 2020, provide recommendations to reduce the sedimentation rate of Bear River water diversions and better facilitate carp and non-native game fish exclusion'' was changed to: ''Work in partnership with PacifiCorp and other stakeholders to study and consult on the effects, desirability, and feasibility of reducing sediment loading in the Mud Lake Unit.'' The strategy ''By 2020, provide recommendations to better facilitate carp and non-native game fish exclusion'' was added.

Selected Alternative

After considering the comments received, we have selected Alternative 3 for implementation. The goals, objectives, and strategies under Alternative 3 best achieve the purpose and need for the CCP while maintaining balance among the varied management needs and programs. Alternative 3 addresses the purposes, issues, and relevant mandates of the refuge and WPA and is consistent with principles of sound fish and wildlife management.

Public Availability of Documents

In addition to the information in **ADDRESSES**, you can view copies of the draft CCP/EA on the internet at *http://www.fws.gov/bearlake/refuge_planning.html,* and printed copies will be available for review at the following libraries: Bear Lake County Library, 138 North 6th Street, Montpelier, ID 83254; Larsen-Sant Public Library, 109 South 1st East, Preston, ID 83263.

Dated: February 27, 2013.

Richard Hannan,

Acting Regional Director, Pacific Region, U.S. Fish and Wildlife Service.

[FR Doc. 2013–13046 Filed 6–3–13; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Indian Gaming

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of Approved Tribal-State Class III Gaming Amendments.

SUMMARY: This notice publishes approval of an Agreement to Amend the Class III Tribal-State Gaming Compact between the Salt River Pima-Maricopa Indian Community and the State of Arizona (Amendment).

DATES: *Effective Date:* June 4, 2013.

FOR FURTHER INFORMATION CONTACT: Paula L. Hart, Director, Office of Indian Gaming, Office of the Deputy Assistant Secretary—Policy and Economic Development, Washington, DC 20240, (202) 219–4066.

SUPPLEMENTARY INFORMATION: Under section 11 of the Indian Gaming Regulatory Act (IGRA), Public Law 100–497, 25 U.S.C. 2701*et seq.,* the Secretary of the Interior shall publish in the **Federal Register** notice of approved Tribal-State compacts for the purpose of engaging in Class III gaming activities on Indian lands. The Amendment consists of clarifications and minor changes to various sections of the current compact. The Amendment also modifies the frequency of the Tribe's payments to the State or local governments.

Dated: May 28, 2013.

Kevin K. Washburn,

Assistant Secretary—Indian Affairs.

[FR Doc. 2013–13262 Filed 6–3–13; 8:45 am]

BILLING CODE 4310–4N–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[LLAZP02000.L54100000.FR0000. LVCLA09A5130.241A; AZA–34655]

Notice of Realty Action: Application for Conveyance of Federally Owned Mineral Interests in Pima County, AZ

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of Realty Action.

SUMMARY: Upon publication of this notice, the BLM is temporarily segregating the federally owned mineral interests in the land covered by the application from all forms of appropriation under the public land laws, including the mining laws, for up to 2 years while the BLM processes the application. The Bureau of Land Management (BLM) is processing an application under the Federal Land Policy and Management Act (FLPMA) to convey the federally owned mineral interests of 2,286.19 acres located in Pima County, Arizona, to the surface owner, Freeport-McMoRan Sierrita Inc.

DATES: Interested persons may submit written comments to the BLM at the address listed below. Comments must be received no later than July 19, 2013.

ADDRESSES: Bureau of Land Management, Phoenix District Office, 21605 North Seventh Avenue, Phoenix, AZ 85027. Detailed information concerning this action is available for review at this address.

FOR FURTHER INFORMATION CONTACT: Benedict Parsons, Realty Specialist, at 623–580–5637. 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 for the above individual. You will receive a reply during normal business hours.

SUPPLEMENTARY INFORMATION: The location of the federally owned mineral interest segregated by this notice is intended to be identical in location as the privately owned surface interest of the applicant. The tract of land referred to in this notice consists of several miscellaneously shaped parcels of land totaling 2,286.19 acres situated in Pima County, Arizona, and is described as follows:

Gila and Salt River Meridian, Arizona

T. 18 S., R. 12 E,

Sec. 3, Lots 1–4, inclusive, S½NE¼, E½SW¼, NW¼SW¼, N½SW¼SW¼, N½SE¼, except any portion lying within McGee Ranch Road right-of-way as shown in Book 2 of road maps at Pages 184, 185, and 186. *(As reserved in U. S. patents 1048789, 929394 and 1080490)*

The area described contains 458.62 acres.

Sec. 4, Portions of lots 1 and 2, lying South of the southerly right-of-way of McGee Ranch Road as shown in Book 2 of road maps at Pages 184, 185, and 186, E½NW¼SW¼, SW¼NW¼SW¼, N½SW¼SW¼, N½SE¼SW¼, N½SE¼, N½SW¼SE¼, and N½SE¼SE¼, excluding any portion lying within the legal description as described in Quiet Title Judgment, recorded in Superior Court Case No. 312364 on December 17, 1996, in Docket 10443, at Page 2348, together with a portion of that land described in said Quiet Title Judgment falling within SW¼NW¼SE¼ and the NW¼SW¼SE¼, more specifically described as follows:

BEGINNING at the South Quarter corner of said Section 4, an aluminum capped pin, marked LS 13007;

THENCE North 00 degrees 00 minutes 20 seconds East along the Westerly line of said Southeast Quarter, 1321.95 feet to a ½ inch rebar;

THENCE continue North 00 degrees 00 minutes 20 seconds East, 138.52 feet;

THENCE South 89 degrees 59 minutes 40 seconds East, 95.60 feet to the existing fence line; THENCE South 00 degrees 09 minutes 17 seconds West, 1460.40 feet along said fence line to the Southerly line of said Section 4;

THENCE South 88 degrees 28 minutes 11 seconds West, 90.98 feet along said Section line to the POINT OF BEGINNING. *(As reserved in U. S. patents 1048789, 1048790 and 1080490)*

The area described contains 242.55 acres.

Sec. 5, Lots 1–4, inclusive, S½NE¼, S½NW¼, NE¼SE¼, N½NW¼SE¼, except any portion lying within McGee Ranch Road right-of-way as shown in Book 2 of road maps at Pages 184, 185, and 186, and except any portion lying within the legal description as described in Quiet Title Judgment, recorded in Superior Court Case No. 312364 on December 17, 1996, in Docket 10443, at Page 2348. *(As reserved in U. S. patent 843078)*

The area described contains 366.20 acres.

Sec. 6, Lot 1, SE¼NE¼, NE¼SE¼, E½E½SW¼SE¼, and SE¼SE¼, excluding Mineral Survey No. 4667 as described in U.S. patent 02–76–0031. *(As reserved in U.S. patents 843078 and 1059077)*

The area described contains 163.16 acres.

Sec. 7, SE¼NE¼NW¼, NE¼SE¼NW¼, and SW¼SE¼NW¼, excluding Mineral Survey No. 4667 as described in U.S. patent 02–76–0031. *(As reserved in U.S. patent 1077829)*

The area described contains 15.78 acres.

Sec. 10, NE¼NW¼, and S½NW¼. *(As reserved in U.S. patent 1080490)*

The area described contains 120 acres.

Sec. 15, N½, NE¼SW¼, and W½SW¼, excluding Mineral Survey No. 4428 as described in U.S. patent 1221420, Mineral Survey No. 4389 as described in U.S. patent 1166564, and Mineral Survey

No. 276 as described in U.S. patent 6798. *(As reserved in U.S. patent 1113040)*

The area described contains 318.52 acres.

Sec. 20, N½, excluding Mineral Survey No. 4428, as described in U.S. patent 1221420. *(As reserved in U.S. patent 1114812)*

The area described contains 317.26 acres.

Sec. 21, Lots 1–4, inclusive, S½NE¼, NW¼NW¼, and S½NW¼, excluding Mineral Survey No. 4428, as described in U.S. patent 1221420. *(As reserved in U.S. patent 1123349)*

The area described contains 284.10 acres.

The areas described aggregate approximately 2,286.19 acres in Pima County, Arizona.

Under certain conditions, Section 209(b) of the FLPMA of October 21, 1976, 43 U.S.C. 1719, authorizes the sale and conveyance of minerals under non-Federal surface to the current or prospective surface owner, upon payment of administrative costs and the fair market value of the interest being conveyed. The applicant has deposited, as required under section 209(3)(i), an estimated sum of money determined sufficient to cover administrative costs, including, but not limited to, costs of conducting an exploratory program to determine the character of the mineral deposits in the land. The objective is to allow consolidation of the surface and mineral interests when either one of the following conditions exist: (1) There are no known mineral values in the land; or (2) Where continued Federal ownership of the mineral interests interferes with or precludes appropriate non-mineral development and such development is a more beneficial use of the land than mineral development.

An application was filed for the sale and conveyance of the federally owned mineral interests in the above-described tracts of land. Subject to valid existing rights, on June 4, 2013 the federally owned mineral interests in the land described above are hereby segregated from all forms of appropriation under the public land laws, including the mining laws, while the application is being processed to determine if either one of the two specified conditions exists and, if so, to otherwise comply with the procedural requirements of 43 CFR part 2720. The segregative effect shall terminate upon: (1) Issuance of a patent or other document of conveyance as to such mineral interests; (2) Final rejection of the application; or (3) June 4, 2015, whichever occurs first.

Comments: Your comments are invited. Please submit all comments in writing to Benedict Parsons at the address listed above. 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 available to the public at any time. While you can ask in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Authority: 43 CFR 2720.1–1(b).

Patrick Putnam,

Acting District Manager.

[FR Doc. 2013–13158 Filed 6–3–13; 8:45 am]

BILLING CODE 4310–32–P

DEPARTMENT OF THE INTERIOR

National Indian Gaming Commission

2013 Final Fee Rate and Fingerprint Fees

AGENCY: National Indian Gaming Commission, Interior.

ACTION: Notice.

SUMMARY: Notice is hereby given, pursuant to 25 CFR 514.2, that the National Indian Gaming Commission has adopted its 2013 final annual fee rates of 0.00% for tier 1 and 0.072% (.00072) for tier 2. These rates shall apply to all assessable gross revenues from each gaming operation under the jurisdiction of the Commission. If a tribe has a certificate of self-regulation under 25 CFR part 518, the 2013 final fee rate on Class II revenues shall be one-half of the annual fee rate, which is 0.036% (.00036).

Pursuant to 25 CFR 514.16, the National Indian Gaming Commission has also adopted its new fingerprint processing fees of $22 per card effective June 1st, 2013.

FOR FURTHER INFORMATION CONTACT: Yvonne Lee, National Indian Gaming Commission, 1441 L Street NW., Suite 9100, Washington, DC 20005; telephone (202) 632–7003; fax (202) 632–7066.

SUPPLEMENTARY INFORMATION: The Indian Gaming Regulatory Act (IGRA) established the National Indian Gaming Commission which is charged with, among other things, regulating gaming on Indian lands.

The regulations of the Commission (25 CFR part 514), as amended, provide for a system of fee assessment and payment that is self-administered by gaming operations. Pursuant to those regulations, the Commission is required to adopt and communicate assessment rates; the gaming operations are required to apply those rates to their revenues, compute the fees to be paid, report the revenues, and remit the fees to the Commission. The final rate being adopted here is effective June 1st, 2013 and will remain in effect until a new fee rate is adopted. Therefore, all gaming operations within the jurisdiction of the Commission are required to self administer the provisions of these regulations, and report and pay any fees that are due to the Commission.

Pursuant to 25 CFR part 514, the Commission shall also review annually the costs involved in processing fingerprint cards based on fees charged by the Federal Bureau of Investigation and costs incurred by the Commission. Commission costs include Commission personnel, supplies, equipment costs, and postage to submit the results to the requesting tribe. The new fingerprint processing fees being adopted here is effective June 1st, 2013.

Dated: May 30, 2013.

Tracie Stevens,

Chairwoman.

Dated: May 30, 2013.

Daniel Little,

Associate Commissioner.

[FR Doc. 2013–13257 Filed 6–3–13; 8:45 am]

BILLING CODE 7565–01–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–NERO–GATE–13189; PPNEGATEB0, PPMVSCS1Z.Y00000]

Notice of 2013 Meeting Schedule for Fort Hancock 21st Century Advisory Committee

AGENCY: National Park Service, Interior.

ACTION: Notice of Public Meeting Location Change

SUMMARY: In accordance with the Federal Advisory Committee Act of 1972, the U.S. Department of the Interior, National Park Service, Fort Hancock 21st Century Advisory Committee will meet on June 28, 2013, at Sandy Hook Building 22, Magruder Road, Middletown, NJ 07732. This is a location change from what was announced in the April 15, 2013, **Federal Register**.

DATES: The Fort Hancock 21st Century Advisory Committee will meet June 28, 2013.

ADDRESSES: For the June 28, 2013 meeting the committee members will meet at Sandy Hook Building 22,

Magruder Road, Middletown, NJ 07732. Please check *www.forthancock21stcentury.org* for additional information.

Agenda: Committee meeting will consist of the following:

1. Welcome and Introductory Remarks
2. Update on Working Group Progress
3. Assessment of Committee Needs
4. Potential Frameworks and Reuse Scenarios
5. Development of Committee Work Plan
6. Future Committee Activities, Meeting Schedule,
7. Public Comment
8. Adjournment

The final agenda will be posted on *www.forthancock21stcentury.org* prior to each meeting.

FOR FURTHER INFORMATION CONTACT: Further information concerning the meeting may be obtained from John Warren, Gateway National Recreation Area, 210 New York Avenue, Staten Island, NY 10305, at (718) 354–4608 or email: *forthancock21stcentury@yahoo.com,* or visit the Advisory Committee Web site at *www.forthancock21st century.org.*

SUPPLEMENTARY INFORMATION: Under section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App.). The purpose of the committee is to provide advice to the Secretary of the Interior, through the Director of the National Park Service, on the development of a reuse plan and on matters relating to future uses of certain buildings at Fort Hancock within Gateway National Recreation Area.

The meeting is open to the public. Interested members of the public may present, either orally or through written comments, information for the committee to consider during the public meeting. Attendees and those wishing to provide comment are strongly encouraged to preregister through the contact information provided. The public will be able to comment on from 4:00 p.m. to 4:45 p.m. Written comments will be accepted prior to, during or after the meeting. Due to time constraints during the meeting, the committee is not able to read written public comments submitted into the record. Individuals or groups requesting to make oral comments at the public committee meeting will be limited to no more than 5 minutes per speaker.

Before including your address, telephone number, email address, or other personal indentifying information in your written comments, you should be aware that your entire comment including your personal identifying information may be made publicly available. 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. All comments will be made part of the public record and will be electronically distributed to all committee members.

Dated: May 29, 2013.

Alma Ripps,

Chief, Office of Policy.

[FR Doc. 2013–13259 Filed 6–3–13; 8:45 am]

BILLING CODE 4310–WV–P

DEPARTMENT OF JUSTICE

Notice of Lodging of Proposed Consent Decree Under the Comprehensive Environmental Response, Compensation and Liability Act

On May 23, 2013, the Department of Justice lodged a proposed Consent Decree (''Decree'') with the United States District Court for the Southern District of West Virginia in the action entitled *United States* v. *Cooper Industries, LLC,* Civil Action No. 1:13–cv–12064.

The Consent Decree is being filed simultaneously with a Complaint alleging claims against Defendant under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607(a), for costs of past response actions in connection with the release of hazardous substances at the Lin-Electric Superfund Site (the ''Site'') in Bluefield, West Virginia. The Consent Decree requires Cooper Industries LLC to pay $340,000 in reimbursement of these response costs, which were incurred during an EPA removal action at the Site in 2008–2009.

The publication of this notice opens a period for public comment on the Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, and should refer to *United States* v. *Cooper Industries LLC,* D.J. Ref. No. 90–11–3–10604. All comments must be submitted no later than thirty (30) days after the publication date of this notice. Comments may be submitted either by email or by mail:

To submit comments:	*Send them to:*
By e-mail	*pubcomment-ees.enrd@usdoj.gov.*
By mail	Assistant Attorney General, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

During the public comment period, the Consent Decree may be examined and downloaded at this Justice Department Web site: *http://www.justice.gov/enrd/Consent_Decrees.htm.* We will provide a paper copy of the Consent Decree upon written request and payment of reproduction costs. Please mail your request and payment to: Consent Decree Library, U.S. DOJ—ENRD, P.O. Box 7611, Washington, DC 20044–7611.

Please enclose a check or money order for $5.00 (25 cents per page reproduction cost) payable to the United States Treasury.

Robert Brook,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 2013–13102 Filed 6–3–13; 8:45 am]

BILLING CODE 4410–15–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Apple, Inc., et al.; Public Comments and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States hereby publishes below the United States' Response to Public Comments on the proposed Final Judgment as to Defendants Verlagsgruppe Georg von Holtzbrinck GmbH and Holtzbrinck Publishers, LLC d/b/a Macmillan in *United States* v. *Apple, Inc., et al.,* Civil Action No. 12–CV–2826 (DLC), which was filed in the United States District Court for the Southern District of New York on May 24, 2013, along with copies of the one comment received by the United States.

Copies of the comment and the response are available for inspection at the Department of Justice Antitrust Division, 450 Fifth Street NW., Suite 1010, Washington, DC 20530 (telephone: 202–514–2481), on the Department of Justice's Web site at *http://www.justice.gov/atr/cases/apple/index-2.html,* and at the Office of the Clerk of the United States District Court for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, New York, NY 10007–1312. Copies of any of these

materials may also be obtained upon request and payment of a copying fee.

Patricia A. Brink,

Director of Civil Enforcement.

United States District Court for the Southern District of New York

UNITED STATES OF AMERICA, Plaintiff, v. *APPLE, INC., et al.,* Defendants.

Civil Action No. 12–CV–2826 (DLC) ECF Case

Response by Plaintiff United States to Public Comments on the Proposed Final Judgment as to the Macmillan Defendants

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h) (''APPA'' or ''Tunney Act''), the United States hereby responds to the single public comment received regarding the proposed Final Judgment as to Defendants Verlagsgruppe Georg von Holtzbrinck GmbH and Holtzbrinck Publishers, LLC d/b/a Macmillan (collectively, ''Macmillan''). After careful consideration of the comment submitted, the United States continues to believe that the proposed Final Judgment as to Macmillan (''proposed Macmillan Final Judgment'') will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint.

The comment submitted to the United States, along with a copy of this Response to Comments, are posted publicly at *http://www.justice.gov/atr/cases/apple/index-2.html,* in accordance with 15 U.S.C. 16(d) and the Court's May 22, 2013 Order (Docket No. 260). The United States will publish this Internet location and this Response to Comments in the **Federal Register**, *see* 15 U.S.C. 16(d), and will then, pursuant to the Court's February 19, 2013 Order (Docket No. 180), move for entry of the proposed Macmillan Final Judgment by no later than June 13, 2013.

I. Procedural History

On April 11, 2012, the United States filed a civil antitrust Complaint alleging that Apple, Inc. (''Apple'') and five of the six largest publishers in the United States (''Publisher Defendants'') conspired to raise prices of electronic books (''e-books'') in the United States in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. On the same day, the United States filed a proposed Final Judgment (''Original Final Judgment'') as to three of the Publisher Defendants: Hachette Book Group, Inc., HarperCollins Publishers L.L.C., and Simon & Schuster, Inc. (collectively, ''Original Settling Defendants''). During the Tunney Act process concerning the Original Final Judgment, the United States received and responded to 868 public comments (Docket No. 81) (''Original Response to Comments''), and this Court entered the Original Final Judgment on September 6, 2012 (Docket No. 119).

On December 18, 2012, the United States filed a proposed Final Judgment as to Penguin. The United States responded on April 5, 2013 to the three public comments it received concerning the proposed Penguin Final Judgment (''Penguin Response to Comments'') (Docket No. 201), moved for entry of the proposed Penguin Final Judgment on April 18, 2013 (Docket No. 211), and this Court granted the United States' motion on May 17, 2013 (Docket No. 257).

The United States reached a settlement with Macmillan and, on February 8, 2013, filed a proposed Final Judgment and a Stipulation signed by the United States and Macmillan consenting to the entry of the proposed Macmillan Final Judgment after compliance with the requirements of the Tunney Act, 15 U.S.C. 16 (Docket No. 174). Pursuant to those requirements, the United States filed its Competitive Impact Statement (''CIS'') with the Court on February 8, 2013 (Docket No. 175); the proposed Final Judgment and CIS were published in the **Federal Register** on February 25, 2013, *see United States* v. *Apple, Inc., et al.,* 78 FR 12874; and summaries of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, were published in the *Washington Post* and the *New York Post* for seven consecutive days beginning on February 21, 2013 and ending on February 27, 2013. The sixty-day period for public comment ended on April 28, 2013. The United States received only one comment, which is described below and attached hereto.[1]

II. The Proposed Macmillan Final Judgment

The language and relief contained in the proposed Macmillan Final Judgment is largely identical to the terms included in the Original Final Judgment and the Penguin Final Judgment. As explained in more detail in the CIS, the requirements and prohibitions included in the proposed Macmillan Final Judgment will eliminate Macmillan's illegal conduct, prevent recurrence of the same or similar conduct, and establish a robust antitrust compliance program.

The proposed Macmillan Final Judgment requires that Macmillan immediately cease enforcing any terms in its contracts with e-book retailers that restrict retailer discounting, *see* proposed Macmillan Final Judgment, §§ IV.A & V.A, and forbids Macmillan until December 18, 2014 from entering new contracts that restrict retailers from discounting its e-books. *See id.* § V.B. These provisions will help ensure that new contracts will not be set under the same collusive conditions that produced the unlawful Apple agency agreements. The proposed Macmillan Final Judgment permits Macmillan, however, in new agreements with e-book retailers, to agree to terms that prevent the retailer from selling Macmillan's entire catalog of e-books at a sustained loss. *See id.* § VI.B.

To prevent a recurrence of the alleged conspiracy, the proposed Macmillan Final Judgment prohibits Macmillan from entering into new agreements with other publishers under which prices are fixed or coordinated, *see id.* § V.E, and also forbids communications between Macmillan and other publishers about competitively sensitive subjects. *See id.* § V.F. Banning such communications is critical here, where communications among publishing competitors were a common practice and led directly to the collusive agreement alleged in the Complaint.

As outlined in Section VII, Macmillan also must designate an Antitrust Compliance Officer, who is required to distribute copies of the Macmillan Final Judgment; ensure training related to the Macmillan Final Judgment and the antitrust laws; certify compliance with the Macmillan Final Judgment; maintain a log of all communications between Macmillan and employees of other Publisher Defendants; and conduct an annual antitrust compliance audit. This compliance program is necessary considering the extensive

[1] The United States has described the allegations in the Complaint and summarized the standard of review applicable to Tunney Act proceedings in several previous submissions. *See, e.g.,* Original Response to Comments (Docket No. 81; 77 FR 44271); Penguin Response to Comments (Docket No. 201; 78 FR 22298). This Court also articulated the standard of review in its Opinion and Order finding that the Original Final Judgment satisfied the requirements of the Tunney Act. *See United States* v. *Apple, Inc.,* 889 F. Supp. 2d 623, 630–32 (S.D.N.Y. 2012). Bob Kohn, the lone commenter on the proposed Macmillan Final Judgment, asserts that *United States* v. *American Cyanamid Co.,* 719 F.2d 558 (2d Cir. 1983), and *United States* v. *International Business Machines Corporation,* 163 F.3d 737 (2d Cir. 1998) require the Court to apply a more stringent standard of review than the one the Court applied in its evaluation of the Original Final Judgment. Those cases, however, involved petitions by the parties to terminate consent decrees. *See American Cyanamid,* 719 F.2d at 559; *IBM,* 163 F.3d at 738. Neither evaluated whether a proposed final judgment met the Tunney Act's requirements.

communication among competitors' CEOs that led to the Publisher Defendants' conspiracy with Apple.

III. Summary of the Public Comment and the Response of the United States

The United States received only a single comment concerning the proposed Macmillan Final Judgment. The comment was submitted by Bob Kohn, who also provided similar comments on the Original Final Judgment and the Penguin Final Judgment, as well as in a number of submissions to the Court in this case.[2] Mr. Kohn's comments again suggest no basis on which this Court should find that entry of the proposed Macmillan Final Judgment would not be in the public interest.

Mr. Kohn once again asserts that the proposed relief as to Macmillan cannot be in the public interest because it allows e-book retailers to discount Macmillan's e-books. Mr. Kohn believes that Macmillan's agency contracts with Amazon and other retailers, which blocked such discounting, served the procompetitive purpose of addressing predatory pricing or monopolization by Amazon. Kohn Comment at 6–7, 13–15. Again, as the United States stated in its Original Response to Comments and in its Penguin Response to Comments, and as this Court observed in finding that the Original Final Judgment satisfied the requirements of the Tunney Act, even if evidence existed to support Mr. Kohn's claims concerning Amazon's predatory pricing or monopolization, ''this is no excuse for unlawful price-fixing. Congress 'has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies.' . . . The familiar mantra regarding 'two wrongs' would seem to offer guidance in these circumstances.'' *United States* v. *Apple, Inc.,* 889 F. Supp. 2d 623, 642 (S.D.N.Y. 2012) (quoting *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 221 (1940)).

Mr. Kohn, however, argues that his allegations concerning Amazon's predatory pricing now deserve a fresh look because he believes the United States, in its Penguin Response to Comments, ''has now finally conceded that Amazon's e-book prices as a whole were below marginal cost.'' Kohn Comment at 11. Mr. Kohn, however, misunderstood the United States' statements in its Penguin Response to Comments. The United States explained there that the Penguin Final Judgment, like the proposed Macmillan Final Judgment, allows the publisher to enter a contract with a retailer under which aggregate discounting of the publisher's e-books by the retailer is limited to the retailer's commissions under the contract. Penguin Response to Comments at 12–13. This provision will allow the publisher to ensure that the retailer does not sell its entire catalog of e-books at a sustained loss—while still allowing the retailer to compete on the price at which it sells the publisher's e-books. Contrary to Mr. Kohn's suggestion that this provision would permit ''Amazon to resume selling e-books at below marginal costs,'' this provision allows the publisher to ensure that Amazon remains margin positive on the sale of its catalog of e-books. Under such a contract, the retailer's e-book prices overall would be above its marginal costs, as Mr. Kohn desires, but also closer to the retailer's marginal costs (and thus more ''efficient,'' as Mr. Kohn also desires) than would be the case under the contracts publishers imposed after establishing their price-fixing conspiracy with Apple, which guaranteed a 30 percent commission to the retailer.

Finally, Mr. Kohn once again asserts that, under the ''determinative'' materials requirement of 15 U.S.C. 16(b), the United States must disclose materials concerning the profitability of Amazon's e-book business. Kohn Comment at 21–23. However, information concerning Amazon's pricing practices is not only, as discussed above, irrelevant to the question of whether Apple and the Publisher Defendants can be held liable for conspiring to raise retail prices of and eliminate retail price competition for e-books, it also has no bearing on whether the proposed Macmillan Final Judgment adequately addresses the harms to competition alleged by the United States in the Complaint. As this Court previously determined with respect to the Original Final Judgment, the United States has provided ''ample factual foundation for [its] decisions regarding the proposed Final Judgment.'' *Apple, Inc.,* 889 F. Supp. 2d at 638–39.

IV. Conclusion

The United States continues to believe that the proposed Macmillan Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint and that it is therefore in the public interest.

Pursuant to the Court's February 19, 2013 Order (Docket No. 180), the United States will move for entry of the proposed Macmillan Final Judgment after this Response to Comments is published in the **Federal Register** (along with the Internet location where Mr. Kohn's comment is posted) and by no later than June 13, 2013.

Dated: May 24, 2013.

Respectfully submitted,

s/Mark W. Ryan
Mark W. Ryan
Lawrence E. Buterman
Stephen T. Fairchild
Attorneys for the United States, United States Department of Justice, Antitrust Division, 450 Fifth Street NW., Suite 4000, Washington, DC 20530. (202) 532–4753.
Mark.W.Ryan@usdoj.gov.

Certificate of Service

I, Stephen T. Fairchild, hereby certify that on May 24, 2013, I caused a copy of the Response of Plaintiff United States to Public Comments on the Proposed Final Judgment as to the Macmillan Defendants to be served by the Electronic Case Filing System, which included the individuals listed below.

For Apple:

Daniel S. Floyd, Gibson, Dunn & Crutcher LLP, 333 S. Grand Avenue, Suite 4600, Los Angeles, CA 90070, (213) 229–7148, *dfloyd@gibsondunn.com.*

For Macmillan and Verlagsgruppe Georg Von Holtzbrinck GMBH:

Joel M. Mitnick, Sidley Austin LLP, 787 Seventh Avenue, New York, NY 10019, (212) 839–5300, *jmitnick@sidley.com.*

For Penguin U.S.A. and the Penguin Group:

Daniel F. McInnis, Akin Gump Strauss Hauer & Feld, LLP, 1333 New Hampshire Avenue NW., Washington, DC 20036, (202) 887–4000, *dmcinnis@akingump.com.*

For Hachette:

Walter B. Stuart, IV, Freshfields Bruckhaus Deringer LLP, 601 Lexington Avenue, New York, NY 10022, (212) 277–4000, *walter.stuart@freshfields.com.*

For HarperCollins:

[2] *See* Mem. in Supp. of Mot. of Bob Kohn for Leave to Participate as *Amicus Curiae* (Aug. 13, 2012) (Docket No. 97); Br. of Bob Kohn as *Amicus Curiae* (Sept. 4, 2012) (Docket No. 110); Mem. in Supp. of Bob Kohn's Mot. to Stay Final J. Pending Appeal (Sept. 7, 2012) (Docket No. 117); Mem. . . . In Supp. of Mot. by Bob Kohn for Leave to Intervene for the Sole Purpose of Appeal (Sept. 7, 2012) (Docket No. 115); Mem. of Law in Reply to Opp'n of the United States to Mot. by Bob Kohn for Leave to Intervene for the Sole Purpose of Appeal (September 20, 2012) (Docket No. 130); Mem. in Supp. of Mot. of *Amicus Curiae* Bob Kohn to Submit a 5-Page Br. *Amicus Curiae* Solely to Reply to Government's Resp. to Public Comments on the Proposed Final J. with the Penguin Defs. (Apr. 29, 2013) (Docket No. 214–1). On March 26, 2013, the Second Circuit affirmed this Court's denial of Mr. Kohn's motion to intervene for purposes of appealing the Court's entry of the Original Final Judgment. *See Bob Kohn* v. *United States,* No. 12–4017 (2d Cir. Mar. 26, 2013).

Paul Madison Eckles, Skadden, Arps, Slate, Meagher & Flom, Four Times Square, 42nd Floor, New York, NY 10036, (212) 735–2578, *pmeckles@skadden.com.*

For Simon & Schuster:

Yehudah Lev Buchweitz, Weil, Gotshal & Manges LLP (NYC), 767 Fifth Avenue, 25th Fl., New York, NY 10153, (212) 310–8000 x8256, *yehudah.buchweitz@weil.com.*

Additionally, courtesy copies of this Response to Comments have been provided to the following:

For the State of Connecticut:

W. Joseph Nielsen, Assistant Attorney General, Antitrust Division, Office of the Attorney General, 55 Elm Street, Hartford, CT 06106, (860) 808–5040, *Joseph.Nielsen@ct.gov.*

For the State of Texas:

Gabriel R. Gervey, Assistant Attorney General, Antitrust Division, Office of the Attorney General of Texas, 300 W. 15th Street, Austin, Texas 78701, (512) 463–1262, *gabriel.gervey@oag.state.tx.us.*

For the Private Plaintiffs:

Jeff D. Friedman, Hagens Berman, 715 Hearst Ave., Suite 202, Berkeley, CA 94710, (510) 725–3000, *jefff@hbsslaw.com.*

s/Stephen T. Fairchild
Stephen T. Fairchild
Attorney for the United States, United States Department of Justice, Antitrust Division, 450 Fifth Street NW., Suite 4000, Washington, DC 20530, (202) 532–4925, *stephen.fairchild@usdoj.gov.*

[FR Doc. 2013–13133 Filed 6–3–13; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances, Notice of Application; Watson Pharma, Inc.

Pursuant to Title 21 Code of Federal Regulations 1301.34 (a), this is notice that on May 3, 2013, Watson Pharma, Inc., 2455 Wardlow Road, Corona, California 92880–2882, made application by renewal to the Drug Enforcement Administration (DEA) for registration as an importer of the following basic classes of controlled substances:

Drug	Schedule
Amphetamine (1100)	II
Methylphenidate (1724)	II
Oxycodone (9143)	II
Hydromorphone (9150)	II

The company plans to import the listed controlled substances for analytical testing and clinical trials.

The import of the above listed basic classes of controlled substances will be granted only for analytical testing and clinical trials. This authorization does not extend to the import of a finished FDA approved or non-approved dosage form for commercial distribution in the United States.

Any bulk manufacturer who is presently, or is applying to be, registered with DEA to manufacture such basic classes of controlled substances listed in schedules I or II, which fall under the authority of section 1002(a)(2)(B) of the Act 21 U.S.C. 952 (a)(2)(B) may, in the circumstances set forth in 21 U.S.C. 958(i), file comments or objections to the issuance of the proposed registration and may, at the same time, file a written request for a hearing on such application pursuant to 21 CFR 1301.43 and in such form as prescribed by 21 CFR 1316.47.

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than July 5, 2013.

This procedure is to be conducted simultaneously with, and independent of, the procedures described in 21 CFR 1301.34(b), (c), (d), (e), and (f). As noted in a previous notice published in the **Federal Register** on September 23, 1975, 40 FR 43745–46, all applicants for registration to import a basic class of any controlled substance in schedules I or II are, and will continue to be, required to demonstrate to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, that the requirements for such registration pursuant to 21 U.S.C. 958(a); 21 U.S.C. 823(a); and 21 CFR 1301.34(b), (c), (d), (e), and (f) are satisfied.

Dated: May 24, 2013.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2013–13177 Filed 6–3–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances, Notice of Registration; Rhodes Technologies

By a Notice dated April 10, 2013, and published in the **Federal Register** on April 19, 2013, 78 FR 23594, Rhodes Technologies, 498 Washington Street, Coventry, Rhode Island 02816, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the following basic classes of controlled substances:

Drug	Schedule
Opium Raw (9600)	II
Poppy Straw Concentrate (9670)	II

The company plans to import the listed controlled substances in order to bulk manufacture controlled substances in Active Pharmaceutical Ingredient (API) form. The company distributes the manufactured API's in bulk to its customers.

Comments and requests for hearings on applications to import narcotic raw material are not appropriate. 72 FR 3417 (2007).

DEA has considered the factors in 21 U.S.C. 823(a) and 952(a), and determined that the registration of Rhodes Technologies to import the basic classes of controlled substances is consistent with the public interest, and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. DEA has investigated Rhodes Technologies to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history.

Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic classes of controlled substances listed.

Dated: May 24, 2013.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2013–13178 Filed 6–3–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration; Mylan Technologies, Inc.

By Notice dated January 15, 2013, and published in the **Federal Register** on January 29, 2013, 78 FR 6131, Mylan Technologies, Inc., 110 Lake Street, Saint Albans, Vermont 05478, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of the following basic classes of controlled substances:

Drug	Schedule
Methylphenidate (1724)	II
Fentanyl (9801)	II

The company plans to import the listed controlled substances in finished dosage form (FDF) from foreign sources for analytical testing and clinical trials in which the foreign FDF will be compared to the company's own domestically-manufactured FDF. This analysis is required to afford the company the opportunity to export domestically-manufactured FDF to foreign markets.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a), and determined that the registration of Mylan Pharmaceuticals, Inc., to import the basic classes of controlled substances is consistent with the public interest, and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. DEA has investigated Mylan Pharmaceuticals, Inc., to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history.

Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic classes of controlled substances listed.

Dated: May 24, 2013.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2013–13181 Filed 6–3–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration; Caraco Pharmaceutical Laboratories, LTD

By Notice dated February 8, 2013, and published in the **Federal Register** on February 21, 2013, 78 FR 12101, Caraco Pharmaceutical Laboratories, Ltd., 270 Prospect Plains Road, Cranbury, New Jersey 08512, made application to the Drug Enforcement Administration (DEA) to be registered as an importer of Fentanyl (9801), a basic class of controlled substance listed in schedule II.

The company plans to import the listed controlled substance in finished dosage form for clinical trials, and research.

The import of the above listed basic class of controlled substance is granted only for analytical testing and clinical trials. This authorization does not extend to the import of finished FDA approved or non-approved dosage form for commercial distribution in the United States.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and 952(a), and determined that the registration of Caraco Pharmaceutical Laboratories, Ltd., to import the basic class of controlled substance is consistent with the public interest, and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971. DEA has investigated Caraco Pharmaceutical Laboratories, Ltd., to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history.

Therefore, pursuant to 21 U.S.C. 952(a) and 958(a), and in accordance with 21 CFR 1301.34, the above named company is granted registration as an importer of the basic class of controlled substance listed.

Dated: May 24, 2013.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2013–13183 Filed 6–3–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application; Agilent Technologies

Pursuant to § 1301.33(a), Title 21 of the Code of Federal Regulations (CFR), this is notice that on March 27, 2013, Agilent Technologies, 25200 Commercentre Drive, Lake Forest, California 92630–8810, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed in schedule II:

Drug	Schedule
1-Piperidinocyclohexane-carbonitrile (8603)	II
Benzoylecgonine (9180)	II

The company plans to manufacture small quantities of the listed controlled substances for use in diagnostic products.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR § 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than August 5, 2013.

Dated: May 24, 2013.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2013–13219 Filed 6–3–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application; Penick Corporation

Pursuant to § 1301.33(a), Title 21 of the Code of Federal Regulations (CFR), this is notice that on April 23, 2013, Penick Corporation, 33 Industrial Park Road, Pennsville, New Jersey 08070, made application to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of Opium Tincture (9630), a basic class of

controlled substance listed in schedule II.

The company plans to manufacture the listed controlled substance, as bulk intermediates for distribution to its customers.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR § 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than August 5, 2013.

Dated: May 24, 2013.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2013–13221 Filed 6–3–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Application Sigma Aldrich Research Biochemicals, Inc.

Pursuant to 1301.33(a), Title 21 of the Code of Federal Regulations (CFR), this is notice that on May 7, 2013, Sigma Aldrich Research Biochemicals, Inc., 1–3 Strathmore Road, Natick, Massachusetts 01760–2447, made application by letter to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the following basic classes of controlled substances:

Drug	Schedule
Mephedrone (4-Methyl-N-methylcathinone) (1248).	I
MDPV (3,4-Methylenedioxypyrovalerone) (7535).	I
Methylone (3,4-Methylenedioxy-N-methylcathinone) (7540).	I
Sufentanil (9740)	II

The company plans to manufacture reference standards.

Any other such applicant, and any person who is presently registered with DEA to manufacture such substances, may file comments or objections to the issuance of the proposed registration pursuant to 21 CFR 1301.33(a).

Any such written comments or objections should be addressed, in quintuplicate, to the Drug Enforcement Administration, Office of Diversion Control, Federal Register Representative (ODL), 8701 Morrissette Drive, Springfield, Virginia 22152; and must be filed no later than August 5, 2013.

Dated: May 24, 2013.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2013–13217 Filed 6–3–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration; Cerilliant Corporation

By Notice dated January 14, 2013, and published in the **Federal Register** on January 25, 2013, 78 FR 5499, Cerilliant Corporation, 811 Paloma Drive, Suite A, Round Rock, Texas 78665–2402, made application to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the following basic classes of controlled substances:

Drug	Schedule
JWH–250 (6250)	I
SR–18 also known as RCS–8 (7008).	I
JWH–019 (7019)	I
JWH–081 (7081)	I
SR–19 also known as RCS–4 (7104).	I
JWH–122 (7122)	I
AM–2201 (7201)	I
JWH–203 (7203)	I
2C–T–2 (7385)	I
JWH–398 (7398)	I
N-Ethyl-1-phenylcyclohexylamine (7455).	I
2C–D (7508)	I
2C–E (7509)	I
2C–H (7517)	I
2C–I (7518)	I
2C–C (7519)	I
2C–N (7521)	I
2C–P (7524)	I
2C–T–4 (7532)	I
AM–694 (7694)	I
Metazocine (9240)	II

The company plans to manufacture the listed controlled substances for distribution to their research and forensic customers conducting drug testing and analysis.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Cerilliant Corporation to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Cerilliant Corporation to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. § 823(a), and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: May 24, 2013.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2013–13225 Filed 6–3–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration; GE Healthcare

By Notice dated February 8, 2013 and published in the **Federal Register** on February 21, 2013, 78 FR 12103, GE Healthcare, 3350 North Ridge Avenue, Arlington Heights, Illinois 60004–1412, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of Cocaine (9041), a basic class of controlled substance listed in schedule II.

The company plans to manufacture a radioactive product to diagnose Parkinson's disease; and to manufacture a bulk investigational new drug (IND) for clinical trials.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a), and determined that the registration of GE Healthcare to manufacture the listed basic class of controlled substance is consistent with the public interest at this time. DEA has investigated GE Healthcare to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history.

Therefore, pursuant to 21 U.S.C. § 823(a), and in accordance with 21 CFR

1301.33, the above named company is granted registration as a bulk manufacturer of the basic class of controlled substance listed.

Dated: May 24, 2013.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2013–13230 Filed 6–3–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration; Pharmagra Labs, Inc.

By Notice dated February 8, 2013, and published in the **Federal Register** on February 21, 2013, 78 FR 12102, Pharmagra Labs, Inc., 158 McLean Road, Brevard, North Carolina 28712, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of Pentobarbital (2270), a basic class of controlled substance in schedule II.

The company plans to manufacture the listed substance for analytical research and clinical trials.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a), and determined that the registration of Pharmagra Labs, Inc., to manufacture the listed basic class of controlled substance is consistent with the public interest at this time. DEA has investigated Pharmagra Labs., Inc. to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history.

Therefore, pursuant to 21 U.S.C. 823(a), and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic class of controlled substance listed.

Dated: May 24, 2013.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2013–13227 Filed 6–3–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration; Alltech Associates, Inc.

By Notice dated February 8, 2013 and published in the **Federal Register** on February 21, 2013, 78 FR 12103, Alltech Associates, Inc., 2051 Waukegan Road, Deerfield, Illinois 60015, made application to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the following basic classes of controlled substances:

Drug	Schedule
5-Methoxy-N-N-dimethyltryptamine (7431)	I
2C-E (2-(2,5-Dimethoxy-4-ethylphenyl)ethanamine) (7509)	I
2C-H (2-(2,5-Dimethoxyphenyl)ethanamine) (7517)	I
2C-T-4 (2-(4-isopropylthio)-2,5-dimethoxyphenyl) ethanamine) (7532)	I

The company plans to manufacture high purity drug standards used for analytical applications only in clinical, toxicological, and forensic laboratories.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. 823(a) and determined that the registration of Alltech Associates, Inc., to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Alltech Associates, Inc., to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history.

Therefore, pursuant to 21 U.S.C. 823(a), and in accordance with 21 CFR 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: May 24, 2013.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2013–13228 Filed 6–3–13; 8:45 am]

BILLING CODE 4410–09–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration; Norac, Inc.

By Notice dated November 19, 2012, and published in the **Federal Register** on November 27, 2012, 77 FR 70825, Norac, Inc., DBA: Norac Pharma, 405 S. Motor Avenue, Azusa, California 91702–3232, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the following basic classes of controlled substances:

Drug	Schedule
Gamma Hydroxybutyric Acid (2010).	I
Tetrahydrocannabinols (7370)	I
Methamphetamine (1105)	II
Pentobarbital (2270)	II
Nabilone (7379)	II

With regard to Gamma Hydroxybutyric Acid (2010), Tetrahydrocannabinols (7370), and Methamphetamine (1105) only, the company manufactures these controlled substances in bulk solely for domestic distribution within the United States to customers engaged in dosage-form manufacturing.

With regard to Nabilone (7379) only, the company presently manufactures a small amount of this controlled substance in bulk solely to conduct manufacturing internal process development. It is the company's intention once the manufacturing process is refined to the point that its Nabilone bulk product is available for commercial use, the company will export the controlled substance in bulk solely to customers engaged in dosage-form manufacturing outside the United States. The company is aware of the requirement to obtain a DEA registration as an exporter to conduct this activity.

No comments or objections have been received. DEA has considered the factors in 21 U.S.C. § 823(a) and determined that the registration of Norac, Inc., DBA: Norac Pharma, to manufacture the listed basic classes of controlled substances is consistent with the public interest at this time. DEA has investigated Norac, Inc., DBA: Norac Pharma, to ensure that the company's registration is consistent with the public interest. The investigation has included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. § 823(a), and in accordance with 21 CFR § 1301.33, the above named company is granted registration as a bulk manufacturer of the basic classes of controlled substances listed.

Dated: May 24, 2013.

Joseph T. Rannazzisi,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 2013–13226 Filed 6–3–13; 8:45 am]

BILLING CODE 4410–09–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice at least once monthly of certain Federal agency requests for records disposition authority (records schedules). Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. They authorize the preservation of records of continuing value in the National Archives of the United States and the destruction, after a specified period, of records lacking administrative, legal, research, or other value. Notice is published for records schedules in which agencies propose to destroy records not previously authorized for disposal or reduce the retention period of records already authorized for disposal. NARA invites public comments on such records schedules, as required by 44 U.S.C. 3303a(a).

DATES: Requests for copies must be received in writing on or before July 5, 2013. Once the appraisal of the records is completed, NARA will send a copy of the schedule. NARA staff usually prepare appraisal memorandums that contain additional information concerning the records covered by a proposed schedule. These, too, may be requested and will be provided once the appraisal is completed. Requesters will be given 30 days to submit comments.

ADDRESSES: You may request a copy of any records schedule identified in this notice by contacting Records Management Services (ACNR) using one of the following means:

Mail: NARA (ACNR), 8601 Adelphi Road, College Park, MD 20740–6001.

Email: request.schedule@nara.gov.

FAX: 301–837–3698.

Requesters must cite the control number, which appears in parentheses after the name of the agency which submitted the schedule, and must provide a mailing address. Those who desire appraisal reports should so indicate in their request.

FOR FURTHER INFORMATION CONTACT: Margaret Hawkins, Director, Records Management Services (ACNR), National Archives and Records Administration, 8601 Adelphi Road, College Park, MD 20740–6001. Telephone: 301–837–1799. Email: *request.schedule@nara.gov.*

SUPPLEMENTARY INFORMATION: Each year Federal agencies create billions of records on paper, film, magnetic tape, and other media. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval, using the Standard Form (SF) 115, Request for Records Disposition Authority. These schedules provide for the timely transfer into the National Archives of historically valuable records and authorize the disposal of all other records after the agency no longer needs them to conduct its business. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

The schedules listed in this notice are media neutral unless specified otherwise. An item in a schedule is media neutral when the disposition instructions may be applied to records regardless of the medium in which the records are created and maintained. Items included in schedules submitted to NARA on or after December 17, 2007, are media neutral unless the item is limited to a specific medium. (See 36 CFR 1225.12(e).)

No Federal records are authorized for destruction without the approval of the Archivist of the United States. This approval is granted only after a thorough consideration of their administrative use by the agency of origin, the rights of the Government and of private persons directly affected by the Government's activities, and whether or not they have historical or other value.

Besides identifying the Federal agencies and any subdivisions requesting disposition authority, this public notice lists the organizational unit(s) accumulating the records or indicates agency-wide applicability in the case of schedules that cover records that may be accumulated throughout an agency. This notice provides the control number assigned to each schedule, the total number of schedule items, and the number of temporary items (the records proposed for destruction). It also includes a brief description of the temporary records. The records schedule itself contains a full description of the records at the file unit level as well as their disposition. If NARA staff has prepared an appraisal memorandum for the schedule, it too includes information about the records. Further information about the disposition process is available on request.

Schedules Pending

1. Department of Agriculture, Food Safety and Inspection Service (N1–462–13–1, 12 items, 11 temporary items). Records related to meat and poultry investigations and violations, including correspondence, reports, and administrative case files. Proposed for permanent retention are reports of cases involving precedent-setting investigations or violations.

2. Department of Agriculture, Forest Service (N1–95–12–1, 19 items, 10 temporary items). Study plans related to research and development. Proposed for permanent retention are periodic reports summarizing the results of studies.

3. Department of Agriculture, Forest Service (N1–95–12–3, 13 items, 12 temporary items). Raw data related to research studies. Proposed for permanent retention are periodic reports summarizing the results of studies.

4. Department of Agriculture, Forest Service (N1–95–12–4, 46 items, 30 temporary items). Records related to research and development, including grants, agreements, program management, and research programs.

Proposed for permanent retention are research reviews, records of experimental forests and natural research areas, and research policy records.

5. Department of Agriculture, Forest Service (N1–95–12–5, 8 items, 6 temporary items). Research and development program records, including statistical reports and records related to data management and archival activities, problem analysis, program formulation, and research work units. Proposed for permanent retention are a research data archive and correspondence regarding emerging research areas.

6. Department of Health and Human Services, Agency for Healthcare Research and Quality (DAA–0510–2013–0003, 1 item, 1 temporary item). Data use agreements for electronic information systems related to quality of patient care and culture of safety in healthcare facilities.

7. Department of Health and Human Services, Office of the Assistant Secretary for Health (DAA–0514–2013–0001, 9 items, 6 temporary items). Records related to discretionary grant programs, including announcement and application records, case files, and final reports. Proposed for permanent retention are selected final reports pertaining to family planning and adolescent pregnancy prevention activities.

8. Department of Homeland Security, U.S. Coast Guard (N1–26–11–1, 1 item, 1 temporary item). Records of vessel security planning.

9. Department of Homeland Security, U.S. Coast Guard (N1–26–11–3, 2 items, 2 temporary items). Personnel payroll processing records.

10. Department of Homeland Security, U.S. Coast Guard (DAA–0026–2013–0001, 1 item, 1 temporary item). Records of real property case files, including white papers and inspection reports.

11. Department of State, Bureau of Diplomatic Security (DAA–0059–2013–0004, 1 item, 1 temporary item). Master files of an electronic information system used to manage and track security equipment from procurement to retirement or surplus.

12. Department of State, Bureau of Administration (DAA–0059–2013–0005, 1 item, 1 temporary item). Master files of an electronic information system used to manage parking and transit matters at department facilities.

13. Department of Transportation, National Highway Traffic Safety Administration (N1–416–11–8, 2 items, 1 temporary item). Development records of a publication on pedestrian safety for law enforcement personnel. Proposed for permanent retention is the publication.

14. Department of the Treasury, Internal Revenue Service (DAA–0058–2013–0007, 1 item, 1 temporary item). Forms used to report suspected tax fraud activities.

15. Department of the Treasury, Internal Revenue Service (DAA–0058–2013–0010, 1 item, 1 temporary item). Master files of an electronic information system used to prevent and document data breach incidents.

16. Department of the Treasury, Internal Revenue Service (DAA–0058–2013–0011, 3 items, 3 temporary items). Records include registration data and correspondence used to monitor foreign financial institutions' compliance activities.

17. Department of the Treasury, Internal Revenue Service (DAA–0058–2013–0012, 2 items, 2 temporary items). Inputs and outputs of an electronic information system used to track taxpayer correspondence relating to account issues for closed appeals cases.

18. National Archives and Records Administration, Research Services (N2–306–13–1, 2 items, 2 temporary items). Records of the United States Information Agency including correspondence logs and a routine personnel grievance case file. These records were accessioned to the National Archives but lack sufficient historical value to warrant continued preservation.

19. Occupational Safety and Health Review Commission, Office of the Executive Secretary (N1–455–11–2, 1 item, 1 temporary item). Master files of an electronic information system used to track case files.

Dated: May 28, 2013.

Paul M. Wester, Jr.,

Chief Records Officer for the U.S. Government.

[FR Doc. 2013–13162 Filed 6–3–13; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL CREDIT UNION ADMINISTRATION

Office of Small Credit Unions (OSCUI) Grant Program Access For Credit Unions

AGENCY: National Credit Union Administration (NCUA).

ACTION: Notice of Funding Opportunity.

SUMMARY: The National Credit Union Administration (NCUA) is issuing a Notice of Funding Opportunity (NOFO) to invite eligible credit unions to submit applications for participation in the OSCUI Grant Program (a.k.a. Community Development Revolving Loan Fund (CDRLF)), subject to funding availability. The OSCUI Grant Program serves as a source of financial support, in the form of technical assistance grants, for credit unions serving predominantly low-income members. It also serves as a source of funding to help low-income designated credit unions (LICUs) respond to emergencies arising in their communities.

DATES: The application open period for the Multi-Initiative Application is June 17, 2013–July 12, 2013. For each initiative funds may be exhausted prior to the deadlines, at which time the programs/funds will no longer be available.

ADDRESSES: Applications must be submitted online at *www.cybergrants.com/ncua/applications.*

FOR FURTHER INFORMATION CONTACT: Further information can be found at: *www.ncua.gov/OSCUI/grantsandloans.* For questions email: National Credit Union Administration, Office of Small Credit Union Initiatives at *OSCUIAPPS@ncua.gov.*

SUPPLEMENTARY INFORMATION:

I. Description of Funding Opportunity

The purpose of the OSCUI Grant Program is to assist specially designated credit unions in providing basic financial services to their low-income members to stimulate economic activities in their communities. Through the OSCUI Grant Program, NCUA provides financial support in the form of technical assistance grants to LICUs. These funds help improve and expand the availability of financial services to these members. The OSCUI Grant Program also serves as a source of funding to help LICUs respond to emergencies. The Grant Program consists of Congressional appropriations that are administered by OSCUI, an office of the NCUA.

From June 17, 2013 to July 12, 2013, 2013 OSCUI will accept applications from credit unions under the 2013 Multi-Initiative Application. OSCUI will provide funding up to $24,000 per credit union for the following initiatives: *Staff & Volunteer Training, Collaboration, Computer Modernization, Financial Capability, New Retail Location for Home Based CUs, and New Product/Service Development.*

Additional information about the OSCUI Grant Program, including more details regarding the other funding initiatives, amount of funds available, funding priorities, permissible uses of

funds, funding limits, deadlines and other pertinent details, are periodically published in NCUA Letters to Credit Unions, in the OSCUI e-newsletter and on the NCUA Web site at *www.ncua.gov/OSCUI/GrantsandLoans.*

A. *Program Regulation:* Part 705 of NCUA's regulations implements the OSCUI Grant and Loan Program. 12 CFR part 705. A revised Part 705 was published on November 2, 2011. 76 FR 67583. Additional requirements are found at 12 CFR Parts 701 and 741. Applicants should review these regulations in addition to this NOFO. Each capitalized term in this NOFO is more fully defined in the regulations and grant guidelines. For the purposes of this NOFO, an Applicant is a Qualifying Credit Union that submits a complete Application to NCUA under the OSCUI Grant Program.

B. *Funds Availability:* Congress has appropriated approximately $1 million to the OSCUI Grant Program for Fiscal Years 2013–2014. NCUA expects to award the entire amount appropriated under this NOFO. NCUA reserves the right to: (i) Award more or less than the amount appropriated; (ii) fund, in whole or in part, any, all, or none of the applications submitted in response to this NOFO; and (iii) reallocate funds from the amount that is anticipated to be available under this NOFO to other programs, particularly if NCUA determines that the number of awards made under this NOFO is fewer than projected.

II. Description of Grant Program

OSCUI grants are made to LICUs that meet the requirements in the program regulation and this NOFO, subject to funds availability.

A. *Eligibility Requirements:* The regulations specify the requirements a credit union must meet in order to be eligible to apply for assistance under this NOFO. See 12 CFR part 705. A credit union must be a LICU, or equivalent in the case of a Qualifying State-chartered Credit Union, in order to participate in the OSCUI Grant Program. Requirements for obtaining the designation are found at 12 CFR 701.34.

B. *Permissible Uses of Funds:* NCUA will consider requests for funds consistent with the purpose of the OSCUI Grant Program. 12 CFR 705.1. Per § 705.10 of the regulation permissible uses for the grant fund include: (i) Development of new products or services for members including new or expanded share draft or credit card programs; (ii) Partnership arrangements with community based service organizations or government agencies; (iii) Enhancement and support credit union internal capacity to serve its members and better enable it to provide financial services to the community in which the credit union is located.

NCUA will consider other proposed uses of funds that in its sole discretion it determines are consistent with the purpose of the OSCUI Grant Program, the requirements of the regulations, and this NOFO.

C. *The Initiatives: 1. The Staff & Volunteer Training:* This initiative will provide funds up to $3,000 to qualifying credit unions that need assistance offsetting the cost of training.

2. The Collaboration: This initiative will provide grant funding up to $24,000 for credit unions that partner with other credit union participants for a long term cost-saving collaboration that is scalable and replicable.

3. The Computer Modernization: This initiative will fund manually operated credit unions that do not have computers to purchase hardware and software necessary to convert to computerized operations. The maximum award amount for this initiative is $7,500 per credit union.

4. The Financial Capability: This initiative provides funding up $10,000 per credit union for financial education projects that improve financial capability in the community. This includes implementing programs that result in consumer outcomes that show improvements in how consumers make financial decisions.

5. New Retail Location for Home Based Credit Unions: This initiative will fund up to $10,000 for credit unions that wish to relocate from a home-based office to a retail location. The funds can be used to assist the planning process, acquisition of property/land, renovation of an office, equipment purchases, and/or moving expenses.

6. New Product/Service Development: This initiative will fund qualifying credit unions up to $15,000 for projects that develop a new product/service to better serve its members. Only products/services that are not already offered to the credit union's membership will be considered.

D. *Terms:* The specific terms and conditions governing a grant will be established in the grant guidelines for each initiative.

III. Application Requirements

A. *Application Form:* The application and related documents can be found on NCUA's Web site at *www.ncua.gov/OSCUI/GrantsandLoans.*

B. *Minimum Application Content:* Each Applicant must complete and submit information regarding the applicant and requested funding. In addition, applicants will be required to certify applications prior to submission.

1. *DUNS Number:* Based on an Office of Management and Budget (OMB) policy directive effective October 31, 2003, credit unions must have a Data Universal Numbering System (DUNS) number issued by Dun and Bradstreet (D&B) in order to be eligible to receive funding from the OSCUI Grant Program. NCUA will not consider an Application that does not include a valid DUNS number. Such an Application will be deemed incomplete and will be declined. Information on how to obtain a DUNS number may be found on D&B's Web site at *http://fedgov.dnb.com/webform* or by calling D&B, toll-free, at 1–866–705–5711.

2. *Employer Identification Number:* Each Application must include a valid and current Employer Identification Number (EIN) issued by the U.S. Internal Revenue Service (IRS). NCUA will not consider an application that does not include a valid and current EIN. Such an Application will be deemed incomplete and will be declined. Information on how to obtain an EIN may be found on the IRS's Web site at *www.irs.gov.*

3. *Application:* An Applicant requesting a grant must complete an online grant application form which includes required responses. The required responses will address the proposed use of funds and how the credit union will assess the impact of the funding.

C. *Submission of Application:* Under this NOFO, Applications must be submitted online at *www.cybergrants.com/ncua/applications.*

IV. Application Review

A. *Review Process:* 1. *Eligibility and Completeness Review:* NCUA will review each Application to determine whether it is complete and that the Applicant meets the eligibility requirements described in the Regulations, Section II of this NOFO, and the grant guidelines. An incomplete Application or one that does not meet the eligibility requirements will be declined without further consideration.

2. *Substantive Review:* After an Applicant is determined eligible and its Application is determined complete, NCUA will conduct a substantive review in accordance with the criteria and procedures described in the Regulations, this NOFO, and the grant guidelines. NCUA reserves the right to contact the Applicant during its review for the purpose of clarifying or confirming information contained in the

Application. If so contacted, the Applicant must respond within the time specified by NCUA or NCUA, in its sole discretion, may decline the application without further consideration.

3. *Evaluation and Scoring:* The evaluation criteria for each initiative will be more fully described in the grant guidelines.

4. *Input from Examiners:* NCUA will not approve an award to a credit union for which it's NCUA regional examining office or State Supervisory Agency (SSA), if applicable, indicates it has safety and soundness concerns. If the NCUA regional office or SSA identifies a safety and soundness concern, OSCUI, in conjunction with the regional office or SSA, will assess whether the condition of the Applicant is adequate to undertake the activities for which funding is requested, and the obligations of the loan and its conditions. NCUA, in its sole discretion, may defer decision on funding an Application until the credit union's safety and soundness conditions improve.

V. Award Process

A. *Award Selection:* In general, NCUA will make its award selections based on a consistent scoring system where each applicant will receive an individual score. NCUA will consider the impact of the funding. When grant demand is high applications may be ranked based on the aforementioned in addition to factors listed in the grant guidelines.

B. *Notice of Award:* NCUA will notify each Applicant of its funding decision. Notification will generally be by email. Applicants that are approved for funding will also receive instructions on how to proceed with the reimbursement request for disbursement of funds.

VI. Post-Award Requirements

A. *Reporting Requirements:* Each awarded credit union must submit a reimbursement request in order to receive the awarded funds. The reimbursement requirements are specific to each initiative. In general, the reimbursement request will require an explanation of the impact of funding and any success or failure to meet objectives for use of proceeds, outcome, or impact. NCUA, in its sole discretion, may modify these requirements.

VII. Agency Contacts

A. *Methods of Contact:* For further information, contact NCUA by email at *OSCUIAPPS@ncua.gov.*

B. *Information Technology Support:* People who have visual or mobility impairments that prevent them from using NCUA's Web site should call (703) 518–6610 for guidance (this is not a toll free number).

Authority: 12 U.S.C. 1756, 1757(5)(D), and (7)(I), 1766, 1782, 1784, 1785 and 1786; 12 CFR part 705.

By the National Credit Union Administration Board on May 31, 2013.

Mary F. Rupp,

Secretary of the Board.

[FR Doc. 2013–13169 Filed 6–3–13; 8:45 am]

BILLING CODE 7535–01–P

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act Meeting

AGENDA

TIME AND DATE: 9:30 a.m., Tuesday, June 18, 2013.

PLACE: NTSB Conference Center, 429 L'Enfant Plaza SW., Washington, DC 20594.

STATUS: The one item is open to the public.

MATTERS TO BE CONSIDERED:

8431B Railroad Accident Report—*Head-on Collision of Two Union Pacific Railroad Company Freight Trains near Goodwell, Oklahoma, June 24, 2012* (DCA–12–MR–005)

NEWS MEDIA CONTACT: Telephone: (202) 314–6100.

The press and public may enter the NTSB Conference Center one hour prior to the meeting for set up and seating.

Individuals requesting reasonable accommodations should contact Rochelle Hall at (202) 314–6305 or by email at *Rochelle.Hall@ntsb.gov* by Friday, May 14, 2013.

The public may view the meeting via a live or archived webcast by accessing a link under ''News & Events'' on the NTSB home page at *www.ntsb.gov.*

Schedule updates including weather-related cancellations are also available at *www.ntsb.gov.*

FOR FURTHER INFORMATION CONTACT: Candi Bing, (202) 314–6403 or by email at *bingc@ntsb.gov.*

FOR MEDIA INFORMATION CONTACT: Terry Williams, at (202) 314–6100 or by email at *williat@ntsb.gov.*

Dated: May 31, 2013.

Candi R. Bing,

Federal Register Liaison Officer.

[FR Doc. 2013–13337 Filed 5–31–13; 4:15 pm]

BILLING CODE 7533–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2013–0104]

Draft Applications for Sealed Source and Device Evaluation and Registration

AGENCY: Nuclear Regulatory Commission.

ACTION: Draft NUREG; request for comments.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is revising its licensing guidance for applications for sealed source and device evaluation and registration. The NRC is requesting public comment on draft NUREG–1556, Volume 3, Revision 2, ''Consolidated Guidance about Materials Licenses: Applications for Sealed Source and Device Evaluation and Registration.'' The document has been updated from the previous revision to include safety culture, security of radioactive materials, protection of sensitive information, and changes in regulatory policies and practices. This document is intended for use by applicants, licensees, and the NRC staff and will also be available to Agreement States.

DATES: Submit comments by July 5, 2013. Comments received after this date will be considered if it is practical to do so, but the NRC is only able to assure consideration of comments received on or before this date.

ADDRESSES: You may access information and comment submissions related to this document, which the NRC possesses and are publicly available, by searching on *http://www.regulations.gov* under Docket ID NRC–2013–0104. You may submit comments by any of the following methods:

- *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0104. Address questions about NRC dockets to Carol Gallagher; telephone: 301–492–3668; email: *Carol.Gallagher@nrc.gov.*
- *Mail comments to:* Cindy Bladey, Chief, Rules, Announcements, and Directives Branch (RADB), Office of Administration, Mail Stop: TWB–05–B01M, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

For additional direction on accessing information and submitting comments, see ''Accessing Information and Submitting Comments'' in the **SUPPLEMENTARY INFORMATION** section of this document.

FOR FURTHER INFORMATION CONTACT: Tomas Herrera, Office of Federal and State Materials and Environmental

Management Programs; U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–7138; email: *Tomas.Herrera@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments

A. Accessing Information

Please refer to Docket ID NRC–2013–0104 when contacting the NRC about the availability of information regarding this document. You may access information related to this document, which the NRC possesses and is publicly available, by the following methods:

• *Federal Rulemaking Web site:* Go to *http://www.regulations.gov* and search for Docket ID NRC–2013–0104.

• *NRC's Agencywide Documents Access and Management System (ADAMS):* You may access publicly available documents online in the NRC Library at *http://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''*ADAMS Public Documents''* and then select ''*Begin Web-based ADAMS Search.''* For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, 301–415–4737, or by email to *pdr.resource@nrc.gov.* The draft NUREG–1556, Volume 3, Revision 2, is available under ADAMS Accession Number ML13141A179.

• *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 draft NUREG–1556, Volume 3, Revision 2, is also available on the NRC's public Web site on the: (1) ''Consolidated Guidance About Materials Licenses (NUREG–1556)'' page at *http://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr1556/;* and the (2) ''Draft NUREG-Series Publications for Comment'' page at *http://www.nrc.gov/public-involve/doc-comment.html#nuregs.*

B. Submitting Comments

Please include Docket ID NRC–2013–0104 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 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, and the NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment submissions into ADAMS.

II. Further Information

The NUREG provides guidance to an applicant applying for a sealed source and device registration and provides the NRC criteria for evaluating a sealed source and device registration application. The purpose of this notice is to provide the public with an opportunity to review and provide comments on draft NUREG–1556, Volume 3, Revision 2; ''Consolidated Guidance about Materials Licenses: Applications for Sealed Source and Device Evaluation and Registration.'' These comments will be considered in the final version or subsequent revisions.

Dated at Rockville, Maryland, this 28th day of May 2013.

For the Nuclear Regulatory Commission.

Pamela J. Henderson,

Deputy Director, Division of Materials Safety and State Agreements, Office of Federal and State Materials and Environmental Management Programs.

[FR Doc. 2013–13210 Filed 6–3–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Application for a License To Export High-Enriched Uranium

Pursuant to 10 CFR 110.70 (b) ''Public Notice of Receipt of an Application,'' please take notice that the Nuclear Regulatory Commission (NRC) has received the following request for an export license. Copies of the request are available electronically through ADAMS and can be accessed through the Public Electronic Reading Room (PERR) link *http://www.nrc.gov/reading-rm.html* at the NRC Homepage.

A request for a hearing or petition for leave to intervene may be filed within thirty days after publication of this notice in the **Federal Register**. Any request for hearing or petition for leave to intervene shall be served by the requestor or petitioner upon the applicant, the office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555; the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555; and the Executive Secretary, U.S. Department of State, Washington, DC 20520.

A request for a hearing or petition for leave to intervene may be filed with the NRC electronically in accordance with NRC's E-Filing rule promulgated in August 2007, 72 FR 49139 (Aug. 28, 2007). Information about filing electronically is available on the NRC's public Web site at *http://www.nrc.gov/site-help/e-submittals.html.* To ensure timely electronic filing, at least 5 (five) days prior to the filing deadline, the petitioner/requestor should contact the Office of the Secretary by email at *HEARINGDOCKET@NRC.GOV,* or by calling (301) 415–1677, to request a digital ID certificate and allow for the creation of an electronic docket.

In addition to a request for hearing or petition for leave to intervene, written comments, in accordance with 10 CFR 110.81, should be submitted within thirty (30) days after publication of this notice in the **Federal Register** to Office of the Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Rulemaking and Adjudications.

The information concerning this application for an export license follows.

NRC EXPORT LICENSE APPLICATION

[Description of material]

Name of applicant, date of application, date received, application No., docket No.	Material type	Total quantity	End use	Destination
DOE/NNSA—Y–12 National Security Complex, May 13, 2013, May 21, 2013, XSNM3745, 11006098.	High-Enriched Uranium (93.35%).	7.0 kilograms uranium-235 contained in 7.5 kilograms uranium.	To fabricate targets at the National Research Universal reactor in Canada for ultimate use in production of Molybdenum-99 medical isotopes..	Canada.

Dated this 28th day of May 2013, at Rockville, Maryland.

For the Nuclear Regulatory Commission.

Mark R. Shaffer,

Deputy Director, Office of International Programs.

[FR Doc. 2013–13206 Filed 6–3–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–346–LA; ASLBP No. 13–928–02–LA–BD01]

FirstEnergy Nuclear Operating Company; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission, *see* 37 Fed. Reg. 28,710 (Dec. 29, 1972), and the Commission's regulations, *see* 10 CFR 2.104, 2.105, 2.300, 2.309, 2.313, 2.318, and 2.321, notice is hereby given that an Atomic Safety and Licensing Board (Board) is being established to preside over the following proceeding:

FirstEnergy Nuclear Operating Company

[Davis-Besse Nuclear Power Station, Unit 1]

This proceeding involves a license amendment request from FirstEnergy Nuclear Operating Company for Davis-Besse Nuclear Power Station, Unit 1, which is located in Ottawa County, Ohio. In response to a ''Notice of Consideration of Issuance of Amendments to Facility Operating Licenses and Combined Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing,'' *see* 78 FR 16,876, 16,883 (Mar. 19, 2013), a hearing request was filed on May 20, 2013 by Beyond Nuclear, Citizens Environment Alliance of Southwestern Ontario, Don't Waste Michigan, and the Ohio Sierra Club.

The Board is comprised of the following administrative judges:

Paul S. Ryerson, Chairman, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

Michael F. Kennedy, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

Nicholas G. Trikouros, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001

All correspondence, documents, and other materials shall be filed in accordance with the NRC E-Filing rule (10 CFR 2.302), which the NRC promulgated in August 2007. *See* 72 FR 49,139.

Issued at Rockville, Maryland this 28th day of May 2013.

E. Roy Hawkens,

Chief Administrative Judge, Atomic Safety and Licensing Board Panel.

[FR Doc. 2013–13209 Filed 6–3–13; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[NRC–2013–0001]

Sunshine Act Meetings

AGENCY HOLDING THE MEETINGS: Nuclear Regulatory Commission

DATES: Weeks of June 3, 10, 17, 24, July 1, 8, 2013

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland

STATUS: Public and Closed

Week of June 3, 2013

There are no meetings scheduled for the week of June 3, 2013.

Week of June 10, 2013—Tentative

There are no meetings scheduled for the week of June 10, 2013.

Week of June 17, 2013—Tentative

There are no meetings scheduled for the week of June 17, 2013.

Week of June 24, 2013—Tentative

There are no meetings scheduled for the week of June 24, 2013.

Week of July 1, 2013—Tentative

There are no meetings scheduled for the week of July 1, 2013.

Week of July 8, 2013—Tentative

Tuesday, July 9, 2013

9:30 a.m. Briefing on Security Issues (Closed—Ex. 1)

Wednesday, July 10, 2013

9:00 a.m. Briefing on NRC International Activities (Part 1) (Public Meeting) (Contact: Karen Henderson, 301–415–0202)

This meeting will be webcast live at the Web address—*www.nrc.gov*

10:30 a.m. Briefing on NRC International Activities (Part 2) (Closed—Ex. 1 & 9) (Contact: Karen Henderson, 301–415–0202)

Thursday, July 11, 2013

9:30 a.m. Meeting with the Advisory Committee on Reactor Safeguards (ACRS) (Public Meeting) (Contact: Ed Hackett, 301–415–7360)

This meeting will be webcast live at the Web address—*www.nrc.gov.*

* * * * *

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings, call (recording)—301–415–1292. Contact person for more information: Rochelle Bavol, 301–415–1651.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *http://www.nrc.gov/public-involve/public-meetings/schedule.html.*

* * * * *

The NRC provides reasonable accommodation to individuals with disabilities where appropriate. If you need a reasonable accommodation to participate in these public meetings, or need this meeting notice or the transcript or other information from the public meetings in another format (e.g.

braille, large print), please notify Kimberly Meyer, NRC Disability Program Manager, at 301–287–0727, or by email at *kimberly.meyer-chambers@nrc.gov.* Determinations on requests for reasonable accommodation will be made on a case-by-case basis.

* * * * *

This notice is distributed electronically to subscribers. If you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969), or send an email to *darlene.wright@nrc.gov.*

Dated: May 30, 2013.

Rochelle C. Bavol,

Policy Coordinator, Office of the Secretary.

[FR Doc. 2013–13312 Filed 5–31–13; 4:15 pm]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: Report of Withholdings and Contributions for Health Benefits, Life Insurance and Retirement (Standard Form 2812); Report of Withholdings and Contributions for Health Benefits By Enrollment Code (Standard Form 2812–A); Supplemental Semiannual Headcount Report (OPM Form 1523)

AGENCY: U.S. Office of Personnel Management.

ACTION: 60-Day Notice and request for comments.

SUMMARY: Trust Funds Group of the Office of Chief Financial Officer, Office of Personnel Management (OPM), offers the general public and other Federal agencies the opportunity to comment on changes to existing Standard Form 2812, Standard Form 2812–A, and OPM Form 1523. As required by the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. chapter 35), and as amended by the Clinger-Cohen Act (Pub. L. 104–106), OPM is soliciting comments for this collection. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of OPM, including whether the information will have practical utility;

2. Evaluate the accuracy of OPM's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submissions of responses.

DATES: Comments are encouraged and will be accepted until August 5, 2013. This process is conducted in accordance with 5 CFR 1320.1.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Trust Funds Group, Room 4416, Office of Personnel Management, 1900 E Street NW., Washington, DC 20415, Attention: Paul Gvozdov, or sent via email to *FundsManagement-TrustFunds@opm.gov.*

FOR FURTHER INFORMATION CONTACT: A copy of this ICR, with applicable supporting documentation, may be obtained by contacting the Trust Funds Group, Room 4416, Office of Personnel Management, 1900 E Street NW., Washington, DC 20415, Attention: Paul Gvozdov, or sent via email to *FundsManagement-TrustFunds@opm.gov.*

SUPPLEMENTARY INFORMATION: Public Law 112–96, Section 5001, the ''Middle Class Tax Relief and Job Creation Act of 2012,'' makes two significant changes to the Federal Employees Retirement System (FERS). First, beginning in 2013, new employees (as designated in the statute) will have to pay significantly higher employee contributions, an increase of 2.3 percent of salary. Second, new Members of Congress and Congressional employees, in addition to paying higher retirement contributions, will accrue retirement benefits at the same rate as regular employees.

New employees affected by this law will be classified in a new retirement category: the Federal Employees Retirement System—Revised Annuity Employees (FERS–RAE). The current Standard Form 2812, Standard Form 2812–A, and OPM Form 1523, have been changed to reflect this additional category.

Analysis

Agency: Trust Funds Group of the Office of Chief Financial Officer, Office of Personnel Management.

Title: (1) Report of Withholdings and Contributions for Health Benefits, Life Insurance and Retirement (Standard Form 2812); (2) Report of Withholdings and Contributions for Health Benefits By Enrollment Code (Standard Form 2812–A); (3) Supplemental Semiannual Headcount Report (OPM Form 1523).

OMB Number: 3260–NEW.

Frequency: Semiannually for OPM Form 1523 and once-per-pay-period for the Standard Form 2812 and Standard Form 2812–A.

Affected Public: Public Entities with Federal Employees and Retirees.

Number of Respondents: 100.

Estimated Time per Respondent: 30 minutes.

Total Burden Hours: 2,700.

U.S. Office of Personnel Management.

Elaine Kaplan,

Acting Director.

[FR Doc. 2013–13216 Filed 6–3–13; 8:45 am]

BILLING CODE 6325–23–P

POSTAL REGULATORY COMMISSION

Sunshine Act Meetings

TIME AND DATE: Wednesday, June 12, 2013, at 11 a.m.

PLACE: Commission Hearing Room, 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001.

STATUS: Part of this meeting will be open to the public. The rest of the meeting will be closed to the public. The open session will be audiocast. The audiocast may be accessed via the Commission's Web site at *http://www.prc.gov.* A period for public comment will be offered following consideration of the last numbered item in the open session.

MATTERS TO BE CONSIDERED: The agenda for the Commission's June 12, 2013 meeting includes the items identified below.

PORTIONS OPEN TO THE PUBLIC:

1. Report on legislative activities.
2. Report on communications with the public.
3. Report from the Office of General Counsel on the status of Commission dockets.
4. Report from the Office of Accountability and Compliance.
5. Report from the Office of the Secretary and Administration.

Chairman's Public Comment Period (Opportunity for brief comments or questions from the public.)

PORTION CLOSED TO THE PUBLIC:

6. Discussion of pending litigation.

CONTACT PERSON FOR MORE INFORMATION: Stephen L. Sharfman, General Counsel, Postal Regulatory Commission, 901 New York Avenue NW., Suite 200, Washington, DC 20268–0001, at 202–

789–6820 (for agenda-related inquiries) and Shoshana M. Grove, Secretary of the Commission, at 202–789–6800 or *shoshana.grove@prc.gov* (for inquiries related to meeting location, access for handicapped or disabled persons, the audiocast, or similar matters).

By direction of the Commission.

Ruth Ann Abrams,

Acting Secretary.

[FR Doc. 2013–13310 Filed 5–31–13; 4:15 pm]

BILLING CODE 7710–FW–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2013–51 and CP2013–64; Order No. 1733]

New Postal Product

AGENCY: Postal Regulatory Commission.

ACTION: Notice.

SUMMARY: The Commission is noticing a recently-filed Postal Service request to add Global Reseller Expedited Package Contracts 2 Negotiated Service Agreements to the competitive product list. This notice informs the public of the filing, invites public comment, and takes other administrative steps.

DATES: *Comments are due:* June 4, 2013.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov*. Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: Stephen L. Sharfman, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction
II. Contents of Filing
III. Commission Action
IV. Ordering Paragraphs

I. Introduction

On May 24, 2013, the Postal Service filed a formal request pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30 *et seq.* to add Global Reseller Expedited Package (GREP) Contracts 2 to the competitive product list.[1] The Postal Service contemporaneously filed a contract related to the proposed new product pursuant to 39 U.S.C. 3632(b)(3) and 39 CFR 3015.5. On May 28, 2013, the Postal Service filed the certified statement and supporting financial information required by 39 CFR 3015.5(c).[2] For purposes of 39 CFR 3015.5(a), the Commission considers May 28, 2013 (the day the Postal Service submitted all information required under that section), to be the date of filing of the Request. In the future, the Postal Service should file all of its supporting information contemporaneously with its request.

Customers for GREP contracts are sales agents, or ''Resellers,'' who market Express Mail International, Priority Mail International, and First-Class Package International Service at discounted prices to mailers, particularly small and medium-size businesses. Request at 5. Governors' Decision No. 10–1 established prices and classifications ''not of general applicability'' for the GREP Contracts 1 product, and the Commission added GREP Contracts 1 to the competitive product list by operation of Order No. 445 in Docket Nos. MC2010–21 and CP2010–36. *Id.* at 1–2. The Postal Service now seeks to establish a new baseline agreement for a product it proposes to designate as GREP Contracts 2. *Id.* at 2.

The Postal Service asserts that Governors' Decision No. 11–6 authorizes Postal Service management to prepare and present to the Commission product descriptions for competitive services with non-published rates that include text for inclusion in the Mail Classification Schedule (MCS). *Id.* at 1–2, 3. The Postal Service asserts this classification change is consistent with the requirements of 39 U.S.C. 3642 and proposes conforming MCS language that it styles as a revision to the language for GREP Contracts 1. *Id.* at 7, Attachment 2B. The request to add GREP Contracts 2 to the MCS has been assigned Docket No. MC2013–51.

The Postal Service states that the instant contract is the immediate successor to the contract included in GREP Contracts 1 in Docket No. CP2011–55. *Id.* at 4. The contract has been assigned Docket No. CP2013–64.

II. Contents of Filing

In support of its Request, the Postal Service filed the following six attachments:

- Attachment 1—an application for non-public treatment of materials to maintain the contract and supporting documents under seal;
- Attachment 2A—a redacted copy of Governors' Decision No. 11–6, which authorizes Postal Service management to prepare any necessary product description of nonpublished competitive services, including text for inclusion in the MCS, and to present such matter for review by the Commission;
- Attachment 2B—draft MCS language;
- Attachment 2C—a certified statement required by 39 CFR 3015.5(c)(2);[3]
- Attachment 3—a Statement of Supporting Justification as required by 39 CFR 3020.32; and
- Attachment 4—a redacted copy of the contract.

The Postal Service also filed supporting financial documents for the contract as part of the Supplement.

The Postal Service filed a copy of the contract and Governors' Decision No. 11–6 with attachments under seal. Request at 4. It later filed the certified statement required by 39 CFR 3015.5(c)(2) and supporting documents establishing compliance with 39 U.S.C. 3633 and 39 CFR 3015.5 under seal, incorporating by reference the application for non-public treatment submitted with its Request. Supplement at 2.

In the Statement of Supporting Justification, Frank Cebello, Executive Director, Global Business Management, asserts that the service to be provided under the contract will ''improve the Postal Service's competitive posture,'' make a positive contribution to institutional costs, and increase contribution toward the requisite 5.5 percent of the Postal Service's total institutional costs. Notice, Attachment 3 at 2. Thus, Mr. Cebello contends, there will be no issue of subsidization of competitive products by market dominant products as a result of this contract. *Id.* He states that he is unaware of any small business concerns that could offer comparable services, and that the contract will have a positive net impact on small business concerns because the contract provides ''an additional option for shipping articles internationally.'' *Id.* at 5.

In the certified statement required under 39 CFR 3015.5, Steven Phelps, Acting Manager, Regulatory Reporting and Cost Analysis, Finance Department, states that the prices under the contract result ''in a cost coverage of in excess of the minimum required by the

[1] Request of the United States Postal Service to Add Global Reseller Expedited Package Contracts 2 to the Competitive Products List and Notice of Filing a Global Reseller Expedited Package 2 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal, May 24, 2013 (Request).

[2] Notice of the United States Postal Service of Filing Supplemental Materials, May 28, 2013 (Supplement).

[3] This certification was filed on May 28, 2013, as part of the Supplement.

Governors' Decision [No. 11–6], exclusive of pickup on demand and international ancillary services fees.'' Supplement, Attachment 2C. Nevertheless, Mr. Phelps concludes that the contract ''should cover its attributable costs and preclude the subsidization of competitive products by market dominant products.'' *Id.*

The contract is scheduled to take effect upon the termination of the contract approved in Docket No. CP2011–55. Request at 5. The contract is scheduled to expire 1 year from the date the Postal Service notifies the customer that all necessary regulatory approvals have been received. *Id.* Either party may terminate the contract with 30 days written notice. *Id.* Attachment 4 at 8.

III. Commission Action

The Commission establishes Docket Nos. MC2013–51 and CP2013–64 for consideration of matters raised in the Request.

Interested persons may submit comments on whether the Postal Service's filings in the captioned dockets are consistent with the policies of 39 U.S.C. 3632, 3633, or 3642, 39 CFR part 3015, and 39 CFR 3020 subpart B. Comments are due no later than June 4, 2013. The public portions of these filings can be accessed via the Commission's Web site (*www.prc.gov*). Information on how to obtain access to non public material appears at 39 CFR 3007.40.

The Commission appoints Lyudmila Y. Bzhilyanskaya to serve as Public Representative in these dockets.

IV. Ordering Paragraphs

It is ordered:

1. The Commission establishes Docket Nos. MC2013–51 and CP2013–64 for consideration of matters raised by the Postal Service's Request.

2. Comments by interested persons in these proceedings are due no later than June 4, 2013.

3. Pursuant to 39 U.S.C. 505, Lyudmila Y. Bzhilyanskaya is appointed to serve as an officer of the Commission (Public Representative) to represent the interests of the general public in these proceedings.

4. The Secretary shall arrange for publication of this order in the **Federal Register**.

By the Commission.

Shoshana M. Grove,

Secretary.

[FR Doc. 2013–13078 Filed 6–3–13; 8:45 am]

BILLING CODE 7710–FW–P

POSTAL SERVICE

International Product Change—Global Reseller Expedited Package Contracts 2

AGENCY: Postal Service™.

ACTION: Notice.

SUMMARY: The Postal Service hereby gives notice of its filing a request with the Postal Regulatory Commission to add Global Reseller Expedited Package Contracts 2 to the Competitive Products List.

DATES: *Effective Date:* June 4, 2013.

FOR FURTHER INFORMATION CONTACT: Patricia Fortin, (202) 268–8785.

SUPPLEMENTARY INFORMATION: The United States Postal Service® hereby gives notice that, pursuant to 39 U.S.C. 3642 and 39 CFR 3020.30, on May 24, 2013, it filed with the Postal Regulatory Commission, a request to add Global Reseller Expedited Package Contracts 2 (GREP Contracts 2) to the Competitive Products List, and Notice of Filing a Global Reseller Expedited Package 2 Negotiated Service Agreement and Application for Non-Public Treatment of Materials Filed Under Seal. The documents are available at *http://www.prc.gov,* Docket Nos. MC2013–51 and CP2013–64.

Stanley F. Mires,

Attorney, Legal Policy & Legislative Advice.

[FR Doc. 2013–13129 Filed 6–3–13; 8:45 am]

BILLING CODE 7710–12–P

POSTAL SERVICE

Board of Governors; Sunshine Act Meeting

DATES AND TIMES: June 18, 2013, at 9:30 a.m.

PLACE: Washington, DC.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Tuesday, June 18, 2013 at 9:30 a.m.

1. Strategic Issues.
2. Financial Matters.
3. Pricing.
4. Personnel Matters and Compensation Issues.
5. Governors' Executive Session—Discussion of prior agenda items and Board Governance.

FOR FURTHER INFORMATION CONTACT: Julie S. Moore, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza SW., Washington, DC 20260–1000. Telephone (202) 268–4800.

Julie S. Moore,

Secretary.

[FR Doc. 2013–13232 Filed 5–31–13; 11:15 am]

BILLING CODE 7710–12–P

SECURITIES AND EXCHANGE COMMISSION

Submission for OMB Review; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 17Ad–10, SEC File No. 270–265, OMB Control No. 3235–0273.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (''PRA''), the Securities and Exchange Commission (''Commission'') has submitted to the Office of Management and Budget (''OMB'') a request for approval of extension of the previously approved collection of information provided for in Rule 17Ad–10 (17 CFR 240.17Ad–10), under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

Rule 17Ad–10 generally requires registered transfer agents to: (1) Create and maintain current and accurate securityholder records; (2) promptly and accurately record all transfers, purchases, redemptions, and issuances, and notify their appropriate regulatory agency if they are unable to do so; (3) exercise diligent and continuous attention in resolving record inaccuracies; (4) disclose to the issuers for whom they perform transfer agent functions and to their appropriate regulatory agency information regarding record inaccuracies; (5) buy-in certain record inaccuracies that result in a physical over issuance of securities; and (6) communicate with other transfer agents related to the same issuer. These requirements assist in the creation and maintenance of accurate securityholder records, enhance the ability to research errors, and ensure the transfer agent is aware of the number of securities that are properly authorized by the issuer, thereby avoiding over issuance.

The rule also has specific recordkeeping requirements. It requires registered transfer agents to retain certificate detail that has been deleted for six years and keep current an accurate record of the number of shares or principal dollar amount of debt securities that the issuer has authorized

to be outstanding. These mandatory requirements ensure accurate securityholder records and assist the Commission and other regulatory agencies with monitoring transfer agents and ensuring compliance with the rule. This rule does not involve the collection of confidential information.

There are approximately 464 registered transfer agents. We estimate that the average number of hours necessary for each transfer agent to comply with Rule 17Ad–10 is approximately 80 hours per year, which generates an industry-wide annual burden of 37,120 hours (464 times 80 hours). This burden is of a recordkeeping nature but also includes a small amount of third party disclosure and SEC reporting burdens. At an average staff cost of $50 per hour, the industry-wide internal labor cost of compliance (a monetization of the burden hours) is approximately $1,856,000 per year (37,120 × $50).

In addition, we estimate that each transfer agent will incur an annual external cost burden of $18,000 resulting from the collection of information. Therefore, the total annual external cost on the entire transfer agent industry is approximately $8,352,000 ($18,000 times 464). This cost primarily reflects ongoing computer operations and maintenance associated with generating, maintaining, and disclosing or providing certain information required by the rule.

The amount of time any particular transfer agent will devote to Rule 17Ad–10 compliance will vary according to the size and scope of the transfer agent's business activity. We note, however, that at least some of the records, processes, and communications required by Rule 17Ad–10 would likely be maintained, generated, and used for transfer agent business purposes even without the rule.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following Web site, *www.reginfo.gov.* Comments should be directed to: (i) Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, New Executive Office Building, Washington, DC 20503, or by sending an email to: *Shagufta_Ahmed@omb.eop.gov;* and (ii) Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, VA 22312 or send an email to: *PRA_Mailbox@sec.gov.* Comments must be submitted to OMB within 30 days of this notice.

Dated: May 29, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–13126 Filed 6–3–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Proposed Collection; Comment Request

Upon Written Request, Copies Available From: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549–0213.

Extension:

Rule 31 and Form R31, SEC File No. 270–537, OMB Control No. 3235–0597.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (''Commission'') is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information to the Office of Management and Budget for extension and approval.

Section 31 of the Securities Exchange Act of 1934 (15 U.S.C. 78ee) (''Exchange Act'') requires the Commission to collect fees and assessments from national securities exchanges and national securities associations (collectively, ''self-regulatory organizations'' or ''SROs'') based on the volume of their securities transactions. To collect the proper amounts, the Commission adopted Rule 31 (17 CFR 240.31) and Form R31 (17 CFR 249.11) under the Exchange Act whereby the SROs must report to the Commission the volume of their securities transactions and the Commission, based on that data, calculates the amount of fees and assessments that the SROs owe pursuant to Section 31. Rule 31 and Form R31 require the SROs to provide this data on a monthly basis.

Currently, there are 22 respondents under Rule 31: 17 national securities exchanges, two security futures exchanges, and one national securities association subject to the collection of information requirements of Rule 31; there are additionally two registered clearing agencies that are required to provide certain data in their possession needed by the SROs to complete Form R31, although these two entities are not themselves required to complete and submit Form R31. The Commission estimates that the total burden for all 22 respondents is 366 hours per year. The Commission notes that, based on previous and current experience, it estimates an additional two new national securities exchanges will become registered and subject to the reporting requirements of Rule 31 over the course of the authorization period.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's estimate of the burden of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

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.

Please direct your written comments to: Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia, 22312 or send an email to: *PRA_Mailbox@sec.gov.*

Dated: May 30, 2013.

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–13191 Filed 6–3–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Public Law 94–409, that the Securities and Exchange Commission will hold a Closed Meeting on Thursday, June 6, 2013 at 2:00 p.m.

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the Closed Meeting. Certain staff members who have an interest in the matters also may be present.

The General Counsel of the Commission, or her designee, has

certified that, in her opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (7), 9(B) and (10) and 17 CFR 200.402(a)(3), (5), (7), 9(ii) and (10), permit consideration of the scheduled matters at the Closed Meeting.

Commissioner Gallagher, as duty officer, voted to consider the items listed for the Closed Meeting in a closed session.

The subject matter of the Closed Meeting will be: institution and settlement of injunctive actions; institution and settlement of administrative proceedings; consideration of amicus participation; and other matters relating to enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting items.

For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact the Office of the Secretary at (202) 551–5400.

Dated: May 30, 2013.

Elizabeth M. Murphy,

Secretary.

[FR Doc. 2013–13245 Filed 5–31–13; 11:15 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69658; File No. SR–MIAX–2013–23]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Expand the Short Term Option Series Program

May 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 May 20, 2013, Miami International Securities Exchange LLC (the ''Exchange'' or ''MIAX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend Exchange Rule 404, Series of Option Contracts Open for Trading, by modifying Interpretations and Policies .02 to the Rule to expand the number of expirations available under the Short Term Option Series Program (''STOS Program''), to allow the Exchange to delist certain series in STOS that do not have open interest, and to expand the number of series in STOS under limited circumstances.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.miaxoptions.com/filter/wotitle/rule_filing,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposal is to amend Exchange Rule 404, Interpretations and Policies .02, to provide for the ability to open up to five consecutive expirations under the STOS Program for trading on the Exchange, to allow the Exchange to delist certain series in STOS that do not have open interest, and to expand the number of series in STOS under limited circumstances when there are no series at least 10% but not more than 30% away from the current price of the underlying security.

Currently, the Exchange may select up to 25 currently listed option classes in which STOS options may be opened in the STOS Program, and the Exchange may also match any option classes that are selected by other securities exchanges that employ a similar program under their respective rules. For each option class eligible for participation in the STOS Program, the Exchange may open up to 30 Short Term Option Series for each expiration date in that class.[3]

This proposal seeks to allow the Exchange to open STOS option series for up to five consecutive week expirations. The Exchange intends to add a maximum of five consecutive week expirations under the STOS Program. However, it will not add an STOS expiration in the same week that a monthly options series expires or, in the case of Quarterly Option Series,[4] on an expiration that coincides with an expiration of Quarterly Option Series on the same class. In other words, the total number of consecutive expirations will be five, including any existing monthly or quarterly expirations.[5]

The Exchange notes that the STOS Program has been well-received by market participants, in particular by retail investors.[6] The Exchange believes that the current proposed revision to the STOS Program will permit the Exchange to meet increased customer demand and provide market participants with the ability to hedge in a greater number of option classes and series.

With regard to the impact of this proposal on system capacity, the Exchange has analyzed its capacity and represents that it and the Options Price Reporting Authority have the necessary systems capacity to handle the potential additional traffic associated with trading of an expanded number of expirations that participate in the STOS Program.

In addition, to provide for circumstances where the underlying security has moved such that there are no series that are at least 10% above or below the current price of the underlying security, the Exchange is proposing to add new language to Interpretations and Policies .02 to provide that the Exchange would delist series with no open interest in both the call and the put series having: (i) A

[3] *See* Exchange Rule 404, Interpretations and Policies .02(a).

[4] *See* Exchange Rule 404, Interpretations and Policies .03.

[5] For example, if Quarterly Options expire week 1 and monthly options expire week 3 from now, the proposal would allow the following expirations: week 1 Quarterly, week 2 STOS, week 3 monthly, week 4 STOS, and week 5 STOS.

[6] Since the STOS Program has been adopted, it has seen rapid acceptance among industry participants as evidenced by the expansion of the number of classes eligible for the STOS Program by various Exchanges. *See* Securities Exchange Act Release Nos. 65775 (November 17, 2011), 76 FR 72473 (November 23, 2011) (SR–NASDAQ–2011–138); 65776 (November 17, 2011), 76 FR 72482 (November 23, 2011) (SR–PHLX–2011–131); 66563 (March 9, 2012), 77 FR 15426 (March 15, 2012); 67194 (June 13, 2012), 77 FR 36597 (June 19, 2012) (SR–NYSEMKT–2012–08); and 67178 (June 11, 2012), 77 FR 36305 (June 18, 2012) (SR–NYSEArca–2012–60).

strike higher than the highest price with open interest in the put and/or call series for a given expiration month; and (ii) a strike lower than the lowest strike price with open interest in the put and/or the call series for a given expiration month, so as to list series that are at least 10% but not more than 30% above or below the current price of the underlying security. Further, in the event that all existing series have open interest and there are no series at least 10% above or below the current price of the underlying security, the Exchange may list additional series, in excess of the 30 allowed currently under Interpretations and Policies .02, that are at least 10% and not more than 30% above or below the current price of the underlying security.

The Exchange believes that it is important to allow investors to roll existing option positions, and ensuring that there are always series at least 10% but not more than 30% above or below the current price of the underlying security will allow investors the flexibility they need to roll existing positions. This change is being proposed notwithstanding the current cap of 30 series per class under the STOS Program.

2. Statutory Basis

The Exchange believes that its proposed rule change is consistent with Section 6(b)[7] of the Act in general, and furthers the objectives of Section 6(b)(5)[8] of the Act in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that expanding the STOS Program will result in a continuing benefit to investors by giving them more flexibility to closely tailor their investment decisions and hedging decisions in a greater number of securities. The Exchange also believes that expanding the STOS Program will provide the investing public and other market participants with additional opportunities to hedge their investment, thus allowing these investors to better manage their risk exposure. While the expansion of the STOS Program will generate additional quote traffic, the Exchange does not believe that this increased traffic will become unmanageable since the proposal remains limited to a fixed number of expirations.

The Exchange believes that the ability to delist series with no open interest in both the call and the put series will benefit investors by devoting the current cap in the number of series to those series that are more closely tailored to the investment decisions and hedging decisions of investors.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange believes that the proposal enhances competition among exchanges by enabling market participants to use STOS in a greater number of series in making investment decisions. MIAX will have more series through which investors will be able to tailor their investment and hedge positions, therefore enabling MIAX to compete with other exchanges that have similar rules in place, as cited below.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[9] and Rule 19b–4(f)(6) thereunder.[10]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to those of other exchanges that have been approved by the Commission and would provide the investing public and other market participants with greater flexibility to closely tailor their investment and hedging decisions in a greater number of series, thus allowing investors to better manage their risk exposure.[11] Therefore, the Commission designates the proposal operative upon filing.[12]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml);* or
- Send an email to *rule-comments@sec.gov.* Please include File Number SR–MIAX–2013–23 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2013–23. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml).* Copies of the

[7] 15 U.S.C. 78f(b).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78s(b)(3)(A).

[10] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[11] *See* Exchange Act Release Nos. 68190 (November 8, 2012), 77 FR 68193 (November 15, 2012) (SR–NYSEArca–2012–95); 68191 (November 8, 2012), 77 FR 68194 (November 15, 2012) (SR–NYSEMKT–2012–42).

[12] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2013–23 and should be submitted on or before June 25, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–13146 Filed 6–3–13; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69653; File No. SR–FICC–2013–05]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Filing Proposed Rule Change to Include trueEX LLC as a Designated Locked-In Trade Source Pursuant to the Rulebook of the Government Securities Division

May 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 May 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 amend the Rulebook of the Government Securities Division (''GSD'') to include trueEX LLC (''trueEX'') as one of the GSD's designated locked-in trade sources.

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.[3]

(A) Clearing Agency's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(i) The GSD Rulebook (''Rules'') provides for the submission of ''locked-in trades'' (*i.e.,* trades that are deemed compared when the data on the trade is received from a single source)[4] by a locked-in trade source[5] on behalf of a GSD Member. Currently, the GSD's designated locked-in trade sources are the following entities: (i) Federal Reserve Banks (as fiscal agents of the United States); (ii) the Federal Home Loan Mortgage Corporation (''Freddie Mac''); (iii) GCF-Authorized Inter-Dealer Brokers;[6] (iv) the U.S. Department of the Treasury; and (v) New York Portfolio Clearing, LLC. FICC is proposing to add trueEX as a designated locked-in trade source.

trueEX is an exchange for interest rate swaps, and has been designated a contract market by the Commodity Futures Trading Commission. trueEX will offer electronic execution of interest-rate swaps, which will be cleared by a clearing house other than FICC. For the delivery vs. payment (''DVP'')[7] leg of these transactions, trueEX will offer its members, who are also members of GSD, the ability to have such transactions submitted to the GSD as netting-eligible transactions (*e.g.,* as Treasury DVP transactions). In its capacity as a designated locked-in trade source, trueEX will transmit transactions to the GSD throughout the day by submitting single tickets in a batch format. Once trueEX transmits a locked-in trade to the GSD, the GSD will process the trade normally from the point of guarantee through settlement with the respective GSD member's current DVP trades. Because the single ticket submitted by trueEX lists trueEX as the submitter on behalf of two FICC counterparties, the single-ticket format guarantees that the parties to the trade will not know each other's identity, and ensures that trueEX will not have a resulting settlement obligation.[8] Subject to the Commission's approval of this rule filing, trueEX will be the first designated contract market (''DCM'')[9] to act as a locked-in trade source for the GSD.[10]

As is the case with other locked-in trade submissions accepted by FICC, GSD members will be required to execute appropriate documentation evidencing to FICC their authorization of trueEX to submit trades on their behalf. FICC will notify members of the availability of this documentation via Important Notice.

(ii) FICC believes that the proposed rule change is consistent with Section 17A of the Act[11] and the rules and regulations promulgated thereunder

[13] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission has modified the text of the summaries prepared by FICC.

[4] The GSD Rulebook defines the term ''Locked-In Trade'' as ''a trade involving Eligible Securities that is deemed a compared trade once the data on such trade is received from a single, designated source and meets the requirements for submission of data on a locked-in trade pursuant to GSD's rules, without the necessity of matching the data regarding the trade with data provided by each member that is or is acting on behalf of an original counterparty to the trade.'' GSD Rulebook, Rule 1.

[5] The GSD Rulebook defines the term ''Locked-in Trade Source'' as ''a source of data on Locked-In Trades that the Corporation has so designated, subject to such terms and conditions as to which the Locked-In Trade Source and the Corporation may agree.'' GSD Rulebook, Rule 1.

[6] The GSD Rulebook defines the term ''GCF-Authorized Inter-Dealer Broker'' as ''an Inter-Dealer Broker Netting Member that the Corporation has designated as eligible to submit to the Corporation data on GCF Repo Transactions on a Locked-In Basis.'' GSD Rulebook, Rule 1.

[7] Delivery vs. payment is a settlement procedure in which the buyer's cash payment for the securities it has purchased is due at the time the securities are delivered.

[8] In its capacity as a locked-in trade source, trueEX will initially not be subject to any fees pursuant to the existing GSD Rules. FICC may, however, consider imposing a fee on certain locked-in trade sources in the future based on volumes and processing costs.

[9] Designated contract markets (DCMs) are exchanges that may list for trading futures or option contracts based on all types of commodities and that may allow access to their facilities by all types of traders, including retail customers.

[10] During the onboarding phase, trueEX will be subject to FICC's existing due diligence process, including testing trueEX's trade input and receipt of output capabilities prior to the go-live date.

[11] 15 U.S.C. 78q–1.

because it will provide operational efficiencies in the marketplace, and will therefore support the prompt and accurate clearance and settlement of securities transactions.

(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 the proposed change, or

(B) institute proceedings to determine whether the proposed change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is 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–2013–05 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–2013–05. 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_05.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–2013–05 and should be submitted on or before June 25, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–13108 Filed 6–3–13; 8:45 am]

BILLING CODE 8011–01–P

[12] 17 CFR 300.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69657; File No. SR–NASDAQ–2013–079]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, Relating to the WisdomTree Global Corporate Bond Fund and the WisdomTree Emerging Markets Corporate Bond Fund

May 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 May 17, 2013, The NASDAQ Stock Market LLC (''NASDAQ'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. On May 20, 2013, the Exchange filed Partial Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1 thereto, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

NASDAQ is filing with the Commission a proposed rule change relating to the WisdomTree Global Corporate Bond Fund (the ''Global Fund'') and the WisdomTree Emerging Markets Corporate Bond Fund (the ''Emerging Markets Fund,'' and collectively with the Global Fund, the ''Funds'') of the WisdomTree Trust (the ''Trust'') listed under NASDAQ Rule 5735 (Managed Fund Shares). The shares of the Fund are collectively referred to herein as the ''Shares.''

The Exchange requests that the proposal be approved on an accelerated basis.

The text of the proposed rule change is available from NASDAQ's Web site at *http://nasdaq.cchwallstreet.com/Filings/,* at NASDAQ's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ 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. NASDAQ has prepared summaries, set

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] In Partial Amendment No. 1, the Exchange corrected a typographical error by moving the word ''indicative'' from just before ''NAV'' to just before ''intra-day'' such that the sentence, as modified, reads: ''The Adviser represents that it does not believe that the ability of the Funds' agent to calculate NAV and an indicative intra-day value (''IIV'') for each Fund, and disseminate such IIV every 15 seconds throughout the trading day, has been impeded by the Funds' current Rule 144A holdings limited to 15% of net assets.''

forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to reflect changes to the means of achieving the investment objectives of each of the Funds. The Commission has approved the listing and trading of Shares of each of the Funds under NASDAQ Rule 5735, which governs the listing and trading of Managed Fund Shares on the Exchange.[4] The Exchange believes the proposed rule change raises no significant issues not previously addressed in the Prior Approval Orders. The Funds are actively managed exchange traded funds (''ETFs''). The Shares are offered by the Trust, which was established as a Delaware statutory trust on December 15, 2005. The Trust, which is registered with the Commission as an investment company, has filed a registration statement on Form N–1A with the Commission on behalf of each of the Funds (each, a ''Registration Statement'').[5]

Description of the Shares and the Fund

WisdomTree Asset Management, Inc. (''WisdomTree Asset Management'') is the investment adviser (''Adviser'') to the Funds. Western Asset Management Company serves as sub-adviser for the Funds (''Sub-Adviser'').[6]

In this proposed rule change, the Exchange proposes to amend the description of the measures the Sub-Adviser may utilize to implement each of the Fund's investment objectives.[7] The Emerging Markets Fund Order defined Corporate and Quasi-Sovereign Debt as fixed income securities of emerging market countries, such as bonds, notes or other debt obligations, including loan participation notes (''LPNs''), as well as other instruments, such as derivative instruments, collateralized by money market securities, as defined therein. Quasi-Sovereign Debt referred specifically to fixed income securities or debt obligations that are issued by companies or agencies that may receive financial support or backing from a local government. The Global Fund Order defined Global Corporate Debt to include fixed income securities, such as bonds, notes, or other debt obligations, including LPNs, as well as debt instruments denominated in U.S. dollars or local currencies. Global Corporate Debt also included fixed income securities or debt obligations issued by companies or agencies that may receive financial support or backing from local governments, as well as money market securities as defined therein.[8]

Under the Prior Approval Orders, the Funds are permitted to hold up to 15% of their respective net assets in illiquid securities (calculated at the time of investment), including (1) Rule 144A securities and (2) loan interests (such as loan participations and assignments, but not including LPNs).[9] Under the 1940 Act and rules thereunder, the Funds are required to monitor their respective portfolio's liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and to consider taking appropriate steps in order to maintain adequate liquidity if through a change in values, net assets or other circumstances, more than 15% of the Fund's net assets were held in illiquid securities.[10]

The Exchange seeks to make a change to the representations made by the Adviser reflected in the Prior Approval Orders to increase the amount of Rule 144A securities that each Fund may hold. Under the proposed amendment, each Fund may continue to hold up to an aggregate amount of 15% of its net assets in illiquid securities (calculated at the time of investment), including (1) Rule 144A securities deemed illiquid by the Adviser or Sub-Adviser, and (2) loan interests (including loan participations and assignments, but not including LPNs).[11] Each Fund will, however, continue to hold up to an additional 40% of its net assets in Rule 144A securities not deemed illiquid by the Sub-Adviser (calculated at the time of investment). The proposed rule change would therefore exclude Rule 144A securities not deemed illiquid by the Adviser or Sub-Adviser from the 15% limitation on investments in illiquid securities, and limit each Fund's investment in liquid Rule 144A securities to 40% of Fund net assets.

[4] The Commission approved NASDAQ Rule 5735 in Securities Exchange Act Release No. 57962 (June 13, 2008), 73 FR 35175 (June 20, 2008) (SR–NASDAQ–2008–039). The Commission previously approved the listing and trading of the Shares of each of the Funds. *See* Securities Exchange Act Release Nos. 66489 (February 29, 2012), 77 FR 13379 (March 6, 2012) (SR–NASDAQ–2012–004) (order approving listing and trading of WisdomTree Emerging Markets Corporate Bond Fund) (''Emerging Markets Fund Order''); and 68073 (October 19, 2012), 77 FR 65237 (October 25, 2012) (SR–NASDAQ–2012–98) (order approving listing and trading of WisdomTree Global Corporate Bond Fund) (''Global Fund Order,'' and collectively the ''Prior Approval Orders'').

[5] *See* Post-Effective Amendment Nos. 99 to Registration Statement on Form N–1A for the Trust, dated February 8, 2012 (File Nos. 333–132380 and 811–21864) (relating to the Emerging Markets Fund); and 139 to Registration Statement on Form N–1A for the Trust, dated October 26, 2012 (relating to the Global Fund). The descriptions of the Funds and the Shares contained herein are based, in part, on information in the applicable Registration Statement for each Fund.

[6] The Commission has issued an order granting certain exemptive relief to the Trust under the Investment Company Act of 1940 (15 U.S.C. 80a–1) (''1940 Act''). *See* Investment Company Act Release No. 28171 (October 27, 2008) (File No. 812–13458) (''Exemptive Order'').

[7] The changes described herein, including the risks associated with investing in 144A securities, will be reflected in each Fund's Registration Statement, as amended, and become effective upon the filing thereof with the Commission, following approval of this proposal. *See supra* note 5. The Adviser represents that the Adviser and Sub-Adviser have managed and will continue to manage the Funds in the manner prescribed in the Prior Approval Orders, and will not implement the changes described herein until the instant proposed rule change has been approved.

[8] *See supra* note 4.

[9] The Commission has stated that long-standing Commission guidelines have required open-end funds to hold no more than 15% of their net assets in illiquid securities and other illiquid assets. *See* Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008), footnote 34. *See also* Investment Company Act Release No. 5847 (October 21, 1969), 35 FR 19989 (December 31, 1970) (Statement Regarding ''Restricted Securities''); Investment Company Act Release No. 18612 (March 12, 1992), 57 FR 9828 (March 20, 1992) (Revisions of Guidelines to Form N–1A). A fund's portfolio security is illiquid if it cannot be disposed of in the ordinary course of business within seven days at approximately the value ascribed to it by the fund. *See* Investment Company Act Release No. 14983 (March 12, 1986), 51 FR 9773 (March 21, 1986) (adopting amendments to Rule 2a–7 under the 1940 Act); Investment Company Act Release No. 17452 (April 23, 1990), 55 FR 17933 (April 30, 1990) (adopting Rule 144A under the Securities Act of 1933).

[10] Illiquid securities were defined in the Emerging Markets Fund Order to include securities that cannot be sold or disposed of within seven days in the ordinary course of business at approximately the amount at which a fund has valued such securities. Illiquid securities were defined in the Global Fund Order to include securities subject to contractual or other restrictions on resale and other instruments that lack readily available markets as determined in accordance with Commission staff guidance. *See* Prior Approval Orders, *supra* note 4.

[11] While the ultimate responsibility for determination of liquidity of securities (including Rule 144A securities) lies with each Fund's Board of Directors, the Funds' Sub-Adviser is responsible for complying with each Fund's restrictions on investing in illiquid securities on a day to day basis. In doing that, the Sub-Adviser makes ongoing determinations about the liquidity of Rule 144A securities that the respective Fund may invest in. In reaching liquidity decisions, the Adviser represents that the Sub-Adviser may consider the following factors: the frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and of the marketplace trades (e.g. the time needed to dispose of the security, the method of soliciting offers, and the mechanics of transfer). *See* Securities Act Release No. 6862 (April 23, 1990), 55 FR 17933, 17940 (April 30, 1990) (Resale of Restricted Securities; Changes to Method of Determining Holding Period of Restricted Securities Under Rules 144 and 145).

The Adviser represents that each Fund's holdings in Rule 144A securities not deemed illiquid by the Sub-Adviser will be comprised of issuances with more than $100 million principal outstanding.

The Adviser represents that the purpose of the proposed change would be to permit the Sub-Adviser the flexibility to meet each Fund's investment objectives by permitting each Fund to invest in a higher percentage of Rule 144A securities not deemed illiquid by the Adviser or Sub-Adviser in accordance with Commission guidance and regulations. Rule 144A securities are securities that are not registered under the Securities Act, but which can only be offered and sold to ''qualified institutional buyers'' under Rule 144A of the Securities Act.[12] The Exchange notes that Rule 144A was adopted, in part, to promote a more liquid resale market in unregistered securities among institutional investors,[13] and the Adviser represents that liquid institutional markets for Rule 144A securities, including those Rule 144A securities generally held by the Funds, have developed. In this regard, the Adviser represents that most reference benchmarks for non-investment grade corporate bonds include more than 25% Rule 144A securities.[14] ETFs tracking such benchmarks have not, to the knowledge of the Adviser, experienced particular secondary market liquidity issues due to positions in Rule 144A securities. The Adviser would not expect a materially different result for the Funds as the market for investment grade bonds,[15] which the Funds each hold, is typically more liquid than the market for similar non-investment grade bonds. The Adviser notes further that the average issue size for Rule 144A securities is also comparable to the average issue size for registered securities within most high yield bond indices. The Adviser represents further that currently-listed high yield bond ETFs typically include a significant percentage of Rule 144A securities within their respective portfolios.[16] Based on these representations, the Exchange believes there is ample existing precedent, and that its proposal is consistent with such precedent, to permit the Funds to invest in Rule 144A securities not deemed illiquid by the Adviser or Sub-Adviser, without the 15% limitation currently imposed by the Prior Approval Orders.

In addition, the Exchange proposes that the requirements of the Global Fund Order be modified to permit the Global Fund to invest up to 20% of its net assets in sovereign debt.[17] The Exchange also proposes that the requirements of the Prior Approval Orders be modified to amend the definitions of Global Corporate Debt and Corporate and Quasi-Sovereign Debt, as applicable, to include both inflation-protected debt, including fixed income securities and other debt obligations linked to inflation rates of local economies, and variable rate or floating rate securities which are readjusted on set dates (such as the last day of the month or calendar quarter) in the case of variable rates or whenever a specified interest rate change occurs in the case of a floating rate instrument.[18] The Adviser represents that these proposed changes in the permitted investments will permit the Funds to invest in a broader range of market sectors, and will thereby help further the Funds' investment objectives to obtain both income and capital appreciation through direct and indirect investments in Global Corporate Debt or Corporate and Quasi-Sovereign Debt, as applicable, and other investments.

The Adviser represents that there is no change to the Funds' respective investment objectives. The Funds will continue to comply with all initial and continuing listing requirements under NASDAQ Rule 5735.

The Net Asset Value (''NAV'') of each Fund's Shares is calculated each day the New York Stock Exchange is open for trading as of the close of regular trading on that exchange, generally 4:00 p.m. Eastern Time (the ''NAV Calculation Time''). NAV per Share is calculated by dividing a Fund's net assets by the number of Fund Shares outstanding. In calculating the Fund's NAV, each Fund's investments generally are valued using market valuations. Short-term debt securities with remaining maturities of 60 days or less generally are valued on the basis of amortized cost, which approximates fair value. U.S. fixed income assets may be valued as of the announced closing time for such securities on any day that the Securities Industry and Financial Markets Association announces an early closing time. The values of any assets or liabilities of a Fund that are denominated in a currency other than the U.S. dollar are converted into U.S. dollars using an exchange rate deemed appropriate by the Fund.

In certain instances, such as when reliable market valuations are not readily available or are not deemed to

[12] The term ''qualified institutional buyer'' (QIB) is defined in Rule 144A(a)(1). 17 CFR 230.144A(a)(1).

[13] *See* Securities Act Release No. 6862 (April 23, 1990), 55 FR 17933 (April 30, 1990).

[14] *See, e.g.,* Merrill Lynch High Yield Master II index (''Master II index''), which as of November 6, 2012, was comprised of 32% Rule 144A securities. The Master II index is the benchmark index for the American Century High-Yield Inv ETF (ABHIX). Also, as of March 6, 2013, Barclays High Yield Very Liquid Index was comprised of 43% Rule 144A securities. That index is the benchmark for the SPDR Barclays High Yield Bond ETF (JNK).

[15] The Global Fund intends to have 55% or more of its assets invested in investment grade securities, though this percentage may change from time to time in response to economic events and changes in the credit ratings of such issuers. *See* Global Fund Order at 65238. The Emerging Markets Fund expects to have 65% or more of its assets invested in investment grade securities, though this percentage may change in response to economic events and changes to the ratings of such issuers. *See* Emerging Markets Order at 13380.

The Global Fund Order defines the term ''investment grade'' to mean securities rated in the Baa/BBB categories or above by one or more nationally recognized statistical rating organizations (''NRSROs''). If a security is rated by multiple NRSROs, each Fund will treat the security as being rated in the highest rating category received from an NRSRO. Rating categories may include sub-categories or gradations indicating relative standing. *See* Global Fund Order at note 11. The Emerging Markets Fund Order does not define the term ''investment grade.'' However, the Adviser represents that it intends to apply the definition of ''investment'' grade'' in the Global Fund Order to the Emerging Markets Fund.

[16] For example, the Adviser represents that as of November 6, 2012, more than 30% of the investment portfolio of the actively-managed Peritus High Yield ETF was comprised of Rule 144A securities. *See* Securities Exchange Act Release Nos. 63329 (November 17, 2010), 75 FR 71760 (November 24, 2010) (SR–NYSEArca-2010–86) (order approving proposed rule change relating to listing and trading of Peritus High Yield ETF); and 63041 (October 5, 2010), 75 FR 62905 (October 13, 2010) (SR–NYSEArca-2010–86) (notice of filing of proposed rule change to list the Peritus High Yield ETF). *See also* Securities Exchange Act Release No. 66818 (April 17, 2012), 77 FR 24233 (April 23, 2012) (SR–NYSEArca-2012–33) (notice of filing and immediate effectiveness of proposed rule change regarding Peritus High Yield ETF). The Adviser also represents that the investment strategies of various index-based high yield ETFs permit active use of Rule 144A securities, provided such securities are deemed liquid. *See, e.g.,* prospectus for SPDR Barclays Capital High Yield Bond ETF, *https://www.spdrs.com/library-content/public/SPDR_SERIES%20TRUST_SAI.pdf,* which explicitly permits the fund to invest in Rule 144A securities deemed liquid. The Adviser represents that as of November 6, 2012, the portfolio of the SPDR Barclays High Yield Bond ETF included approximately 37% Rule 144A securities.

[17] The sovereign debt would not fall within the definition of Global Corporate Debt in the Global Fund Order, and it therefore would not be considered as part of the 80% minimum investment in fixed income securities that are Global Corporate Debt within that order. The Registration Statement defines ''sovereign debt'' as ''debt securities of emerging market countries,'' for purposes of the Emerging Markets Fund, and ''as debt securities of foreign governments,'' for purposes of the Global Fund.

[18] Variable or floating interest rates generally reduce changes in the market price of securities from their original purchase price because, upon readjustment, such rates approximate market rates. Accordingly, as interest rates decrease or increase, the potential for capital appreciation or depreciation is less for variable or floating rate securities than for fixed rate obligations.

reflect current market values, the Fund's investments will be valued in accordance with the Fund's pricing policy and procedures. Such securities may be valued using ''fair value'' pricing and may include, but are not limited to, securities for which there are no current market quotations or whose issuer is in default or bankruptcy, securities subject to corporate actions (such as mergers or reorganizations), securities subject to non-U.S. investment limits or currency controls, and securities affected by ''significant events.'' An example of a significant event is an event occurring after the close of the market in which a security trades but before the Fund's next NAV Calculation Time that may materially affect the value of the Fund's investment (e.g., government action, natural disaster, or significant market fluctuation).

Price movements in U.S. markets that are deemed to affect the value of foreign securities, or reflect changes to the value of such securities, also may cause securities to be ''fair valued.'' When fair-value pricing is employed, the prices of securities used by the Fund to calculate its NAV may differ from quoted or published prices for the same securities.

The Adviser represents that it does not believe that the ability of the Funds' agent to calculate NAV and an indicative intra-day value (''IIV'') for each Fund, and disseminate such IIV every 15 seconds throughout the trading day, has been impeded by the Funds' current Rule 144A holdings limited to 15% of net assets. Moreover, the Adviser does not expect that permitting the Funds to increase each of their liquid Rule 144A holdings as requested herein will otherwise impede the ability of the Funds' agent to calculate an NAV and an IIV, and disseminate such IIV every 15 seconds throughout the trading day.

Except for the limited changes proposed herein, all other facts presented and representations made in the Rule 19b–4 [19] filings underlying the Prior Approval Orders remain unchanged. The changes proposed herein would be consistent with the Exemptive Order [20] and the 1940 Act and rules thereunder.

2. Statutory Basis

NASDAQ believes that the proposal is consistent with Section 6(b) of the Act [21] in general and Section 6(b)(5) of the Act [22] in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the Shares will be listed and traded on the Exchange pursuant to the initial and continued listing criteria in NASDAQ Rule 5735. The Funds will not hold more than 15% of their respective net assets (calculated at the time of investment) in illiquid securities, including (1) Rule 144A securities deemed illiquid, or (2) loan participations or assignments (but not including LPNs). Each Fund may, however, hold up to an additional 40% of its net assets in Rule 144A securities not deemed illiquid by the Sub-Adviser (calculated at the time of investment). The proposal would therefore exclude Rule 144A securities not deemed illiquid by the Adviser or Sub-Adviser from the 15% limitation on investments in illiquid securities, and limit each Fund's investment in liquid Rule 144A securities to 40% of Fund net assets. The Adviser represents that the Fund's holdings in Rule 144A securities not deemed illiquid by the Sub-Adviser will be part of an issuance with more than $100 million in principal outstanding.

Under the 1940 Act and rules thereunder, the Funds are required to monitor their respective portfolio's liquidity on an ongoing basis to determine whether, in light of current circumstances, an adequate level of liquidity is being maintained, and to consider taking appropriate steps in order to maintain adequate liquidity if through a change in values, net assets or other circumstances, more than 15% of the Fund's net assets were held in illiquid securities.[23] Moreover, while the ultimate responsibility for determination of liquidity of securities (including Rule 144A securities) lies with each Fund's Board of Directors, the Funds' Sub-Adviser is responsible for complying with each Fund's restrictions on investing in illiquid securities on a day to day basis. In doing that, the Sub-Adviser makes ongoing determinations about the liquidity of Rule 144A securities that the respective Fund may invest in. In reaching liquidity decisions, the Sub-Adviser may consider the following factors: The frequency of trades and quotes for the security; the number of dealers wishing to purchase or sell the security and the number of other potential purchasers; dealer undertakings to make a market in the security; and the nature of the security and of the marketplace trades (e.g. the time needed to dispose of the security, the method of soliciting offers, and the mechanics of transfer).

The Global Fund will continue, under normal circumstances,[24] to invest not less than 80% of its net assets in Global Corporate Debt that are fixed income securities, and the Emerging Markets Fund will continue to invest at least 80% of its net assets in Corporate and Quasi-Sovereign Debt that are fixed income securities. The Funds will continue to comply with all initial and continued listing requirements under NASDAQ Rule 5735.

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Adviser represents there is no change to either Fund's investment objective. The Adviser represents that the purpose of the proposed changes would be, respectively, to (1) permit the Sub-Adviser the flexibility to meet each Fund's investment objectives by permitting each Fund to invest in Rule 144A securities not deemed illiquid by the Adviser or Sub-Adviser, or (2) permit the Funds to invest in a broader range of market sectors, and thereby help further the Fund's objectives to obtain both income and capital appreciation through direct and indirect investments in Global Corporate Debt or Corporate and Quasi-Sovereign Debt, as applicable, and other investments.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that the Funds may invest more than 15% of their respective net assets in Rule 144A securities solely if those securities are not deemed illiquid by the Adviser or Sub-Adviser. Investors and the public interest are protected under the proposal by finite parameters regarding 144A securities investments: A 40% cap on 144A investment, whereby up to a total of 40% may be in not illiquid 144A securities, and a requirement that

[19] 17 CFR 240.19b–4.

[20] *See supra* note 6.

[21] 15 U.S.C. 78f.

[22] 15 U.S.C. 78f(b)(5).

[23] *See supra* note 10.

[24] The term ''under normal circumstances'' includes, but is not limited to, the absence of extreme volatility or trading halts in the fixed income markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption or any similar intervening circumstance. *See supra* note 4 regarding SR–NASDAQ–2012–004 and SR–NASDAQ–2012–98.

holdings in not illiquid Rule 144A securities will be comprised of issuances with more than $100 million principal outstanding. Moreover, under the proposal the Global Fund may invest up to 20% of its net assets in sovereign debt, because sovereign debt will not fall within the definition of Global Corporate Debt under the Global Fund Order.[25] Under the proposal, each of the Global Fund and the Emerging Markets Fund will continue to invest not less than 80% of such Fund's respective net assets in fixed income securities, because both inflation-protected debt and variable rate or floating rate debt [26] will fall within the definitions of Global Corporate Debt or Corporate and Quasi-Sovereign Debt, as applicable, under the Prior Approval Orders. The proposed changes are intended to provide additional flexibility to the Funds' Sub-Adviser to meet each Fund's investment objectives.[27]

For the above reasons, NASDAQ believes the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act, and consistent with investment protection in that each Fund's holdings of Rule 144A securities not deemed illiquid by the Sub-Adviser would be limited to 40% of such Fund's net assets, and the holdings in Rule 144A securities not deemed illiquid by the Sub-Adviser will be comprised of issuances with more than $100 million principal outstanding.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. To the contrary, the proposed rule change is decidedly pro-competitive. The proposed rule change will result in additional investment options to achieve the investment objectives of the Funds, thereby facilitating the listing and trading of additional actively-managed exchange-traded products that will enhance competition to the benefit of investors, market participants, and the marketplace.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall:

(a) By order approve or disapprove such proposed rule change, or

(b) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NASDAQ–2013–079 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–NASDAQ–2013–079. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NASDAQ–2013–079 and should be submitted on or before June 25, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–13110 Filed 6–3–13; 8:45 am]

BILLING CODE 8011–01–P

[25] Sovereign debt enjoys a relationship to foreign governments that is not unlike that of Treasury debt securities and the U.S. government. For purposes of the Global Fund, for example, sovereign debt is specifically defined as the debt securities of foreign governments. *See supra* note 16.

[26] For variable or floating interest rates, as interest rates decrease or increase the potential for capital appreciation or depreciation is less than for fixed rate obligations. Moreover, variable or floating interest rates generally reduce changes in the market price of securities from their original purchase price because, upon readjustment, such rates approximate market rates.

[27] Moreover, it is not expected that the proposed rule change will impede the ability of the Funds' agent to calculate an NAV and an IIV, and disseminate such IIV every 15 seconds throughout the trading day.

[28] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–69659; File No. SR–MIAX–2013–22]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Permit the Listing of Additional Strikes Until the Close of Trading on the Second Business Day Prior to Expiration in Unusual Market Conditions

May 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 May 20, 2013, Miami International Securities Exchange LLC (the ''Exchange'' or ''MIAX'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend Exchange Rule 404, Series of Option Contracts Open for Trading, by stating in Rule 404(e) that the Exchange may list additional strike prices until the close of trading on the second business day prior to monthly expiration in unusual market conditions.

The text of the proposed rule change is available on the Exchange's Web site at *http://www.miaxoptions.com/filter/wotitle/rule_filing,* at MIAX's principal office, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend Exchange Rule 404(e) to permit the Exchange to add additional strikes until the close of trading on the second business day prior to the expiration of a monthly, or standard, option in the event of unusual market conditions. This is a competitive filing that is based on the recently approved proposals of NYSE MKT LLC and NYSE Arca, Inc.[3]

MIAX Rule 404(e) currently permits the Exchange to add new series of options on an individual stock until the beginning of the month in which the option contract will expire. Due to unusual market conditions, the Exchange, in its discretion, may add new series of options on an individual stock until five (5) business days prior to expiration.[4] Options market participants generally prefer to focus their trading in strike prices that immediately surround the price of the underlying security. However, if the price of the underlying stock moves significantly, there may be a market need for additional strike prices to adequately account for market participants' risk management needs in an underlying stock. In these situations, the Exchange has the ability to add additional series at strike prices that are better tailored to the risk management needs of market participants.[5] The Exchange may make the determination to open additional series for trading when the Exchange deems it necessary to maintain an orderly market, to meet customer demand, or when certain price movements take place in the underlying market.[6] If the market need occurs prior to five business days prior to expiration, then the market participants may have access to an option contract that is more tailored to the movement in the underlying stock.[7] However, if the market need to manage risk due to unusual market conditions comes to light anytime from five to two days prior to expiration, then market participants are left without a contract that is tailored to manage their risk.[8]

The Exchange proposes to permit the listing of additional strikes until the close of trading on the second business day prior to expiration in unusual market conditions. Since expiration of the monthly contract is on a Saturday, the close of trading on the second business day prior to expiration will typically fall on a Thursday. However, in the cases where Friday is a holiday during which the Exchange is closed, the close of trading on the second business day prior to expiration will occur on a Wednesday. The Exchange will continue to make the determination to open additional series for trading when the Exchange deems it necessary to maintain an orderly market, to meet customer demand, or when certain price movements take place in the underlying market. The proposed rule change will provide an additional four days for the Exchange to gauge market impact of the underlying stock and to react to any market conditions that would render additional series prior to expiration beneficial to market participants.

The Exchange believes that the impact on the market from the proposed rule change will be very minimal to market participants, however it will be extremely beneficial in the limited number of situations where unusual market conditions dictate immediately prior to expiration. The proposal would simply allow participants to adjust their risk exposure in narrow situations when an unusual market event occurred on trading days 2, 3, 4, 5 prior to expiration.

This proposal does not raise any capacity concerns on the Exchange, because the changes have no material difference in impact from the current rules. The Exchange notes the proposed change allows for new strikes that it would otherwise be permitted to add under existing rules either on the fifth day prior to, or immediately after, expiration.[9] A strike that opens two days prior to expiration will have minimal impact on quoting, as it adds two series out of hundreds of thousands, and only for a small number of days.[10] Thus, any additional strikes that may be added under the proposed change would have no measurable effect on systems capacity.

The Exchange notes that the proposed change is consistent with rules that have been approved by the Commission on at least one other options exchange [11] and for which at least one other options exchange filed for immediate effectiveness.[12]

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act [13] in general, and furthers the objectives of 6(b)(5) of the

[3] *See* Securities Exchange Act Release Nos. 68460 (December 18, 2012), 77 FR 76145 (December 26, 2012) (SR–NYSEMKT–2012–41); 68461 (December 18, 2012), 77 FR 76155 (December 26, 2012) (SR–NYSEArca–2012–94). *See also* Securities Exchange Act Release No. 68491 (December 20, 2012), 77 FR 76334 (December 27, 2012) (SR–ISE–2012–101).

[4] *See* Exchange Rule 404(e). 'Until five (5) business days prior' generally means up through the end of the day on the Friday of the week prior to expiration week.

[5] *See* Exchange Rule 404.

[6] *See* Exchange Rule 404(c).

[7] *See* Exchange Rule 404(e).

[8] While these situations are relatively rare, the Exchange represents that approximately two times a month there is a legitimate need to add additional strikes closer to expiration than the five business day limitation permits, due to it being necessary to maintain an orderly market, to meet customer demand, or when certain price movements take place in the underlying market.

[9] Any new strikes added under this proposal would be added in a manner consistent with the range limitations described in Exchange Rule 404A.

[10] In the case of a multi-stock event where multiple stocks may be subject to unusual market conditions, a strike which opens two days prior to expiration will also have minimal impact on quoting, as it adds two series per stock out of hundreds of thousands, and only for a small number of days.

[11] *See* Securities Exchange Act Release Nos. 68460 (December 18, 2012), 77 FR 76145 (December 26, 2012) (SR–NYSEMKT–2012–41); 68461 (December 12, 2012), 77 FR 76155 (December 26, 2012) (SR–NYSEArca–2012–94).

[12] *See* Securities Exchange Act Release No. 68491 (December 20, 2012), 77 FR 76334 (December 27, 2012) (SR–ISE–2012–101).

[13] 15 U.S.C. 78f(b).

Act[14] in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest.

The Exchange believes that providing an additional four days to the Exchange to gauge market impact and to react to any market conditions prior to expiration is beneficial and will result in a continuing benefit to investors by giving them more flexibility to closely tailor their investment decisions and hedging decisions prior to expiration. The Exchange also believes that the additional four days will provide the investing public and other market participants with additional opportunities to hedge their investment, thus allowing these investors to better manage their risk exposure with additional option series. While the four additional days may generate additional quote traffic, the Exchange does not believe that this increased traffic will become unmanageable since the proposal remains limited to the narrow situations when an unusual market event occurs on trading days 2, 3, 4, 5 prior to expiration.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In this regard and as indicated above, the Exchange notes that the instant proposed rule change is submitted as a competitive response to filings submitted by other competing options exchanges. MIAX believes this proposed rule change is necessary to permit fair competition among the options exchanges and to establish uniform rules regarding the listing of strike prices.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

[14] 15 U.S.C. 78f(b)(5).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act[15] and Rule 19b–4(f)(6) thereunder.[16]

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal is substantially similar to those of other exchanges that have been approved by the Commission and would permit the Exchange to list additional strike prices until the close of trading on the second business day prior to monthly expiration in unusual market conditions.[17] Therefore, the Commission designates the proposal operative upon filing.[18]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

[15] 15 U.S.C. 78s(b)(3)(A).

[16] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[17] *See supra* note 11.

[18] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–MIAX–2013–22 on the subject line.

Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–MIAX–2013–22. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–MIAX–2013–22 and should be submitted on or before June 25, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–13152 Filed 6–3–13; 8:45 am]

BILLING CODE 8011–01–P

[19] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13579 and #13580]

Illinois Disaster Number IL–00041

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Illinois (FEMA–4116–DR), dated 05/10/2013.

Incident: Severe Storms, Straight-line Winds and Flooding.

Incident Period: 04/16/2013 through 05/05/2013.

Effective Date: 05/22/2013.

Physical Loan Application Deadline Date: 07/09/2013.

EIDL Loan Application Deadline Date: 02/10/2014.

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: The notice of the Presidential disaster declaration for the State of Illinois, dated 05/10/2013 is hereby amended to include the following areas as adversely affected by the disaster:

Primary Counties: (Physical Damage and Economic Injury Loans): Bureau; Crawford; Henderson; Knox; Livingston; Marshall; Mason; Mcdonough; Peoria; Rock Island; Schuyler; Stark; Tazewell; Woodford.

Contiguous Counties: (Economic Injury Loans Only):

Illinois: Adams; Brown; Cass; Clark; Ford; Hancock; Henry; Jasper; Lawrence; Logan; Mclean; Menard; Mercer; Richland; Whiteside.

Indiana: Knox; Sullivan.

Iowa: Clinton; Des Moines; Lee; Louisa; Muscatine; Scott.

All other information in the original declaration remains unchanged.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2013–13252 Filed 6–3–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13590 and #13591]

Texas Disaster #TX–00405

AGENCY: U.S. Small Business Administration.

ACTION: Notice.

SUMMARY: This is a notice of an Administrative declaration of a disaster for the State of Texas dated 05/29/2013.

Incident: Severe Weather and Tornadoes.

Incident Period: 05/15/2013.

Effective Date: 05/29/2013.

Physical Loan Application Deadline Date: 07/29/2013.

Economic Injury (EIDL) Loan Application Deadline Date: 03/03/2014.

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: Ellis, Hood, Johnson.

Contiguous Counties:

Texas: Bosque, Dallas, Erath, Henderson, Hill, Kaufman, Navarro, Palo Pinto, Parker, Somervell, Tarrant.

The Interest Rates are:

	Percent
For Physical Damage:	
Homeowners With Credit Available Elsewhere	3.750
Homeowners Without Credit Available Elsewhere	1.875
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 13590 C and for economic injury is 13591 0.

The State which received an EIDL Declaration # is Texas.

(Catalog of Federal Domestic Assistance Numbers 59002 and 59008)

Dated: May 29, 2013.

Karen G. Mills,

Administrator.

[FR Doc. 2013–13253 Filed 6–3–13; 8:45 am]

BILLING CODE 8025–01–P

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13586 and #13587]

Oklahoma Disaster Number OK–00071

AGENCY: U.S. Small Business Administration.

ACTION: Amendment 1.

SUMMARY: This is an amendment of the Presidential declaration of a major disaster for the State of Oklahoma (FEMA–4117–DR), dated 05/20/2013.

Incident: Severe Storms and Tornadoes.

Incident Period: 05/18/2013 through 05/27/2013.

Effective Date: 05/27/2013.

Physical Loan Application Deadline Date: 07/19/2013.

EIDL Loan Application Deadline Date: 02/20/2014.

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: The notice of the President's major disaster declaration for the State of Oklahoma, dated 05/20/2013 is hereby amended to establish the incident period for this disaster as beginning 05/18/2013 and continuing through 05/27/2013.

All other information in the original declaration remains unchanged.
of Federal Domestic Assistance Numbers 59002 and 59008)

James E. Rivera,

Associate Administrator for Disaster Assistance.

[FR Doc. 2013–13256 Filed 6–3–13; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF STATE

[Public Notice 8347]

Culturally Significant Objects Imported for Exhibition Determinations: ''Interwoven Globe: The Worldwide Textile Trade, 1500–1800''

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985; 22 U.S.C. 2459), Executive Order 12047 of March 27, 1978, the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.;* 22 U.S.C. 6501 note, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, Delegation of Authority No. 236–3 of August 28, 2000 (and, as appropriate, Delegation of Authority No. 257 of April 15, 2003), I hereby determine that the objects to be included in the exhibition ''Interwoven Globe: The Worldwide Textile Trade, 1500–1800,'' imported from abroad for temporary exhibition within the United States, are of cultural significance. The objects are imported pursuant to loan agreements with the foreign owners or custodians. I also determine that the exhibition or display of the exhibit objects at The Metropolitan Museum of Art, New York, NY, from on or about September 10, 2013, until on or about January 5, 2014, and at possible additional exhibitions or venues yet to be determined, is in the national interest. I have ordered that Public Notice of these Determinations be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of the exhibit objects, contact Julie Simpson, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State (telephone: 202–632–6467). The mailing address is U.S. Department of State, SA–5, L/PD, Fifth Floor (Suite 5H03), Washington, DC 20522–0505.

Dated: May 23, 2013.

J. Adam Ereli,

Principal Deputy Assistant Secretary, Bureau of Educational and Cultural Affairs, Department of State.

[FR Doc. 2013–13208 Filed 6–3–13; 8:45 am]

BILLING CODE 4710–05–P

DEPARTMENT OF STATE

[Public Notice 8346]

Overseas Schools Advisory Council; Notice of Meeting

The Overseas Schools Advisory Council, Department of State, will hold its Annual Meeting on Thursday, June 27, 2013, at 9:30 a.m. in Conference Room 1107, Department of State Building, 2201 C Street NW., Washington, DC. The meeting is open to the public and will last until approximately 12:00 p.m.

The Overseas Schools Advisory Council works closely with the U.S. business community in improving those American-sponsored schools overseas that are assisted by the Department of State and attended by dependents of U.S. Government employees, and the children of employees of U.S. corporations and foundations abroad.

This meeting will deal with issues related to the work and the support provided by the Overseas Schools Advisory Council to the American-sponsored overseas schools. There will be a report and discussion about the status of the Council-sponsored project to expand the World Virtual School. The Regional Education Officers in the Office of Overseas Schools will make a presentation on the activities and initiatives in the American-sponsored overseas schools. Dr. Gerald Tirozzi, former member of the Council, will speak on his newly published book, based on his 50 years as an educator in the United States.

Members of the public may attend the meeting and join in the discussion, subject to the instructions of the Chair. Admittance of public members will be limited to the seating available. Access to the State Department is controlled, and individual building passes are required for all attendees. Persons who plan to attend should advise the office of Dr. Keith D. Miller, Department of State, Office of Overseas Schools, telephone 202–261–8200, prior to June 17, 2013. Each visitor will be asked to provide his/her date of birth and either driver's license or passport number at the time of registration and attendance, and must carry a valid photo ID to the meeting.

Personal data is requested pursuant to Public Law 99–399 (Omnibus Diplomatic Security and Antiterrorism Act of 1986), as amended; Public Law 107–56 (USA PATRIOT Act); and Executive Order 13356. The purpose of the collection is to validate the identity of individuals who enter Department facilities. The data will be entered into the Visitor Access Control System (VACS–D) database. Please see the Security Records System of Records Notice (State-36) at *http://www.state.gov/documents/organization/103419.pdf* for additional information.

Any requests for reasonable accommodation should be made at the time of registration. All such requests will be considered, however, requests made after June 20th might not be possible to fill. All attendees must use the C Street entrance to the building.

Dated: May 29, 2013.

Keith D. Miller,

Executive Secretary, Overseas Schools Advisory Council.

[FR Doc. 2013–13211 Filed 6–3–13; 8:45 am]

BILLING CODE 4710–24–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (formerly Subpart Q) during the Week Ending May 17, 2013. The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 et. seq.). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2013–0104.

Date Filed: May 14, 2013.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: June 4, 2013.

Description: Application of Marco Aviation, Inc. requesting a certificate of public convenience and necessity to engage in scheduled interstate carriage of passengers, freight and mail.

Docket Number: DOT–OST–2013–0105 and DOT–OST–2013–0106.

Date Filed: May 14, 2013.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: June 4, 2013.

Description: Application of Western Global Airlines, L.L.C. requesting a certificate of public convenience and necessity authorizing it to conduct foreign charter air transportation of property and mail with large aircraft.

Barbara J. Hairston,

Acting Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 2013–13147 Filed 6–3–13; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart B (formerly Subpart Q) during the Week Ending April 27, 2013. The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart B (formerly Subpart Q) of the Department of Transportation's Procedural Regulations (See 14 CFR 301.201 et seq.). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: DOT–OST–2013–0087.

Date Filed: April 26, 2013.

Due Date for Answers, Conforming Applications, or Motion to Modify Scope: May 17, 2013.

Description: Application of 8165343 Canada Inc. d/b/a Air Canada Rouge (''AC rouge'') requesting a foreign air carrier permit and related exemption that would enable it to provide scheduled and charter foreign air transportation of persons, property and mail under the Open Skies Agreement between the U.S. and Canada on the following routing: (i) From points behind Canada via Canada and intermediate points to a point or points in the United States and beyond; and (ii) all-cargo services between the United States and any point or points.

Barbara J. Hairston,

Acting Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 2013–13145 Filed 6–3–13; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements Filed the Week Ending May 11, 2013

The following Agreements were filed with the Department of Transportation under the Sections 412 and 414 of the Federal Aviation Act, as amended (49 U.S.C. 1382 and 1384) and procedures governing proceedings to enforce these provisions. Answers may be filed within 21 days after the filing of the application.

Docket Number: DOT–OST–2013–0098.

Date Filed: May 8, 2013.

Parties: Members of the International Air Transport Association.

Subject: PTC12 via 3 Memo 0001/22 April 2013.

Intended Effective Date: 1 June 2013.

Barbara J. Hairston,

Acting Program Manager, Docket Operations, Federal Register Liaison.

[FR Doc. 2013–13141 Filed 6–3–13; 8:45 am]

BILLING CODE 4910–9X–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA–2013–0002–N–13]

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Federal Railroad Administration, DOT.

ACTION: Notice and Request for Comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995, this notice announces that the Information Collection Requirements (ICRs) abstracted below have been forwarded to the Office of Management and Budget (OMB) for review and comment. The ICRs describes the nature of the information collections and their expected burdens. The **Federal Register** notice with a 60-day comment period soliciting comments on the following collections of information was published on March 27, 2013 (78 FR 18672).

DATES: Comments must be submitted on or before July 5, 2013.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Brogan, Office of Planning and Evaluation Division, RRS–21, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 25, Washington, DC 20590 (Telephone: (202) 493–6292), or Ms. Kimberly Toone, Office of Information Technology, RAD–20, Federal Railroad Administration, 1200 New Jersey Ave. SE., Mail Stop 35, Washington, DC 20590 (Telephone: (202) 493–6132). (These telephone numbers are not toll-free.)

SUPPLEMENTARY INFORMATION: The Paperwork Reduction Act of 1995 (PRA), Public Law 104–13, § 2, 109 Stat. 163 (1995) (codified as revised at 44 U.S.C. 3501–3520), and its implementing regulations, 5 CFR Part 1320, require Federal agencies to issue two notices seeking public comment on information collection activities before OMB may approve paperwork packages. 44 U.S.C. 3506, 3507; 5 CFR 1320.5, 1320.8(d)(1), 1320.12. On March 27, 2013, FRA published a 60-day notice in the **Federal Register** soliciting comment on ICRs that the agency was seeking OMB approval. *See* 78 FR 18672. FRA received no comments after issuing this notice. Accordingly, these information collection activities have been re-evaluated and certified under 5 CFR 1320.5(a) and forwarded to OMB for review and approval pursuant to 5 CFR 1320.12(c).

Before OMB decides whether to approve these proposed collections of information, it must provide 30 days for public comment. 44 U.S.C. 3507(b); 5 CFR 1320.12(d). Federal law requires OMB to approve or disapprove paperwork packages between 30 and 60 days after the 30 day notice is published. 44 U.S.C. 3507 (b)–(c); 5 CFR 1320.12(d); *see also* 60 FR 44978, 44983, Aug. 29, 1995. OMB believes that the 30 day notice informs the regulated community to file relevant comments and affords the agency adequate time to digest public comments before it renders a decision. 60 FR 44983, Aug. 29, 1995. Therefore, respondents should submit their respective comments to OMB within 30 days of publication to best ensure having their full effect. 5 CFR 1320.12(c); *see also* 60 FR 44983, Aug. 29, 1995.

The summary below describes the nature of the information collection requirements (ICRs) and the expected burden. The revised requirements are being submitted for clearance by OMB as required by the PRA.

Title: Filing of Dedicated Cars.

OMB Control Number: 2130–0502.

Type of Request: Extension without change of a currently approved collection.

Affected Public: Railroads.

Form(s): N/A.

Abstract: Title 49, Part 215 of the Code of Federal Regulations, prescribes certain conditions to be followed for the movement of freight cars that are not in compliance with this Part. Dedicated service means the exclusive assignment of railroad cars to the transportation of freight between specified points under the following conditions: (1) The cars are operated primarily on track that is inside an industrial or other non-railroad installation; and only occasionally over track of a railroad; (2) The cars are not operated at speeds of

more than 15 miles per hour; and over track of a railroad—(A) for more than 30 miles in one direction; or (B) on a round trip for more than 60 miles; (3) The cars are not freely interchanged among railroads; (4) The words ''Dedicated Service'' are stenciled, or otherwise displayed, in clear legible letters on each side of the car body; and (5) The cars have been examined and found safe to operate in dedicated service. These cars must be identified in a written report to FRA before they are assigned to dedicated service, and these reports must be filed with FRA 30 days before the cars operate in dedicated service. FRA uses the information collected under § 215.5(d) to determine the number of railroads affected, the number and type of cars involved, the commodities being carried, and the territorial and speed limits within which the cars will be operated. FRA reviews these reports to determine if the equipment is safe to operate and if the operation qualifies for dedicated service. The information collected indicates to FRA inspectors that the particular or ''dedicated'' car is in special service and that certain exceptions have been provided for regarding the application of this regulation spelled out in § 215.3. Cars not in compliance with § 215.5(d) will be cited for violations by FRA inspectors. The information collected is also used by railroads to provide identification and control so that dedicated cars remain in the prescribed service.

Annual Estimated Burden: 4 hours.

Title: Special Notice for Repairs.

OMB Control Number: 2130–0504.

Type of Request: Extension with change of a currently approved collection.

Affected Public: Railroads.

Form(s): FRA F 6180.8; FRA F 6180.8a.

Abstract: The Special Notice for Repairs is issued to notify the carrier in writing of an unsafe condition involving a locomotive, car, or track. The carrier must return the form after repairs have been made. The collection of information is used by State and Federal inspectors to remove freight car or locomotives until they can be restored to a serviceable condition. It is also used by State and Federal inspectors to reduce the maximum authorized speed on a section of track until repairs can be made.

Annual Estimated Burden: 20 hours.

Title: Remotely Controlled Switch Operations.

OMB Control Number: 2130–0516.

Type of Request: Extension with change of a currently approved collection.

Affected Public: Railroads.

Form(s): N/A.

Abstract: Title 49, § 218.30 of the Code of Federal Regulations (CFR), ensures that remotely controlled switches are lined to protect workers who are vulnerable to being struck by moving cars as they inspect or service equipment on a particular track or, alternatively, occupy camp cars. FRA believes that production of notification requests promotes safety by minimizing mental lapses of workers who are simultaneously handling several tasks. Sections 218.30 and 218.67 require the operator of remotely controlled switches to maintain a record of each notification requesting blue signal protection for 15 days. Operators of remotely controlled switches use the information as a record documenting blue signal protection of workers or camp cars. This record also serves as a valuable resource for railroad supervisors and FRA inspectors monitoring regulatory compliance.

Annual Estimated Burden: 60,010 hours.

Title: Bad Order and Home Shop Card.

OMB Control Number: 2130–0519.

Type of Request: Extension without change of a currently approved collection.

Affected Public: Railroads.

Form(s): N/A.

Abstract: Under 49 CFR Part 215, each railroad is required to inspect freight cars placed in service and take the necessary remedial action when defects are identified. Part 215 defects are specific in nature and relate to items that have or could have caused accidents or incidents. Section 215.9 sets forth specific procedures that railroads must follow when it is necessary to move defective cars for repair purposes. For example, railroads must affix a ''bad order'' tag describing each defect to each side of the freight car. It is imperative that a defective freight car be tagged ''bad order'' so that it may be readily identified and moved to another location for repair purposes only. At the repair point, the ''bad order'' tag serves as a repair record. Railroads must retain each tag for 90 days to verify that proper repairs were made at the designated location. FRA and State inspectors review all pertinent records to determine whether defective cars presenting an immediate hazard are being moved in transportation.

Annual Estimated Burden: 15,750 hours.

Addressee: Send comments regarding these information collections to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 Seventeenth Street NW., Washington, DC 20503, Attention: FRA Desk Officer.

Comments are invited on the following: Whether the proposed collections of information are necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; the accuracy of the Department's estimates of the burden of the proposed information collections; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collections of information on respondents, including the use of automated collection techniques or other forms of information technology.

A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication of this notice in the **Federal Register**.

Authority: 44 U.S.C. 3501–3520.

Issued in Washington, DC on May 29, 2013.

Rebecca Pennington,

Chief Financial Officer, Federal Railroad Administration.

[FR Doc. 2013–13159 Filed 6–3–13; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Transit Administration

Second Allocation of Public Transportation Emergency Relief Funds in Response to Hurricane Sandy: Response, Recovery & Resiliency; Correction

AGENCY: Federal Transit Administration (FTA), DOT.

ACTION: Notice; correction.

SUMMARY: On May 29, 2013, the Federal Transit Administration (FTA) published a notice in the **Federal Register** announcing the allocation of $3.7 billion under the Public Transportation Emergency Relief Program to the four FTA recipients most severely affected by Hurricane Sandy. This amount was in addition to the initial $2 billion allocation announced in the March 29, 2013 **Federal Register** notice. This notice corrects the May 29 notice.

FOR FURTHER INFORMATION CONTACT: Contact the appropriate FTA Regional Office found at *http://www.fta.dot.gov* for application-specific information and other assistance needed in preparing a TEAM grant application. For program-specific questions, please contact Adam Schildge, Office of Program

Management, phone (202) 366–0778, or email, *Adam.Schildge@dot.gov*. For legal questions, contact Bonnie Graves, Office of Chief Counsel, phone (202) 366–4011, or email *Bonnie.Graves@dot.gov*. For questions about direct transfers to other modes within Department of Transportation, please contact Vinn White, Office of Policy, Office of the Secretary, phone (202) 366–9044, or email *Vinn.White@dot.gov*; or Eric Beightel, Office of Policy, Office of the Secretary, phone (202) 366–8154, or email *Eric.Beightel@dot.gov*.

SUPPLEMENTARY INFORMATION:

Need for Correction

The FTA notice published in the **Federal Register** on May 29, 2013 (78 FR 32296), FR Doc. 2013–12766, contained errors. In the **FOR FURTHER INFORMATION CONTACT** section of the notice, the first name of one of the contact persons is incorrect. Also, the table included in the notice provided incorrect discretionary funding IDs for the New York Metropolitan Transportation Authority and the New York City Department of Transportation.

Therefore, FR Doc. 2013–12766 is corrected as follows:

1. On page 32296, in the 3rd column, the **FOR FURTHER INFORMATION CONTACT** section is corrected to read as shown above

2. On page 32302, the table is revised to read as follows:

FEDERAL TRANSIT ADMINISTRATION

State(s)	Agency	Discretionary funding ID	Previous allocation	Additional recovery and restoration	Resiliency	Total allocations
FTA Section 5324 Emergency Relief Program Allocations for Hurricane Sandy, by Agency*						
NY	New York Metropolitan Transportation Authority.	D2013–SAND–022 (recov.); D2013–SAND–023 (resil.).	*$1,194,309,560*	$1,702,462,214	$897,848,194	*$3,794,619,968*
NY	New York City Department of Transportation.	D2013–SAND–024 (recov.); D2013–SAND–025 (resil.).	*33,918,813*	2,834,128	8,561,124	*45,314,065*
NY, NJ	Port Authority of New York and New Jersey.	D2013–SAND–018 (recov.); D2013–SAND–019 (resil.).	*489,120,634*	583,904,018	287,391,637	*1,360,416,289*
NJ	New Jersey Transit Corporation.	D2013–SAND–020 (recov.); D2013–SAND–021 (resil.).	*231,191,117*	110,799,640	106,199,045	*448,189,802*
Mult	Other affected agencies.		*2,456,379*			*2,456,379*
Mult	Reserved for future allocation.		*28,048,497*			*28,048,497*
	Grand Total		*1,979,045,000*	2,400,000,000	1,300,000,000	*5,679,045,000*

* Allocation amounts reflect reductions due to sequestration.

Issued on: May 30, 2013.

Peter Rogoff,

Administrator.

[FR Doc. 2013–13212 Filed 6–3–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[Docket No. AB 33 (Sub-No. 292X)]

Union Pacific Railroad Company—Abandonment Exemption—in Wright County, Iowa

Union Pacific Railroad Company (UP) has filed a verified notice of exemption under 49 CFR part 1152 subpart F—*Exempt Abandonments* to abandon a 0.5-mile line of railroad on its Thornton Industrial Lead from milepost 29.52 to milepost 30.02 near Belmond, in Wright County, Iowa (the Line). The Line traverses United States Postal Service Zip Code 50421.

UP has certified that: (1) No local traffic has moved over the Line for at least two years; (2) there is no overhead traffic on the Line; (3) no formal complaint filed by a user of rail service on the Line (or by a state or local government entity acting on behalf of such user) regarding cessation of service over the Line either is pending with the Surface Transportation Board (Board) or with any U.S. District Court or has been decided in favor of complainant within the two-year period; and (4) the requirements at 49 CFR 1105.7(c) (environmental report), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line Railroad—Abandonment Portion Goshen Branch Between Firth & Ammon, in Bingham & Bonneville Counties, Idaho,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on July 4, 2013, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Office of Environmental Analysis (OEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Serv. Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each OFA must be accompanied by the filing fee, which is currently set at $1,600. *See* 49 CFR 1002.2(f)(25).

CFR 1152.29 must be filed by June 14, 2013. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by June 24, 2013, with the Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to UP's representative: Mack H. Shumate, Jr., Senior General Attorney, Union Pacific Railroad Company, 101 North Wacker Drive, Room 1920, Chicago, IL 60606.

If the verified notice contains false or misleading information, the exemption is void *ab initio.*

UP has filed a combined environmental and historic report which addresses the effects, if any, of the abandonment on the environment and historic resources. OEA will issue an environmental assessment (EA) by June 7, 2013. Interested persons may obtain a copy of the EA by writing to OEA (Room 1100, Surface Transportation Board, Washington, DC 20423–0001) or by calling OEA at (202) 245–0305. Assistance for the hearing impaired is available through the Federal Information Relay Service at 1–800–877–8339. Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), UP shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the Line. If consummation has not been effected by UP's filing of a notice of consummation by June 4, 2014, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our Web site at *www.stb.dot.gov*.

Decided: May 29, 2013.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.

Derrick A. Gardner,

Clearance Clerk.

[FR Doc. 2013–13136 Filed 6–3–13; 8:45 am]

BILLING CODE 4915–01–P

DEPARTMENT OF THE TREASURY

Bureau of the Fiscal Service

Proposed Collection: Comment Request

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 Bureau of the Fiscal Service within the Department of the Treasury is soliciting comments concerning the Regulations governing the offering of United States Mortgage Guaranty Insurance Company Tax and Loss Bonds.

DATES: Written comments should be received on or before August 3, 2013 to be assured of consideration.

ADDRESSES: Direct all written comments to Bureau of the Fiscal Service, Bruce A. Sharp, 200 Third Street A4–A, Parkersburg, WV 26106–1328, or *bruce.sharp@bpd.treas.gov*. The opportunity to make comments online is also available at *www.pracomment.gov*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies should be directed to Bruce A. Sharp, Bureau of the Fiscal Service, 200 Third Street A4–A, Parkersburg, WV 26106–1328, (304) 480–8150.

SUPPLEMENTARY INFORMATION: *Title:* Regulations governing the offering of United States Mortgage Guaranty Insurance Company Tax and Loss Bonds.

OMB Number: 1535–0127.

Abstract: The information is requested to establish an investor account, issue and redeem securities.

Current Actions: None.

Type of Review: Revision.

Affected Public: Businesses or other for-profit organizations.

Estimated Number of Respondents: 50.

Estimated Time Per Respondent: 15 minutes.

Estimated Total Annual Burden Hours: 13.

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.

Dated: May 30, 2013.

Bruce A. Sharp,

Bureau Clearance Officer.

[FR Doc. 2013–13171 Filed 6–3–13; 8:45 am]

BILLING CODE 4810–39–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Proposed Information Collection; Comment Request; Interagency Statement on Complex Structured Finance Transactions

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 comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995 (PRA). An agency may not conduct or sponsor, and a 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 an information collection titled, ''Interagency Statement on Complex Structured Finance Transactions.''

DATES: Comments must be submitted on or before August 5, 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: 1557–0229, 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, 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 is publishing notice of the proposed collection of information set forth in this document.

The OCC is proposing to extend the following information collection:

Title: Interagency Statement on Complex Structured Finance Transactions.

OMB Control No.: 1557–0229.

Description: The interagency statement describes the types of internal controls and risk management procedures that the agencies (OCC, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, and the Securities and Exchange Commission) consider particularly effective in helping financial institutions identify and address the reputational, legal, and other risks associated with complex structured finance transactions.

Affected Public: Businesses or other for-profit.

Burden Estimates:

Estimated Number of Respondents: 9.

Estimated Number of Responses: 9.

Estimated Annual Burden: 225 hours.

Frequency of Response: On occasion.

Comments: Comments submitted in response to this notice will be summarized and 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 OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the information collection burden;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Dated: May 28, 2013.

Michele Meyer,

Assistant Director, Legislative and Regulatory Activities Division, Office of the Comptroller of the Currency.

[FR Doc. 2013–12972 Filed 6–3–13; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Identification of Six Individuals Pursuant to the Iranian Transactions and Sanctions Regulations and Executive Order 13599

AGENCY: Office of Foreign Assets Control, Department of the Treasury.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing the names of six individuals identified as the Government of Iran pursuant to the Iranian Transactions and Sanctions Regulations, 31 CFR part 560 (''ITSR''), and Executive Order 13599.

DATES: The identification by the Director of OFAC of the individuals identified in this notice, pursuant to the ITSR and Executive Order 13599, is effective on May 23, 2013.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Sanctions Compliance and Evaluation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, Tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*www.treas.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, Tel.: 202/622–0077.

Background

On February 5, 2012, the President issued Executive Order 13599, ''Blocking Property of the Government of Iran and Iranian Financial Institutions'' (the ''Order''). Section 1 (a) of the Order blocks, with certain exceptions, all property and interests in property of the Government of Iran, including the Central Bank of Iran, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of any United States person, including any foreign branch.

Section 7 (d) of the Order defines the term ''Government of Iran'' to mean the Government of Iran, any political subdivision, agency, or instrumentality thereof, including the Central Bank of Iran, and any person owned or controlled by, or acting for or on behalf of, the Government of Iran.

Section 560.211of the ITSR implements Section 1(a) of the Order. Section 560.304 of the ITSR defines the term ''Government of Iran'' to include: ''(a) The state and the Government of Iran, as well as any political subdivision, agency, or instrumentality thereof, including the Central Bank of Iran; (b) Any person owned or controlled, directly or indirectly, by the foregoing; and (c) Any person to the extent that such person is, or has been, since the effective date, acting or purporting to act, directly or indirectly, for or on behalf of any of the foregoing; and (d) Any other person determined by the Office of Foreign Assets Control to be included within [(a) through (c)].''

On May 23, 2013, the Director of OFAC identified six individuals as

meeting the definition of the Government of Iran pursuant to the Order and the ITSR. The listing for the individuals is as follows:

Individuals

1. BAHADORI, Masoud; nationality Iran; Passport T12828814 (Iran); Managing Director, Petro Suisse Intertrade Company (individual) [IRAN].
2. BAZARGAN, Farzad; DOB 03 Jun 1956; Passport D14855558 (Iran); alt. Passport Y21130717 (Iran); Managing Director, Hong Kong Intertrade Company (individual) [IRAN].
3. GHALEBANI, Ahmad (a.k.a. GHALEHBANI, Ahmad; a.k.a. QALEHBANI, Ahmad); DOB 01 Jan 1953 to 31 Dec 1954; Passport H20676140 (Iran); Managing Director, National Iranian Oil Company; Director, Hong Kong Intertrade Company; Director, Petro Suisse Intertrade Company (individual) [IRAN].
4. JASHNSAZ, Seifollah (a.k.a. JASHN SAZ, Seifollah; a.k.a. JASHNSAZ, Seyfollah); DOB 01 Mar 1958 to 31 Mar 1958; nationality Iran; Passport R17589399 (Iran); Chairman & Director, Naftiran Intertade Co. (NICO) Sarl; Chairman & Director, Naft Iran Intertade Company Ltd.; Director, Hong Kong Intertrade Company; Chairman & Director, Petro Suisse Intertrade Compay (individual) [IRAN].
5. NIKOUSOKHAN, Mahmoud; DOB 01 Jan 1961 to 31 Dec 1962; nationality Iran; Passport U14624657 (Iran); Finance Director, National Iranian Oil Company; Director, Hong Kong Intertrade Company; Director, Petro Suisse Intertrade Company (individual) [IRAN].
6. POURANSARI, Hashem; nationality Iran; Passport B19488852 (Iran); Managing Director, Asia Energy General Trading (individual) [IRAN].

Dated: May 23, 2013.

Barbara C. Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2013–13167 Filed 6–3–13; 8:45 am]

BILLING CODE P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Actions Taken Pursuant to Executive Order 13382

AGENCY: Office of Foreign Assets Control, Treasury Department.

ACTION: Notice.

SUMMARY: The Treasury Department's Office of Foreign Assets Control (''OFAC'') is publishing on OFAC's list of Specially Designated Nationals and Blocked Persons (''SDN List'') the names of eight entities and six individuals, whose property and interests in property are blocked pursuant to Executive Order 13382 of June 28, 2005, ''Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters.'' The designations by the Director of OFAC, pursuant to Executive Order 13382, were effective on May 23, 2013.

DATES: The designations by the Director of OFAC, pursuant to Executive Order 13382, were effective on May 23, 2013.

FOR FURTHER INFORMATION CONTACT: Assistant Director, Compliance Outreach & Implementation, Office of Foreign Assets Control, Department of the Treasury, Washington, DC 20220, Tel.: 202/622–2490.

SUPPLEMENTARY INFORMATION:

Electronic and Facsimile Availability

This document and additional information concerning OFAC are available from OFAC's Web site (*www.treasury.gov/ofac*) or via facsimile through a 24-hour fax-on-demand service, Tel.: 202/622–0077.

Background

On June 28, 2005, the President, invoking the authority, *inter alia,* of the International Emergency Economic Powers Act (50 U.S.C. 1701–1706) (''IEEPA''), issued Executive Order 13382 (70 FR 38567, July 1, 2005) (the ''Order''), effective at 12:01 a.m. eastern daylight time on June 29, 2005. In the Order, the President took additional steps with respect to the national emergency described and declared in Executive Order 12938 of November 14, 1994, regarding the proliferation of weapons of mass destruction and the means of delivering them.

Section 1 of the Order blocks, with certain exceptions, all property and interests in property that are in the United States, or that hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of: (1) The persons listed in the Annex to the Order; (2) any foreign person determined by the Secretary of State, in consultation with the Secretary of the Treasury, the Attorney General, and other relevant agencies, to have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including any efforts to manufacture, acquire, possess, develop, transport, transfer or use such items, by any person or foreign country of proliferation concern; (3) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to have provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, any activity or transaction described in clause (2) above or any person whose property and interests in property are blocked pursuant to the Order; and (4) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State, the Attorney General, and other relevant agencies, to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any person whose property and interests in property are blocked pursuant to the Order.

On May 23, 2013, the Director of OFAC, in consultation with the Departments of State, Justice, and other relevant agencies, designated eight entities and six individuals whose property and interests in property are blocked pursuant to Executive Order 13382.

The list of additional designees is as follows:

1. MOZAFFARINIA, Reza (a.k.a. MOZAFARI–NIYA, Reza; a.k.a. MOZAFARNIA, Reza; a.k.a. MOZAFFARI NIA, Reza; a.k.a. MOZAFFARINIA HOSEIN, Reza; a.k.a. MOZAFFARI–NIA, Reza; a.k.a. MOZAFFARI–NIYA, Reza; a.k.a. MOZZAFARNIA, Dr. Reza); DOB 1959; POB Isfahan, Iran; Deputy Defense Minister and Dean of Malek Ashtar University (individual) [NPWMD] [IFSR].
2. MAHDAVI, Ali; DOB 21 Apr 1967; citizen Iran (individual) [NPWMD] [IFSR].
3. PARVARESH, Farhad Ali; DOB Dec 1957; nationality Iran (individual) [NPWMD] [IFSR].
4. VAZIRI, Hossein Nosratollah (a.k.a. VAZIRI, Ahmad; a.k.a. VAZIRI, Ahmed), 3–C–C Impiana Condo Jalan, Ulu Klang, Kuala Lumpur, Malaysia; DOB 21 Mar 1961; POB Damghan, Iran; nationality Iran; Passport R19246338 (Iran) (individual) [NPWMD] [IFSR].
5. YAZDI, Bahareh Mirza Hossein (a.k.a. YAZDI, BETTY); DOB 26 Jun 1978; citizen United Kingdom (individual) [NPWMD] [IFSR].

6. BUJAR, Farhad (a.k.a. BOUJAR, Farhad); nationality Iran; Passport R10789966; Managing Director, TESA (individual) [NPWMD] [IFSR].
7. ABAN AIR (a.k.a. ABAN AIR CO JPS), No.14, Imam Khomeini Airport, Airport Cargo Terminal, Tehran, Iran; No.1267, Vali Asr Avenue, Tehran 1517736511, Iran; Unit 7, Marlin Park, Central Way, Feltham TW14 OXD, United Kingdom; No.53 Molla Sadra St. Vanak Square, Tehran 19916 14661, Iran; No 7 & 8, Main Dnata Building, Dubai Airport Free Zone, Dubai, United Arab Emirates; Web site *www.abanair.com;* Email *Address info@abanair.com [NPWMD] [IFSR].*
8. DFS WORLWIDE (a.k.a. DFS WORLDWIDE FZCO), No.53 Mollasadra Avenue, P.O. Box 1991614661, Tehran, Iran; Unit 7, Marlin Park, Central Way, Feltham, Middlesex TW14 0XD, United Kingdom; Warehouse No.J–01, Dubai Airport Free Zone, Dubai, United Arab Emirates; P.O. Box 293020 Dubai Airport Free Zone, Dubai, United Arab Emirates; Cargo City South, Building 543, Frankfurt 60549, Germany; S.A. Pty Ltd Unit 8, the Meezricht Business Park, 33 Kelly Road, Jet Park, Boksburg North 1460, South Africa; Web site *www.dfsworldwide.com;* Email Address *irsales@dfsworldwide.com;* DFS WORLWIDE, (a.k.a. DFS WORLDWIDE FZCO) is a separate and distinct entity from DFS Worldwide of Houston, Texas, USA and from Deutsche Financial Services, of Germany. [NPWMD] [IFSR].
9. ENERGY GLOBAL INTERNATIONAL FZE, P.O. Box 1245, Dubai, United Arab Emirates; Email Address *MD@energyglobal.info* [NPWMD] [IFSR].
10. EVEREX (a.k.a. EVEREX GLOBAL CARRIER AND CARGO; a.k.a. EVEREX LIMITED; a.k.a. SUN GROUP; a.k.a. SUN GROUP AIR TRAVEL AND AIR CARGO AND AIRPORT SERVICES LTD), Office 14, Cargo Terminal, Imam Khomeini International Airport, Tehran, Iran; 1267 Vali-E-Asr Avenue, Tehran, Iran; No.53 Mollasadra St, Vanak Square, Tehran, Iran; Office# J01, Dubai Airport Free Zone, Dubai, United Arab Emirates; P.O. Box 293020, Dubai, United Arab Emirates; Unit 7, Marlin Park, Central Way, Feltham TW14 OXD, United Kingdom; Web site *www.everexglobal.com;* Email Address *irsales@everexglobal.com;* alt. Email Address *uksales@everexglobal.com [NPWMD] [IFSR].*
11. GLOBAL SEA LINE CO LTD, 10 Anson Road #31–10 International Plaza, Singapore; Email Address *globalsealine@gmail.com [NPWMD] [IFSR].*
12. PETRO GREEN (a.k.a. PETRO DIAMOND; a.k.a. PETROGREEN), B–8–1 Block B Megan Ave. II, 12 Jalan Yap Kwan Seng, Kuala Lumpur, Malaysia [NPWMD] [IFSR].
13. ANDISHEH ZOLAL, 42 Niam Street, Shariati Avenue, P.O. Box 15875–4159, Tehran 19481, Iran *[NPWMD] [IFSR].*
14. ZOLAL IRAN COMPANY, No. 2 Shariati Avenue, Niyam Street, Tehran, Iran [NPWMD] [IFSR].

Dated: May 23, 2013.

Barbara C. Hammerle,

Acting Director, Office of Foreign Assets Control.

[FR Doc. 2013–13168 Filed 6–3–13; 8:45 am]

BILLING CODE 4810–AL–P

DEPARTMENT OF VETERANS AFFAIRS

Notice of Funds Availability Inviting Applications for the Rural Veterans Coordination Pilot

AGENCY: Department of Veterans Affairs.

ACTION: Notice of Fund Availability.

SUMMARY: The Department of Veterans Affairs (VA) is announcing the availability of funds for applications for assistance under the Rural Veterans Coordination Pilot (RVCP). This Notice of Funding Availability (NOFA) includes funding priorities for those applicants who will assist veterans and their families who are transitioning from military service to civilian life in rural or underserved communities. This Notice contains information concerning the program, funding priorities, application process, and the amount of funding available.

DATES: Applications must be received in accordance with this NOFA no later than 5:00 p.m. eastern standard time, on July 19, 2013.

FOR FURTHER INFORMATION CONTACT: Karen Malebranche, Veterans Health Administration, Office of Interagency Health Affairs (10P5), 810 Vermont Avenue NW., Washington, DC 20420, telephone (202) 461–4001. (This is not a toll-free number.)

For A Copy of the Application Package: Download directly from *http://www.ruralhealth.va.gov/coordination-pilot/index.asp.* Questions should be referred to the RVCP Program Office at (202) 461–4001. (This is not a toll-free number.) For detailed program information and requirements, see the final rule published in the **Federal Register** (78 FR 12617) on February 25, 2013, which is codified at 38 CFR part 64.

Submission of Applications: Applications must be uploaded as a complete package into Grants.gov.

A. *Purpose:* VA is pleased to issue this NOFA for the RVCP program to provide grants to community-based organizations and local and state government entities to assist veterans who are transitioning from military service to civilian life in rural or underserved communities and families of such veterans. VA expects to award a total of five grants each in the amount of 2 million dollars to five separate grantees for a 2-year pilot program, pursuant to the terms of 38 CFR part 64.

B. *Definitions, Regulations, and Authority:* Definitions of terms applicable to the RVCP program are found at 38 CFR 64.2. The types of programs and services (namely, coordination, health-related assistance, family assistance, and outreach services) for which these grant funds may be used are described in 38 CFR 64.6(a)(1)–(4). Funding applied for under this Notice is authorized by Section 506 of the Caregivers and Veterans Omnibus Health Services Act of 2010, Public Law 111–163 (May 5, 2010). Funds made available under this Notice are subject to the requirements of applicable laws and regulations.

C. *Submission of Application:* To apply for an RVCP grant, eligible entities must submit a complete application package. Applications will be accepted only through *http://www.Grants.gov.* Applications may not be sent by fax. In the interest of fairness to all competing applicants, this deadline is firm as to date and hour, and VA will not consider any application that is received after the deadline. Applicants should consider submitting early to avoid any risk of loss of eligibility brought about by computer service outages. For a copy of the application package, download directly from *http://www.Grants.gov.* Applications must arrive as a complete package. Materials arriving separately will not be included in the application package for consideration and may result in the application being rejected or not funded. Applicants should ensure that the items listed in the application requirement, section L of this NOFA, are addressed in their application.

D. *Allocation:* Ten million dollars is available under this Notice for a 2-year period. Five grants will be awarded under this NOFA and each grant will be in the amount of 2 million dollars.

E. *Approach:* Grantees will be expected to use grant funds to enhance

coordination of health care and other benefits for eligible participants. This funding is not intended to provide veteran direct care and benefit programs. This program necessitates the grantee having or developing collaborative working relationships with a wide range of health care and other benefit service providers to facilitate referrals for needed services. It is anticipated that the majority of the services will be provided by the grantee through active and direct referrals to other providers in the grantee's location.

F. *VA's Goals and Objectives for Funds Awarded Under this Notice:* In accordance with 38 CFR part 64, VA will evaluate an applicant's ability to meet VA's goals and objectives for this grant program. VA's goals and objectives include the following: providing outreach services, to include making personal contact with eligible participants; providing comprehensive assessments on the needs of eligible participants; providing coordination of health care and other benefits for eligible participants; conducting post-referral and post-appointment communications with eligible participants to ensure satisfaction with the outcome; similar communications will also occur with collaborating providers to ensure health care and benefits were rendered; increasing the coordination among the organizations providing care and benefits services to eligible participants; increasing the availability and access of care and benefits to eligible participants by collaborating with community-based providers.

G. *Authority:* Public Law 111–163, the Caregivers and Veterans Omnibus Health Services Act of 2010, was signed into law on May 5, 2010. Title V, section 506 directs the Secretary of Veterans Affairs to carry out a 2-year grant program to assess the feasibility and advisability of using community-based organizations and local and state government entities to increase the coordination of health care and benefits for veterans transitioning to civilian life.

H. *Grant Award Period:* Grants awarded will be for a 2-year period, in accordance with 38 CFR 64.4, subject to the availability of VA funds.

I. *Requirements for Use of Grant Funds:* Grantees must operate their programs in a manner consistent with the terms set forth in the Final Rule and this Notice. Grantees must maximize the use of RVCP grants by ensuring that at least 90 percent of funds awarded are used to provide services designed to aid in the adjustment to civilian life in one or more of the following areas: increase coordination of health care and benefits for veterans; increase availability of high quality medical and mental health services; provide assistance to families of transitioning veterans; and outreach to veterans and families.

J. *Application Process:* Applications will be submitted through *http://www.Grants.gov,* which is a ''one-stop storefront'' that provides a unified process for all customers of Federal awards to find funding opportunities and apply for funding. Complete instructions on how to register and submit an application can be found at *http://www.Grants.gov.* If the applicant experiences technical difficulties at any point during this process, please call the Grants.gov Customer Support Hotline at (800) 518–4726, 24 hours a day, 7 days a week, except Federal holidays. Registering with Grants.gov is a one-time process; however, processing delays may occur, and it can take up to several weeks for first-time registrants to receive confirmation and a user password. VA highly recommends that applicants start the registration process as early as possible to prevent delays in submitting an application package by the specified application deadline.

K. *Application Selection Methodology:* VA will review all timely and complete grant applications submitted in response to this NOFA. VA will rank from highest to lowest those applications that score at least 60 cumulative points, using the criteria in section 38 CFR 64.12(a). See section L for more information on the selection process.

L. *Scoring and Selection:*

(a) *Scoring.* VA will score only complete applications received from eligible entities in accordance with this NOFA no later than 5:00 p.m. eastern standard time, on July 19, 2013. Applications will be scored using the following criteria:

(1) Background, organizational history, qualifications, and past performance (maximum 10 points). Applicant documents a relevant history of successfully providing the type of services proposed in the RVCP grant application, particularly in the location the applicant plans to serve veterans and their families.

(2) Need for pilot project (maximum 10 points). Applicant demonstrates the need for the pilot project in the proposed project location, and provides evidence that the applicant understands the unique needs of veterans and their families in the location to be served.

(3) Pilot project concept, innovation, and ability to meet VA's objectives (maximum 40 points). Application shows appropriate concept, size, and scope of the project; provides realistic estimates of time, staffing, and material needs to implement the project; and details the project's ability to enhance the overall services provided, while presenting realistic plans to reduce duplication of benefits and services already in place. Application must describe a comprehensive and well-developed plan to meet one or more of the permissible uses set out in § 64.6.

(4) Pilot project evaluation and monitoring (maximum 10 points). Self-evaluation and monitoring strategy provided in application is reasonable and expected to meet requirements of § 64.10(b) (5).

(5) Organizational finances (maximum 10 points). Applicant provides documentation that the organization is financially stable, has not defaulted on financial obligations, has adequate financial and operational controls in place to ensure the proper use of RVCP grants, and presents a plan for using RVCP grants that is cost effective and efficient.

(6) Pilot project location (maximum 20 points). Applicant documents how the proposed project location meets the definition of rural or underserved communities in this part.

(b) *Selection of Grantees.*

As explained above, all timely and complete applications that obtain a score of 60 points will be ranked from highest to lowest total score. VA will award one RVCP grant to the highest scoring application. VA will award RVCP grants to each successive application, ranked by total score, provided the applicant has not been awarded an RVCP grant for a higher scoring application and the proposed project is not in the same project location as any previously awarded RVCP grant. A total of five grants will be awarded for a 2-year period, with each grantee receiving 2 million dollars. To the extent practicable, VA will ensure RVCP grants are equitably distributed across geographic regions to include local and state governments and tribal lands.

M. *Payment of Grant Funds:* Grantees will receive payments electronically through the U.S. Department of Health and Human Services Payment Management System (HHS PMS). Grantees will have the ability to request payments as frequently as they choose subject to the following limitations: during the first quarter of the grantee's grant award period, the grantee's cumulative requests for funds may not exceed 30 percent of the total grant award without written approval by VA; during each successive period the grantee may request up to 10 percent of the total award by VA. By the end of the

grantee's grant award period, the grantee's cumulative requests for grant funds may not exceed 100 percent of the total grant award.

N. *Monitoring:* VA places great emphasis on the responsibility and accountability of grantees. Applicants should be aware of the following: upon execution of a grant agreement with VA, grantees will have a liaison appointed by VA who will provide oversight and monitor services provided to participants. All grantees must submit to VA quarterly reports based on the Federal fiscal year, which include the following information:

(a) *Quarterly reports.* All grantees must submit to VA quarterly reports based on the Federal fiscal year, which include the following information:

(1) Record of time and resources expended in outreach activities, and the methods used;

(2) The number of participants served, including demographics of this population;

(3) Types of assistance provided;

(4) A full accounting of RVCP grant funds received from VA and used or unused during the quarter; and

(5) Results of routine monitoring and any project variations.

(b) *Submission of reports.* Reports must be submitted to VA no later than 15 calendar days after the close of each Federal fiscal quarter.

(c) *Additional reports.* VA may request additional reports to allow VA to fully assess project accountability and effectiveness. The grantee will be expected to demonstrate adherence to their program concept, as described in their application. Grantees will be required to provide each participant with instructions on how to complete satisfaction surveys to be submitted directly to VA via *http://www.ruralhealth.va.gov/coordination-pilot/index.asp.* Surveys should be submitted to VA within 30 days of the participant's entry into the grantee's program and again within 30 days of such participant's pending exit from the program, or within 30 days of receiving services if on a one-time basis.

O. *Technical Assistance:* Information regarding how to obtain technical assistance with the preparation of a RVCP grants application, including information on grant-writing workshops, is available on *http://www.ruralhealth.va.gov/coordination-pilot/index.asp.*

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Jose D. Riojas, Interim Chief of Staff, Department of Veterans Affairs, approved this document on May 28, 2013, for publication.

Dated: May 30, 2013,

William F. Russo,

Deputy Director, Office of Regulation Policy and Management, Office of the General Counsel, Department of Veterans Affairs.

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Part II

Commodity Futures Trading Commission

17 CFR Part 37
Core Principles and Other Requirements for Swap Execution Facilities; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 37

RIN 3038–AD18

Core Principles and Other Requirements for Swap Execution Facilities

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') is adopting new rules, guidance, and acceptable practices to implement certain statutory provisions enacted by Title VII of the Dodd-Frank Wall Street Reform and Consumer Protection Act (''Dodd-Frank Act''). The final rules, guidance, and acceptable practices, which apply to the registration and operation of a new type of regulated entity named a swap execution facility (''SEF''), implement the Dodd-Frank Act's new statutory framework that, among other requirements, adds a new section 5h to the Commodity Exchange Act (''CEA'' or ''Act'') concerning the registration and operation of SEFs, and adds a new section 2(h)(8) to the CEA concerning the execution of swaps on SEFs.

DATES: The rules will become effective August 5, 2013, with the exception of regulation 37.3(b)(5) (17 CFR 37.3(b)(5)), which shall become effective August 5, 2015.

Compliance date: October 2, 2013, except that: (a) From August 5, 2013 until October 2, 2014 market participants may comply with the minimum market participant requirement in regulation 37.9(a)(3) (17 CFR 37.9(a)(3)) by transmitting a request for a quote to no less than two market participants; and (b) each affected entity shall comply with the warning letter requirement in regulation 37.206(f) (17 CFR 37.206(f)) no later than August 5, 2014.

FOR FURTHER INFORMATION CONTACT: Amir Zaidi, Special Counsel, 202–418–6770, *azaidi@cftc.gov*, Alexis Hall-Bugg, Special Counsel, 202–418–6711, *ahallbugg@cftc.gov*, or David Van Wagner, Chief Counsel, 202–418–5481, *dvanwagner@cftc.gov*, Division of Market Oversight; Michael Penick, Senior Economist, 202–418–5279, *mpenick@cftc.gov*, or Sayee Srinivasan, Research Analyst, 202–418–5309, *ssrinivasan@cftc.gov*, Office of the Chief Economist, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street NW., Washington, DC 20581.

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I. Background

A. Swaps and Title VII of the Dodd-Frank Act

Historically, swaps have traded in over-the-counter (''OTC'') markets, rather than on regulated exchanges given their exemption from regulation.[1] The OTC swaps market is less transparent than exchange-traded futures and securities markets. This lack of transparency was a major contributor to the 2008 financial crisis because regulators and market participants lacked visibility to identify and assess the implications of swaps market exposures and counterparty relationships.[2] As a result, on July 21,

[1] *See* Commodity Futures Modernization Act of 2000, Public Law 106–554, 114 Stat. 2763 (2000).

[2] *See* The Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report: Final Report of

2010, President Obama signed the Dodd-Frank Act,[3] which tasked the Commission with overseeing a large portion of the U.S. swaps market.

Title VII of the Dodd-Frank Act[4] amended the CEA[5] to establish a comprehensive new regulatory framework for swaps and security-based swaps (''SB-swaps''). A key goal of the Dodd-Frank Act is to bring greater pre-trade and post-trade transparency to the swaps market. Pre-trade transparency with respect to the swaps market refers to making information about a swap available to the market, including bid (offers to buy) and offer (offers to sell) prices, quantity available at those prices, and other relevant information before the execution of a transaction. Such transparency lowers costs for investors, consumers, and businesses; lowers the risks of the swaps market to the economy; and enhances market integrity to protect market participants and the public. The Dodd-Frank Act also ensures that a broader universe of market participants receive pricing and volume information by providing such information upon the completion of every swap transaction (*i.e.,* post-trade transparency).[6] By requiring the trading of swaps on SEFs and designated contract markets (''DCMs''), all market participants will benefit from viewing the prices of available bids and offers and from having access to transparent and competitive trading systems or platforms.

In addition to facilitating greater transparency and trading of swaps on SEFs, Title VII of the Dodd-Frank Act establishes a comprehensive regulatory framework, including registration, operation, and compliance requirements for SEFs.[7] For example, section 733 of the Dodd-Frank Act sets forth a broad registration provision that requires any person who operates a facility for the trading of swaps to register as a SEF or as a DCM.[8] In addition, section 721 of the Dodd-Frank Act amended the CEA to define SEF as a trading platform where multiple participants have the ability to execute swaps by accepting bids and offers made by multiple participants in the platform.[9] Furthermore, section 723 of the Dodd-Frank Act set forth a trade execution requirement, which states that swap transactions subject to the clearing requirement must be executed on a DCM or SEF, unless no DCM or SEF makes the swap available to trade or for swap transactions subject to the clearing exception under CEA section 2(h)(7).[10] Section 733 of the Dodd-Frank Act provided that to be registered and maintain registration, a SEF must comply with fifteen enumerated core principles and any requirement that the Commission may impose by rule or regulation.[11]

B. SEF Notice of Proposed Rulemaking

The Dodd-Frank Act amended the CEA to provide that, under new section 5h, the Commission may in its discretion determine by rule or regulation the manner in which SEFs comply with the core principles.[12] In consideration of both the novel nature of SEFs and its experience in overseeing DCMs' compliance with core principles, the Commission carefully assessed which SEF core principles would benefit from regulations, providing legal certainty and clarity to the marketplace, and which core principles would benefit from guidance or acceptable practices, where flexibility is more appropriate. Based on that evaluation, on January 7, 2011, the Commission proposed a combination of regulations, guidance, and acceptable practices for the registration, oversight, and regulation of SEFs (''SEF NPRM'').[13]

The SEF NPRM provided, among other requirements, the following:

(1) Procedures for temporary and full SEF registration.[14]

(2) A minimum trading functionality requirement that all SEFs must offer,[15] which took into account the SEF definition,[16] the core principles applicable to SEFs,[17] and the goals provided in section 733 of the Dodd-Frank Act.[18] The minimum trading functionality required a SEF to provide a centralized electronic trading screen upon which any market participant can post both executable and non-executable bids and offers that are transparent to all other market participants of the SEF.[19] For a trader who has the ability to execute against its customer's order or to execute two customers' orders against each other, the SEF NPRM also required the trader be subject to a 15 second time delay between the entry of those two orders.[20] In addition, the proposal allowed a Request for Quote (''RFQ'') System[21] that operates in conjunction with the SEF's minimum trading functionality.[22] Finally, the SEF NPRM stated that a SEF may offer other functionalities in conjunction with the minimum trading functionality, as long as those functionalities meet the SEF definition and comply with the core principles.[23]

(3) The classification of swap transactions into two categories: Required Transactions (*i.e.,* transactions subject to the trade execution mandate under section 2(h)(8) of the CEA and not block trades) and Permitted Transactions (*i.e.,* transactions not

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the National Commission on the Causes of the Financial and Economic Crisis in the United States (Official Government Edition), at 299, 352, 363–364, 386, 621 n. 56 (2011), *available at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf.* The Commission has acknowledged, however, that the benefits of enhanced market transparency are not boundless, particularly in swap markets with limited liquidity. *See* Procedures to Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades, 77 FR 15460, 15466 (proposed Mar. 15, 2012). In implementing these regulations, the Commission has taken into account the benefits and concerns related to market transparency.

[3] Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[4] Pursuant to section 701 of the Dodd-Frank Act, Title VII may be cited as the ''Wall Street Transparency and Accountability Act of 2010.''

[5] 7 U.S.C. 1 *et seq.*

[6] *See* Financial Stability Board, Implementing OTC Derivatives Market Reforms, at 41 (Oct. 25, 2010), *available at http://www.financialstabilityboard.org/publications/r_101025.pdf;* Technical Committee of the International Organization of Securities Commissions, Transparency of Structured Finance Products Final Report, at 17, 21 (Jul. 2010), *available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD326.pdf.*

[7] *See* CEA section 5h, as enacted by section 733 of the Dodd-Frank Act; 7 U.S.C. 7b–3. This regulatory framework includes: (i) Registration, operation, and compliance requirements for SEFs and (ii) fifteen core principles. Applicants and registered SEFs are required to comply with the core principles as a condition of obtaining and maintaining their registration as a SEF.

[8] CEA section 5h(a)(1), as enacted by section 733 of the Dodd-Frank Act; 7 U.S.C. 7b–3(a)(1).

[9] CEA section 1a(50), as amended by section 721 of the Dodd-Frank Act; 7 U.S.C. 1a(50).

[10] CEA section 2(h)(8), as amended by section 723 of the Dodd-Frank Act; 7 U.S.C. 2(h)(8).

[11] CEA section 5h, as enacted by section 733 of the Dodd-Frank Act; 7 U.S.C. 7b–3.

[12] CEA section 5h(f)(1); 7 U.S.C. 7b–3(f)(1).

[13] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR 1214 (proposed Jan. 7, 2011).

[14] *Id.* at 1238.

[15] *Id.* at 1241.

[16] CEA section 1a(50); 7 U.S.C. 1a(50).

[17] CEA section 5h(f); 7 U.S.C. 7b–3(f).

[18] The goals of section 733 of the Dodd-Frank Act are to promote the trading of swaps on SEFs and to promote pre-trade price transparency in the swaps market. CEA section 5h(e); 7 U.S.C. 7b–3(e).

[19] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1241.

[20] *Id.*

[21] *Id.*

[22] By ''in conjunction with the SEF's minimum trading functionality,'' the Commission means that the SEF NPRM required a SEF to offer the minimum trading functionality, and if that SEF also offered an RFQ System, it was required to communicate any bids or offers resting on the minimum trading functionality to the RFQ requester along with the responsive quotes. *See* the discussion below regarding ''Taken Into Account and Communicated'' Language in the RFQ System Definition under § 37.9(a)(1)(ii)—Request for Quote System in the preamble for further details.

[23] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1220.

subject to the clearing and trade execution mandates, illiquid or bespoke swaps, or block trades).[24] Under the SEF NPRM, Required Transactions were required to be executed on the minimum trading functionality, an Order Book meeting the minimum trading functionality, or an RFQ System (in conjunction with the minimum trading functionality).[25] The SEF NPRM also allowed a SEF to provide additional methods of execution for Permitted Transactions, including Voice-Based Systems.[26]

(4) Regulations, guidance, and acceptable practices to implement the 15 core principles specified in section 5h(f) of the Act.[27]

The initial comment period for the SEF NPRM ended on March 8, 2011. Subsequently, the Commission reopened the comment period until June 3, 2011, as part of its global extension of comment periods for various rulemakings implementing the Dodd-Frank Act.[28] After the second comment period ended, the Commission continued to accept and consider late comments, which it did until April 30, 2013.[29] The Commission received approximately 107 comment letters on the SEF NPRM from members of the public.[30] The Chairman and Commissioners, as well as the Commission staff, participated in numerous meetings with representatives of single dealer platforms, interdealer brokers, DCMs, trade associations, OTC market participants, potential SEF applicants, and other interested parties.[31] In addition, the Commission consulted with the Securities and Exchange Commission (''SEC'') and international regulators on numerous occasions.

II. Part 37 of the Commission's Regulations—Final Rules

A. Adoption of Regulations, Guidance, and Acceptable Practices

In this final rulemaking, the Commission is adopting many of the proposed regulations that each SEF must meet in order to comply with section 5h of the CEA, both initially upon registration and on an ongoing basis, and related guidance, and acceptable practices. As a result of the written comments received and dialogue and meetings with the public, the Commission has revised or eliminated a number of regulations that were proposed in the SEF NPRM, and in a number of instances, has codified guidance and/or acceptable practices in lieu of the proposed regulations. In determining the scope and content of the final SEF regulations, the Commission has carefully considered the costs and benefits for each rule with particular attention to the public comments. Additionally, the Commission has taken into account the concerns raised by commenters regarding the potential effects of specific rules on SEFs offering different swap contracts and trading systems or platforms and the importance of the statutory differences between SEFs and DCMs. The Commission addresses these issues below in its discussion of specific rule provisions.

The Commission also notes that the SEC has proposed rules related to security-based SEFs (''SB–SEFs'') as required under section 763 of the Dodd-Frank Act (''SB–SEF NPRM'').[32] Section 712(a) of the Dodd-Frank Act states that before commencing any rulemaking regarding swap execution facilities, the Commission ''shall consult and coordinate to the extent possible with the Securities and Exchange Commission and the prudential regulators for the purposes of assuring regulatory consistency and comparability . . . .''[33] The Commission has also received several comments stating that the Commission and the SEC should harmonize their rules as much as possible.[34]

The Commission has coordinated with the SEC to harmonize the SEF and SB–SEF requirements to the extent possible and has taken into consideration the comments for greater harmonization between the SEF and SB–SEF regulations. However, there may be appropriate differences in the approach that each agency may take regarding the regulation of SEFs and SB–SEFs. Cognizant of the different products and markets regulated by the SEC and the Commission, the SEC recognized in its SB–SEF NPRM that there may be differences in the approach that each agency may take regarding the regulation of SEFs and SB–SEFs.[35]

Similarly, the Commission is mindful that swaps may also trade on DCMs. Thus, in addition to its efforts to coordinate its approach with the SB–SEF regulations, the Commission also seeks, where possible, to harmonize the final SEF regulations with the DCM regulations in order to minimize regulatory differences between SEFs and DCMs in those instances where Congress enacted similar core principles for the two types of registered entities. In addition, some differences in the agencies' regulatory oversight regimes may be attributed to the fact that, unlike the SEC that is only responsible for overseeing trading in SB-swaps, such as single-name securities and narrow-based security indexes, the Commission is charged with the oversight of swaps trading over a broad range of asset categories. Consequently, the Commission has taken into account the varied characteristics of those underlying commodities in formulating the regulatory responsibilities of SEFs.

In the preamble sections below, the Commission responds to the substantive comments submitted in response to the SEF NPRM. The Commission reviewed and considered all comments in adopting this final rulemaking. Further, the final regulations include a number of technical revisions and non-substantive changes to the proposed rule text intended to clarify certain provisions, standardize terminology

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[24] *Id.* at 1241.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 1241–1253, 1256–1258.

[28] Reopening and Extension of Comment Periods for Rulemakings Implementing the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 FR 25274 (May 4, 2011). The Commission extended the applicable comment periods to provide the public an additional opportunity to comment on the proposed new regulatory framework. The Commission also opened an additional comment period, which ended on June 10, 2011, to provide the public an opportunity to comment on the Commission's phased implementation of the Act, as amended, including its implementation of section 733 of Dodd-Frank Act. Joint Public Roundtable on Issues Related to the Schedule for Implementing Final Rules for Swaps and Security-Based Swaps Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, 76 FR 23221 (Apr. 26, 2011).

[29] The Commission also held two roundtables touching on issues related to the SEF NPRM: (1) ''Available to Trade'' Provision for Swap Execution Facilities and Designated Contract Markets; and (2) Proposed Regulations Implementing Core Principle 9 for Designated Contract Markets. Transcripts are available through the Commission's Web site at *http://www.cftc.gov/PressRoom/Events/2012Events/index.htm.*

[30] A list of the full names and abbreviations of commenters to the SEF NPRM is included in section IV at the end of this release. The Commission notes that many commenters submitted more than one comment letter. Additionally, all comment letters that pertain to the SEF NPRM, including those from the additional comment periods related to implementation of the final Dodd-Frank rules, are contained in the SEF rulemaking comment file and are available through the Commission's Web site at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=955.*

[31] Meeting summaries are available through the Commission's Web site at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=955.*

[32] Registration and Regulation of Security-Based Swap Execution Facilities, 76 FR 10948 (proposed Feb. 28, 2011).

[33] 15 U.S.C. 8302(a)(1).

[34] Tradeweb Comment Letter at 3–4 (Jun. 3, 2011); Reuters Comment Letter 3–4 (Mar. 8, 2011); FSR Comment Letter at 10–11 (Mar. 8, 2011); WMBAA Comment Letter at 10–11 (Mar. 8, 2011).

[35] Registration and Regulation of Security-Based Swap Execution Facilities, 76 FR at 10950.

within this part 37, conform terminology to that used in other parts of the Commission's regulations, and more precisely state regulatory standards and requirements. For example, a minimum trading functionality requirement was in proposed § 37.9, which has been moved to the registration section under final § 37.3 to clarify that this functionality is required in order to register as a SEF. The final regulations will become effective 60 days after their publication in the **Federal Register**.

B. General Regulations (Subpart A)

The regulations in this final rulemaking are codified in subparts A through P under part 37 of the Commission's regulations. The general regulations consisting of §§ 37.1 through 37.9 are codified in subpart A, and the regulations applicable to each of the 15 core principles are codified in subparts B through P, respectively.[36]

1. § 37.1—Scope

Proposed § 37.1 provided that part 37 applies to entities that are registered SEFs, have been registered SEFs, or are applying to become registered SEFs. The proposed rule also stated that part 37 does not restrict the eligibility of SEFs to operate under the provisions of parts 38 or 49 of this chapter.

(a) Commission Determination

The Commission received no comments on this section and is adopting the provision as proposed.[37]

2. § 37.2—Applicable Provisions

Proposed § 37.2 listed the Commission regulations that, in addition to part 37, will be applicable to SEFs, including regulations that have been codified and are proposed to be codified upon the Commission's finalization of the rulemakings implemented pursuant to the Dodd-Frank Act.

(a) Commission Determination

Although it received no comments on this section, the Commission is revising proposed § 37.2 to generally state that SEFs shall comply with, in addition to part 37, all applicable Commission regulations, and to only cite those specific provisions whose applicability to SEFs may not be apparent. The Commission notes that a separate rulemaking adopted conforming changes to existing regulations to clarify the pre-Dodd Frank provisions applicable to SEFs.[38] There are, however, certain existing regulations that will apply to SEFs that the separate rulemaking did not address. Accordingly, for clarity purposes, the Commission is specifically stating that § 1.60[39] and part 9[40] of its regulations will apply to SEFs. These revisions will eliminate the need for the Commission to continually update § 37.2 when new regulations with which SEFs must comply are codified.

3. § 37.3—Requirements for Registration[41]

Proposed § 37.3 established, among other procedures, application procedures for temporary and full registration of new SEFs, and procedures for the transfer of a registration. To assist prospective SEF applicants, the SEF NPRM included under appendix A to part 37 an application form titled Form SEF. Form SEF included information that an applicant would be required to provide to the Commission in order for the Commission to make a determination regarding the applicant's request for SEF registration.

With respect to which entities must register as a SEF, the SEF NPRM stated that in order for an entity to meet the SEF definition and satisfy the SEF registration requirements, multiple parties must have the ability to execute or trade swaps by accepting bids and offers made by multiple participants.[42] In this regard, the SEF NPRM stated that one-to-one voice services and single dealer platforms do not satisfy the SEF definition because multiple participants do not have the ability to execute or trade swaps with multiple participants.[43] In addition, the SEF NPRM stated that entities that operate exclusively as swap processors do not meet the SEF definition and should not be required to register.[44] Although the SEF NPRM stated that the registration provision in CEA section 5h(a)(1) could be read to require the registration of entities that solely engage in trade processing,[45] it stated that such entities do not meet the SEF definition and should not be required to register as SEFs because: (1) They do not provide the ability to execute or trade a swap as required by the SEF definition; and (2) the SEF definition does not include the term ''process.''[46]

The SEF NPRM also noted that CEA section 2(h)(8) requires that transactions involving swaps subject to the clearing requirement be executed on a DCM or SEF, unless no DCM or SEF makes such swaps available to trade or such swaps qualify for the clearing exception under CEA section 2(h)(7).[47] In this regard, the SEF NPRM stated that market participants may desire to avail themselves of the benefits of trading on SEFs for swaps that are not subject to the CEA section 2(h)(8) trade execution requirement, but it also acknowledged that such swaps are not required to be executed on a SEF or DCM.[48]

(a) Requirements for Registration

(1) Summary of Comments

Several commenters asserted that the proposed rule is ambiguous as to who must register as a SEF as required under CEA section 5h(a)(1) and requested clarification.[49] For example, UBS stated that the Commission should clarify that ''the SEF registration requirement in [CEA section 5h(a)(1)] only applies to platforms that meet the SEF definition.''[50] In addition, Barclays

[36] Subparts B through P begin with a regulation containing the language of the core principle in the Act.

[37] The Commission has removed the phrase ''has been registered'' from proposed § 37.1 because a SEF that has been registered is the same as a SEF that is registered.

[38] Adaptation of Regulations to Incorporate Swaps, 77 FR 66288 (Nov. 2, 2012). The Commission may promulgate a second phase of conforming changes to its regulations once more rules relating to swaps are finalized.

[39] The term ''contract market'' used in § 1.60 of the Commission's regulations should be interpreted to include a SEF for purposes of applying the requirements of § 1.60 to a SEF. 17 CFR 1.60.

[40] The term ''exchange'' used in part 9 of the Commission's regulations should be interpreted to include a SEF for purposes of applying the requirements of part 9 to a SEF. 17 CFR part 9.

[41] The Commission is renaming the title of this section from ''Requirements for Registration'' to ''Requirements and Procedures for Registration'' to provide greater clarity. The Commission is also restructuring the order of § 37.3 to provide clarity.

[42] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1219.

[43] *Id.*

[44] *Id.*

[45] CEA section 5h(a)(1) states that ''[n]o person may operate a facility for the trading or processing of swaps unless the facility is registered as a swap execution facility or designated contract market. . . .'' 7 U.S.C. 7b–3(a)(1).

[46] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1219.

[47] *Id.* at 1221–22. CEA sections 2(h)(7) and 2(h)(8); 7 U.S.C. 2(h)(7) and 2(h)(8). *See* discussion below under § 37.10—Swaps Made Available for Trading in the preamble for further details regarding this process.

[48] *Id.* at 1222.

[49] CEA section 5h(a)(1) states that ''[n]o person may operate a facility for the trading or processing of swaps unless the facility is registered as a swap execution facility or designated contract market. . . .'' 7 U.S.C. 7b–3(a)(1). UBS Comment Letter at 1–2 (May 18, 2012); UBS Comment Letter at 2–3 (Nov. 2, 2011); Barclays Comment Letter at 2 (Jun. 3, 2011); Deutsche Comment Letter at 6 (Mar. 8, 2011); Bloomberg Comment Letter at 3 (Mar. 8, 2011); State Street Comment Letter at 3 (Mar. 8, 2011); CME Comment Letter at 8 (Mar. 8, 2011).

[50] UBS Comment Letter at 1 (May 18, 2012). The Commission notes that UBS submitted 2 comment letters on May 18, 2012.

commented that the language of CEA section 5h(a)(1) should not be read broadly to require SEF registration for any platform or system that executes or processes swaps to the extent it is deemed to be a ''facility'' without considering whether such swaps are or are not subject to the CEA section 2(h)(8) trade execution mandate.[51] Similarly, Bloomberg noted the broad language under the CEA section 5h(a)(1) registration requirement, and stated that if Congress intended that all swaps be traded on a SEF or DCM, then the trade execution mandate under CEA section 2(h)(8) would be unnecessary.[52] The Commission also received comments and specific requests for a Commission determination as to whether certain business models or services must register as a SEF, including one-to-many platforms, blind auction platforms, aggregation services or portals, portfolio compression services, risk mitigation services, and swap processing services.

(i) One-to-Many Systems or Platforms

AFR opined that single dealer or one-to-many platforms do not meet the SEF definition in CEA section 1a(50), which refers to a system in which multiple parties have the ability to execute or trade swaps by accepting bids or offers from multiple participants.[53] Similarly, IECA stated that SEFs should operate in a way that publicly reveals market prices, and that preserving the ''one-to-one'' pricing model of existing dealer systems is inconsistent with the SEF definition.[54]

(ii) Blind Auction Systems or Platforms

Nodal commented that a blind auction platform should be able to register as a SEF.[55] Nodal contended that its blind auction platform meets the SEF definition because multiple participants have the ability to execute swap transactions by accepting bids and offers made by multiple participants albeit without the pre-trade posting of bids or offers.[56] Nodal explained that its platform allows participants to submit firm bids and offers without the disclosure of the terms of those bids and offers to other participants, and that the auction algorithmically processes the bids and offers to match participants efficiently.[57] Nodal further explained that auction volume is awarded to participants at the same price and at a price equal to or better than the participants' auction order.[58]

(iii) Aggregation Services or Portals

UBS and Bloomberg requested clarification whether aggregator services are required to register as SEFs.[59] UBS stated that an aggregator service will provide customers with the ability to access the best available liquidity and pricing on multiple SEFs through the aggregator's screen so that customers will not have to connect to each SEF individually.[60] UBS stated that an aggregator service should not be required to register as a SEF because the transaction is executed on the relevant SEF's platform.[61]

(iv) Services Facilitating Portfolio Compression and Risk Mitigation Transactions

Several commenters sought clarification that portfolio compression and risk mitigation services are not required to register as SEFs.[62] According to TriOptima, its portfolio compression service provides a netting mechanism that reduces the outstanding trade count and outstanding gross notional value of swaps in participants' portfolios by terminating or modifying existing trades.[63] Specifically, TriOptima stated that prospective participants may sign up for a scheduled compression cycle and the participants must provide detailed data about their respective portfolios and risk tolerances.[64] Other than to update mark-to-market values shortly before the compression cycle is run, prospective participants have no further input into the compression process, which is entirely controlled by the compression algorithm.[65] On a specified date, TriOptima runs the compression cycle, which produces a set of proposed transactions for each participant.[66] The proposed transactions, if effected, would terminate or modify participants' existing trades in order to reduce the outstanding trade count and outstanding gross notional value of swaps in the participants' portfolios.[67] Each participant receives only details of the proposed compression transactions to which it is a party, but all of the compression transactions must be accepted in order for the particular compression cycle to occur.[68] If a single participant declines to agree to the proposed compression transactions, then the entire compression cycle fails and the pre-compression swap transactions remain in effect.[69] TriOptima contended that such services do not perform the role of a trade execution venue so they should not be regulated as a SEF.[70]

ICAP stated that its bulk risk mitigation service assists market participants in managing their risk exposures by identifying offsetting risk requirements and executing new offsetting trades among those participants.[71] Specifically, ICAP stated that its risk mitigation service sets the curve and price for all trades based on a survey of market making entities, such as banks, or other entities that are willing to provide quotes, as well as price quotes on DCMs.[72] All prospective participants in a particular risk mitigation run are first shown the curve and prices for transactions along the curve.[73] Subsequently, the prospective participants provide ICAP with data about any of their positions of their choosing and their acceptable risk tolerances.[74] ICAP then runs a proprietary algorithm, which produces a set of proposed transactions for each participant.[75] The proposed transactions, if effected, would result in new trades for the participants that enable them to manage their exposures to market, credit, or other sources of

[51] Barclays Comment Letter at 2 (Jun. 3, 2011).

[52] Bloomberg Comment Letter at 3 (Mar. 8, 2011).

[53] AFR Comment Letter at 3–4 (Mar. 8, 2011). JP Morgan also commented that it agrees with the Commission that a single dealer platform cannot qualify as a SEF because it fails to satisfy the ''multiple to multiple'' language in the SEF definition. JP Morgan Comment Letter at 3 (Mar. 8, 2011).

[54] IECA Comment Letter at 3 (May 24, 2011).

[55] Nodal Comment Letter at 2–3 (Jun. 3, 2011); Nodal Comment Letter at 2–3 (Mar. 8, 2011). Nodal also expressed support for blind auction platforms in its comment letter to the Second Amendment to July 14, 2011 Order for Swap Regulation Notice of Proposed Amendment, 77 FR 28819 (proposed May 16, 2012).

[56] Nodal Comment Letter at 3 (Mar. 8, 2011).

[57] *Id.*

[58] *Id.* at 2.

[59] UBS Comment Letter at 1 (May 18, 2012); Meeting with UBS dated Mar. 27, 2012; Meeting with Bloomberg dated Jan. 18, 2012. *See also* UBS Comment Letter at 1 (Nov. 2, 2011).

[60] Meeting with UBS dated Mar. 27, 2012. *See also* UBS Comment Letter at 1 (Nov. 2, 2011).

[61] Meeting with UBS dated Mar. 27, 2012.

[62] Meeting with ICAP and TriOptima dated Sep. 6, 2012; Meeting with ICAP dated Aug. 29, 2012; Meeting with ICE dated Jul. 25, 2012; WMBAA Comment Letter at 3 (Jul. 18, 2011); ICAP Comment Letter at 2 (Jul. 7, 2011); TriOptima Comment Letter at 1 (Mar. 8, 2011).

[63] TriOptima Comment Letter at 2, 4 (Mar. 8, 2011).

[64] *Id.* at 2. The service does not place any constraints on the number of positions or risk tolerances of prospective participants. *Id.*

[65] *Id.* at 3.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] Meeting with ICAP dated Aug. 29, 2012; ICAP Comment Letter at 1, 4 (Jul. 7, 2011).

[72] Meeting with ICAP dated Aug. 29, 2012; ICAP Comment Letter at 4 (Jul. 7, 2011).

[73] *Id.*

[74] *Id.* The service does not place any constraints on the number of positions or risk tolerances of prospective participants. *Id.*

[75] *Id.*

risk.[76] All transactions must be accepted in order for a particular risk mitigation run to occur.[77] If a single participant declines to agree to the proposed risk mitigation transactions, then the entire risk mitigation run fails and the existing swap transactions remain in effect.[78] While its bulk risk mitigation services result in market participants entering into new trades, ICAP commented that such services do not meet the SEF definition because they do not permit participants to trade in real-time, negotiate price, or initiate directional trades.[79]

(v) Swap Processing Services

In its first comment letter, MarkitSERV agreed with the SEF NPRM that entities operating exclusively as swap processors should not have to register as SEFs because they only provide post-execution services that facilitate clearing and settlement, not services relating to the execution of swaps.[80] However, in a subsequent comment letter, after the SEC's proposed rule that would require certain providers of post-trade services to register with the SEC as clearing agencies, MarkitSERV recommended that the Commission regulate entities that perform the confirmation and processing of swaps.[81] While MarkitSERV acknowledged that the SEC's authority under the Securities and Exchange Act of 1934 to regulate swap processors as a clearing agency has no parallel in the CEA, MarkitSERV recommended that the Commission register such entities to avoid unnecessarily inconsistent regulations.[82] MarkitSERV recommended that the Commission require swap processors to register as a sub-category of SEFs because CEA section 5h(a)(1) references the processing of swaps.[83]

(2) Commission Determination

In response to commenters' requests for clarification regarding the registration requirement, the Commission is clarifying how it interprets the broad registration provision in section 5h(a)(1) of the Act in coordination with the specific requirements for a SEF's structure found in section 1a(50) of the Act and the trade execution requirement in section 2(h)(8) of the Act. As noted in the SEF NPRM, the Commission views the CEA section 5h(a)(1) registration requirement[84] as applying only to facilities that meet the SEF definition in CEA section 1a(50).[85] Section 1a(50) of the Act defines a SEF as ''a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that—(A) Facilitates the execution of swaps between persons; and (B) is not a designated contract market.'' [86] Accordingly, the Commission is revising proposed § 37.3 to clarify the scope of the registration requirement, which states that ''[a]ny person operating a facility that offers a trading system or platform in which more than one market participant has the ability to execute or trade swaps with more than one other market participant on the system or platform shall register the facility as a swap execution facility under this part 37 or as a designated contract market under part 38 of this chapter.'' [87]

The Commission also clarifies that swap transactions that are not subject to the CEA section 2(h)(8) trade execution requirement may be executed on either a registered SEF (*i.e.,* a facility that meets the SEF definition) or an alternative entity that is not required to register as a SEF (*e.g.,* see one-to-many system or platform discussion below).[88] This clarification is consistent with the Commission's acknowledgement in the SEF NPRM that swap transactions that are not subject to the CEA section 2(h)(8) trade execution requirement would not have to be executed on a registered SEF.[89]

The Commission believes that its interpretation of the registration provision in CEA section 5h(a)(1) is consistent with the statute and helps further the goals provided in CEA section 5h, which are to promote the trading of swaps on SEFs and to promote pre-trade price transparency in the swaps market. Although the registration provision is written in broad language and could be read to require the registration of any facility for the trading or processing of swaps, the Commission notes that other statutory provisions appear to narrow the registration requirement. For example, the CEA section 2(h)(8) trade execution requirement and CEA section 5h(d)(2), which states that ''[f]or all swaps that are not required to be executed through a swap execution facility . . . such trades may be executed through any other available means of interstate commerce[,]'' [90] when read together, contemplate alternative entities that are not required to register as SEFs and may execute those swaps that are not

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] ICAP Comment Letter at 2 (Jan. 16, 2013); ICAP Comment Letter at 4 (Jul. 7, 2011).

[80] MarkitSERV Comment Letter at 6 (Mar. 8, 2011).

[81] MarkitSERV Comment Letter at 1–2 (Jun. 3, 2011).

[82] *Id.* at 3–4.

[83] *Id.* at 5.

[84] CEA section 5h(a)(1) states that ''[n]o person may operate a facility for the trading or processing of swaps unless the facility is registered as a swap execution facility or as a designated contract market. . . .'' 7 U.S.C. 7b–3(a)(1).

[85] *See* Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1219 (explaining that entities that operate exclusively as swap processors do not meet the SEF definition and should not be required to register as a SEF despite the broad language in the CEA section 5h(a)(1) registration provision).

[86] CEA section 1a(50); 7 U.S.C. 1a(50). The Commission notes that the Secretary of the Treasury issued a written determination pursuant to CEA sections 1a(47)(E) and 1b that foreign exchange swaps and foreign exchange forwards should not be regulated as swaps under the CEA, and therefore should be exempted from the definition of the term ''swap'' under the CEA. *See* Determination of Foreign Exchange Swaps and Foreign Exchange Forwards Under the Commodity Exchange Act, 77 FR 69694 (Nov. 20, 2012). Accordingly, if a facility offers a trading system or platform solely for the execution or trading of foreign exchange swaps or foreign exchange forwards, then the facility would not be required to register as a SEF.

[87] The Commission is adding this new provision to § 37.3(a)(1). As a result, proposed § 37.3(a) is adopted as § 37.3(b), proposed § 37.3(b) is adopted as § 37.3(c), proposed § 37.3(c) is adopted as § 37.3(d), proposed § 37.3(d) is adopted as § 37.3(e), proposed § 37.3(e) is adopted as § 37.3(f), and proposed § 37.3(f) is adopted as § 37.3(g). The SEF NPRM stated that certain entities such as one-to-one voice services and single-dealer platforms do not provide the ability for participants to conduct multiple-to-multiple execution or trading because they limit the provision of liquidity to a single liquidity provider. Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1219.

[88] The Commission notes that it is not tying the registration requirement in CEA section 5h(a)(1) to the trade execution requirement in CEA section 2(h)(8), such that only facilities trading swaps subject to the trade execution requirement would be required to register as a SEF. Therefore, a facility would be required to register as a SEF if it operates in a manner that meets the SEF definition even though it only executes or trades swaps that are not subject to the trade execution mandate. The Commission also notes that transactions involving swaps on SEFs that are subject to the trade execution mandate are considered to be ''Required Transactions'' under part 37 of the Commission's regulations, whereas ''Permitted Transactions'' are transactions not involving swaps that are subject to the trade execution mandate. As discussed further below, the regulatory obligations which pertain to Permitted Transactions differ from, and are somewhat less rigorous than, those for Required Transactions. *See* discussion below regarding Permitted Transactions under § 37.9(a)(1)(iv)—Required Transactions and § 37.9(a)(1)(v)—Permitted Transactions in the preamble. *See also* Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available To Trade, 76 FR 77728 (proposed Dec. 14, 2011) (discussing the process by which a swap is determined to be subject to the trade execution requirement in CEA section 2(h)(8)).

[89] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1222.

[90] CEA section 5h(d)(2); 7 U.S.C. 7b–3(d)(2).

required to be executed on a SEF (*i.e.,* those swaps that are not subject to the CEA section 2(h)(8) trade execution requirement). The Commission is interpreting the CEA section 5h(a)(1) registration provision in a manner that is consistent with the SEF definition in CEA section 1a(50), the trade execution requirement in CEA section 2(h)(8), and CEA section 5h(d)(2), as discussed above.

The following discussion is not intended to comprehensively cover which entities are required to register as a SEF. Whether a particular entity falls within the scope of CEA section 5h(a)(1) depends on all of the relevant facts and circumstances of the entity's operations. The Commission is mindful that any rule attempting to capture all of the possible configurations of facilities that provide for the execution or trading of swaps may be or become over-inclusive or under-inclusive in light of technological changes and the ever evolving swaps market.[91] However, in response to commenters' requests, the Commission is providing examples of how it would interpret the CEA section 5h(a)(1) registration requirement with respect to certain categories of better understood facilities.

(i) One-to-Many Systems or Platforms

The Commission continues to believe that a one-to-many system or platform on which the sponsoring entity is the counterparty to all swap contracts executed through the system or platform would not meet the SEF definition in section 1a(50) of the Act and, therefore, would not be required to register as a SEF under section 5h(a)(1) of the Act. In the Commission's view, such a system or platform does not meet the SEF definition because it limits the provision of liquidity to a single liquidity provider (*i.e.,* the sponsoring entity). Accordingly, market participants do not have the ability to conduct multiple-to-multiple execution or trading on such a trading system or platform. The Commission notes, however, that transactions in swaps that are subject to the trade execution mandate, under CEA section 2(h)(8), must be executed on a DCM or SEF and, accordingly, may not be executed on a one-to-many system or platform.[92]

(ii) Blind Auction Systems or Platforms

The Commission understands from commenters that a blind auction system or platform, as described above, allows market participants to submit firm bids and offers without disclosure of the terms of those bids and offers to other participants. Such bids and offers are matched through a pre-determined algorithm. The Commission believes that an entity that provides such a blind auction system or platform would meet the SEF definition in CEA section 1a(50) because more than one market participant has the ability to execute or trade swaps with more than one other market participant on the system or platform. Accordingly, an entity that provides such a blind auction system or platform would have to register as a SEF under section 5h(a)(1) of the Act.

(iii) Aggregation Services or Portals

The Commission understands that certain entities may seek to provide their users with the ability to access multiple SEFs and the market participants thereon, but do not provide for execution on their aggregation services as execution occurs on one of those individual SEFs. The Commission believes that an entity that provides such an aggregation service would not meet the SEF definition in CEA section 1a(50) because it is only providing a portal through which its users may access multiple SEFs and swaps are not executed or traded through the service. Accordingly, an entity that provides such an aggregation service or portal would not have to register as a SEF under section 5h(a)(1) of the Act.[93] However, the Commission notes that to the extent that an aggregation service or portal itself provides a trading system or platform whereby more than one market participant has the ability to execute or trade swaps with more than one other market participant on the system or platform, the aggregation service would be required to register as a SEF.[94]

(iv) Services Facilitating Portfolio Compression and Risk Mitigation Transactions

The Commission notes that portfolio compression services provide a netting mechanism that reduces the outstanding trade count and outstanding gross notional value of swaps in two or more swap counterparties' portfolios.[95] To achieve this result, a portfolio compression service, for example, may wholly terminate or change the notional value of some or all of the swaps submitted by the counterparties for inclusion in the portfolio compression exercise and, depending on the methodology employed, replace the terminated swaps with other swaps whose combined notional value (or some other measure of risk) is less than the combined notional value (or some other measure of risk) of the terminated swaps in the compression exercise.[96] The swap counterparties' risk profiles are not materially changed as a result of the portfolio compression exercise.

The Commission does not believe that a portfolio compression service, as described above, provides for the execution or trading of swap transactions between counterparties because the compression service is providing a netting mechanism whereby the outstanding trade count and outstanding gross notional value of swaps in two or more swap counterparties' portfolios are reduced. Therefore, an entity providing such a portfolio compression service would not meet the SEF definition in section 1a(50) of the Act and would not have to register as a SEF under section 5h(a)(1) of the Act.[97]

The Commission understands from commenters that certain entities provide

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[91] The Commission notes that entities seeking guidance concerning their SEF registration obligations may request such further guidance from the Division of Market Oversight (''DMO'').

[92] Transactions in swaps that are subject to the clearing requirement in CEA section 2(h)(1) and ''made available to trade'' would be subject to the trade execution requirement. *See* CEA sections 2(h)(1) and 2(h)(8); 7 U.S.C. 2(h)(1) and 2(h)(8). *See also* Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available To Trade, 76 FR 77728 (proposed Dec. 14, 2011) (discussing the process by which a swap is determined to be subject to the trade execution requirement in CEA section 2(h)(8)). The trade execution requirement provides an exception to the requirement for swap transactions subject to the clearing exception under CEA section 2(h)(7).

[93] The Commission notes that footnote 423 below classifies aggregator platforms as a type of independent software vendor (''ISV''). Therefore, other types of ISVs would not have to register as a SEF if they only provide their users with the ability to access multiple SEFs, but do not provide for execution or trading of swaps. *See* discussion below regarding ISVs under § 37.202(a)—Impartial Access by Members and Market Participants in the preamble.

[94] For example, some aggregation services may provide their users with a portal to multiple SEFs and also execute swap transactions between their multiple users. These services would have to register as a SEF under section 5h(a)(1) of the Act. The Commission notes that if other types of ISVs provide a system or platform whereby more than one participant has the ability to execute or trade swaps with more than one other participant on the system or platform, then they would also have to register as a SEF under section 5h(a)(1) of the Act. *See* discussion below regarding ISVs under § 37.202(a)—Impartial Access by Members and Market Participants in the preamble.

[95] Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 FR 55904, 55932 (Sep. 11, 2012).

[96] *Id.* at 55960.

[97] The Commission notes, however, that transactions in swaps that are subject to the trade execution mandate, under CEA section 2(h)(8), must be executed on a DCM or SEF and, accordingly, may not be executed on a portfolio compression service (unless no DCM or SEF makes the swap available to trade or the swap transaction is excepted or exempted from clearing under CEA section 2(h)(7) or as otherwise provided by the Commission).

risk mitigation services, as described above, that operate to assist market participants in managing their exposures to market, credit, and other sources of risk. These risk mitigation services may redistribute or mitigate market participants' risks, but they do not provide a netting mechanism. To redistribute or mitigate risk, a risk mitigation service, for example, may allow market participants to identify elements of risk in their respective portfolios and to submit information about these risks to the service. The risk mitigation service may set the prices for all points along the maturity or credit curve for all trades and the service's proprietary algorithm produces a set of proposed transactions for each participant. If all participants accept the proposed transactions, then the new trades are executed.

In the Commission's view, such an entity would meet the SEF definition in CEA section 1a(50) because more than one market participant has the ability to execute swaps with more than one other market participant on the system or platform.[98] In response to ICAP's comment that such services do not meet the SEF definition because they do not permit participants to trade in real-time, negotiate price, or initiate directional trades, the Commission notes that the SEF definition does not require any of these stated characteristics. As noted above, the outcome of a successful risk mitigation run is the execution of new trades between multiple participants at prices accepted by those multiple participants.

Additionally, the Commission notes that there are alternative avenues to managing the same risks that risk mitigation services manage, including bringing the risk mitigating orders to the open market. For instance, a market participant could assess the various risk elements in its portfolio using appropriate tools, and then decide on a set of trades to mitigate these risks. The market participant could choose to execute these trades through a risk mitigation service, a SEF, or a DCM. In fact, in the DCM context, market participants execute such risk mitigating trades on the DCM and not through a separate non-DCM service. As such, risk mitigation services are providing an alternative avenue to execute certain swap transactions between counterparties.

Furthermore, the Commission believes that the confluence of trading interests from a diverse range of motivations (*e.g.,* risk mitigating and risk taking trades) brings depth to the marketplace and helps to build liquid markets. If the Commission did not require these risk mitigation services to register as SEFs, then market participants would be able to execute certain swap transactions away from the SEF, which would hurt liquidity and also the trading of swaps on SEFs. This would contradict one of the goals in section 5h of the Act, which is to promote the trading of swaps on SEFs.[99]

For the reasons mentioned above, the Commission believes that an entity that provides such a risk mitigation service would have to register as a SEF under section 5h(a)(1) of the Act. However, the Commission notes that such entities may not have to register as a SEF if they only provide the analytical services that produce the proposed risk mitigation transactions and the execution of those transactions occurs elsewhere and, in particular, the execution of those transactions that are subject to the trade execution mandate occurs on a SEF.

(v) Swap Processing Services

As noted in the SEF NPRM, entities that solely engage in trade processing would not meet the SEF definition in CEA section 1a(50) because they do not provide the ability to execute or trade a swap as required by the definition. Accordingly, swap processing services would not have to register as a SEF under CEA section 5h(a)(1). Consistent with this distinction, the Commission declines to create a sub-category of SEFs for processing services that would be subject to some limited subset of SEF core principles as requested by MarkitSERV.

Finally, the Commission notes that platforms seeking guidance concerning the SEF registration obligations and its application to their particular operations may request informal guidance from the Division of Market Oversight (''DMO'').

(b) § 37.9(b)(2)—Minimum Trading Functionality (Final § 37.3(a)(2))

To further clarify what functionalities a SEF must provide if it is required to register as a SEF, as opposed to what functionalities trigger the registration requirement, the Commission is moving proposed § 37.9(b)(2) to final § 37.3(a)(2). As discussed in the SEF NPRM, an entity that must register as a SEF under CEA section 5h(a)(1) must ensure that its operations comply with the minimum trading functionality requirement.[100] The minimum trading functionality requirement in proposed § 37.9(b)(2) provided that an applicant seeking registration as a SEF must, at a minimum, offer trading services to facilitate Required Transactions by providing market participants with the ability to post both firm and indicative quotes on a centralized electronic screen accessible to all market participants who have access to the SEF.

(1) Summary of Comments

Several commenters stated that the minimum trading functionality is similar to an order book, which is not required by the SEF definition.[101] In this regard, Commissioner Sommers offered a dissent to the SEF NPRM, which was published as Appendix 3 to that notice.[102] Commissioner Sommers' dissent asserted that the minimum trading functionality requirement is not mandated by the Dodd-Frank Act.[103] In addition, Commissioner Sommers' dissent argued for a broader interpretation of the terms ''trading system'' and ''platform,'' which are included in the statutory SEF definition so that SEFs can offer a broader model for executing swaps.[104] Many commenters also stated that the SEF definition only requires that the facility provide multiple participants with the ''ability'' to execute or trade swaps by accepting bids and offers made by ''multiple participants'' and, thus, the definition does not require making bids or offers transparent to the entire market but rather to multiple participants.[105] Better Markets commented that the Commission's minimum trading

[98] The Commission also notes that ICAP's Web sites for its Reset and ReMatch risk mitigation services support the notion that these services are executing trades between counterparties. ICAP's Reset Web site states that ''[t]he new RESET matching engine allows for unilateral matching with hedging. No longer is it necessary to have an offsetting position for each trade to be executed.'' *See http://www.reset.net/aboutus.php.* A press article regarding ReMatch states that ''ReMatch addresses the problem of minimal or no exit liquidity . . . [by] enabling market participants to exit positions that they may otherwise have been unable to.'' *See http://www.icap.com/news-events/in-the-news/news/2011/rematch-expands-service-into-us-financials.aspx.*

[99] CEA section 5h(e); 7 U.S.C. 7b–3(e).

[100] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1219.

[101] Reuters Comment Letter at 3–4 (Dec. 12, 2011); Rosen et al. Comment Letter at 8–9 (Apr. 5, 2011); WMBAA Comment Letter at 4, 9 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 5–6 (Mar. 8, 2011); FXall Comment Letter at 4–5 (Mar. 8, 2011). Commissioner Sommers' dissent to the SEF NPRM. *See* Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1259.

[102] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1259.

[103] *Id.*

[104] *Id.*

[105] Reuters Comment Letter at 3–4 (Dec. 12, 2011); Rosen et al. Comment Letter at 8 (Apr. 5, 2011); ISDA/SIFMA Comment Letter at 5–6 (Mar. 8, 2011); CME Comment Letter at 7–8 (Mar. 8, 2011); FXall Comment Letter at 4–5 (Mar. 8, 2011); Barclays Comment Letter at 5 (Mar. 8, 2011); MarketAxess Comment Letter at 32–33 (Mar. 8, 2011); WMBAA Comment Letter at 8 (Mar. 8, 2011).

functionality requirement is an overly broad interpretation of the SEF definition because it allows a SEF to be almost any type of system or platform.[106] Therefore, it recommended that the Commission narrowly interpret the multiple participant to multiple participant requirement so that the scope of acceptable execution methods has rational boundaries.[107]

Several commenters expressed concern about the requirement to post indicative quotes.[108] Nodal and other commenters expressed concern that indicative quotes could be used for manipulative purposes.[109] Tradeweb commented that, under the proposal, SEFs operating an anonymous order book system would be required to offer indicative quotes due to the minimum trading functionality requirement, which would not be suitable for anonymous order book marketplaces.[110]

(2) Commission Determination

The Commission reiterates its view in the SEF NPRM that an entity that must register as a SEF under CEA section 5h(a)(1) must ensure that its operations comply with the minimum trading functionality requirement.[111] The Commission reaffirms that an acceptable SEF system or platform must provide at least a minimum functionality to allow market participants the ability to make executable bids and offers, and to display them to all other market participants on the SEF. The Commission is adopting a revised version of proposed § 37.9(b)(2), which now requires a SEF to provide an Order Book as defined in final § 37.3(a)(3) (*i.e.,* an electronic trading facility, a trading facility, or a trading system or platform in which all market participants have the ability to enter multiple bids and offers, observe or receive bids and offers, and transact on such bids and offers) because, as noted by several commenters, the proposed minimum trading functionality description is similar to the proposed definition of an Order Book.[112] In response to comments, like the one provided by Commissioner Sommers, that an order book is not required by the SEF definition, the Commission believes that an Order Book, as defined in final § 37.3(a)(3), is consistent with the SEF definition and promotes the goals provided in section 733 of the Dodd-Frank Act.[113] This interpretation is also consistent with the SEF NPRM, as the Commission noted that it took into account these requirements when proposing the minimum trading functionality requirement.[114]

The Commission notes, however, that the final regulations provide SEFs with additional flexibility in the execution methods for Required Transactions by allowing SEFs to offer an RFQ System in conjunction with an Order Book, as described below, to permit market participants to access multiple market participants, but not necessarily the entire market.[115] The Commission also notes that a SEF may petition the Commission under § 13.2 of the Commission's regulations to amend its regulations to include additional execution methods for Required Transactions.[116] The final regulations further allow a SEF to utilize ''any means of interstate commerce'' in providing the execution methods in § 37.9(a)(2)(i)(A) or (B) (*i.e.,* an Order Book or an RFQ System that operates in conjunction with an Order Book, as described below).[117] The Commission also notes that a SEF may provide any method of execution for Permitted Transactions.[118] By allowing SEFs to offer additional methods of execution, and permitting flexible means for executing swaps through these methods of execution, as discussed below, the Commission is effectuating the Congressional direction to allow multiple participants to execute swaps by accepting bids and offers made by multiple participants through any means of interstate commerce.[119] The Commission notes that a DCM must operate as a trading facility and in conjunction with that trading facility is also permitted to utilize additional execution methods; however, those additional execution methods are limited by the requirements set forth in DCM Core Principle 9, for which there is no identical core principle for SEFs.

Finally, given the changes to the minimum trading functionality requirement, the Commission notes that SEFs are not required to offer indicative quote functionality. The Commission agrees with commenters that indicative quotes would not be appropriate for certain trading systems or platforms complying with the Order Book definition in final § 37.3(a)(3) (*e.g.,* central limit order books facilitating only anonymous trading).

(c) § 37.9(a)(1)(i)—Order Book (Final § 37.3(a)(3))

The Commission is also moving proposed § 37.9(a)(1)(i) to final § 37.3(a)(3) given the relocation of, and changes to, the minimum trading functionality section as discussed above. Proposed § 37.9(a)(1)(i) defined the term ''Order Book'' to mean: (A) An electronic trading facility, as that term is defined in section 1a(16) of the Act;[120] (B) a trading facility, as that term is defined in section 1a(51) of the Act;[121] (C) a trading system or platform in which all market participants in the trading system or platform can enter multiple bids and offers, observe bids and offers entered by other market participants, and choose to transact on such bids and offers; or (D) any such

[106] Better Markets Comment Letter at 6–7 (Mar. 8, 2011).

[107] *Id.*

[108] Nodal Comment Letter at 3–4 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 6 (Mar. 8, 2011); SIFMA AMG Comment Letter at 9 (Mar. 8, 2011); ICE Comment Letter at 3 (Mar. 8, 2011); Tradeweb Comment Letter at 6 (Mar. 8, 2011).

[109] Nodal Comment Letter at 3–4 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 6 (Mar. 8, 2011); SIFMA AMG Comment Letter at 9 (Mar. 8, 2011); ICE Comment Letter at 3 (Mar. 8, 2011).

[110] Tradeweb Comment Letter at 6 (Mar. 8, 2011).

[111] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1219.

[112] The Commission is renumbering proposed § 37.9(b)(2) to § 37.3(a)(2).

[113] CEA section 1a(50); 7 U.S.C. 1a(50). In section 5h(e) of the Act, Congress provided a ''rule of construction'' to guide the Commission's interpretation of certain SEF provisions (stating that the goals of section 5h of the Act are to ''promote the trading of swaps on [SEFs] and to promote pre-trade price transparency in the swaps market''). 7 U.S.C. 7b–3(e).

[114] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1219.

[115] *See* discussion below under § 37.9(a)(1)(ii)—Request for Quote System in the preamble.

[116] *See* discussion below under § 37.9(b)(1) and (b)(4)—Execution Methods for Required Transactions in the preamble. Section 13.2 will allow the Commission to consider if a broader model for executing on SEFs, consistent with the suggestion in Commissioner Sommers' dissent, would be appropriate on a case-by-case basis, in conformance with the CEA and the Commission's regulations. Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1259.

[117] *See* discussion below under § 37.9(b)(1) and (b)(4)—Execution Methods for Required Transactions in the preamble.

[118] *See* § 37.9(c)(2).

[119] CEA section 1a(50); 7 U.S.C. 1a(50).

[120] The term ''electronic trading facility'' means ''a trading facility that—(A) operates by means of an electronic or telecommunications network; and (B) maintains an automated audit trail of bids, offers, and the matching of orders or the execution of transactions on the facility.'' CEA section 1a(16); 7 U.S.C. 1a(16). The Commission notes that, under section 1a(16) of the Act, the term ''electronic trading facility'' incorporates the definition of ''trading facility'' as that term is defined under section 1a(51) of the Act.

[121] The term ''trading facility'' means ''a person or group of persons that constitutes, maintains, or provides a physical or electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts, or transactions—(i) by accepting bids or offers made by other participants that are open to multiple participants in the facility or system; or (ii) through the interaction of multiple bids or multiple offers within a system with a pre-determined non-discretionary automated trade matching and execution algorithm.'' CEA section 1a(51)(A); 7 U.S.C. 1a(51)(A).

other trading system or platform as may be determined by the Commission.

(1) Summary of Comments

Better Markets commented that the definition of an ''order book'' should specify that SEF systems must operate pursuant to a best price, first-in-time trade matching algorithm.[122]

(2) Commission Determination

The Commission is adopting the rule as proposed, subject to the modification described below.[123] The Commission notes that the Dodd-Frank Act does not mandate that the Commission specify or require a particular trade-matching algorithm for modes of execution provided by SEFs. Therefore, a SEF has the discretion to use a matching algorithm such as a price-time, price-size-time, or pro-rata allocation, provided, however, that such matching algorithm is published in the SEF's rulebook and submitted to the Commission for review and approval as part of the registration application. The Commission is eliminating proposed § 37.9(a)(1)(i)(D) because, as discussed in § 37.9 below, a SEF may petition the Commission under § 13.2 to amend § 37.9(a)(2) to include additional execution methods for Required Transactions.[124]

(d) § 37.3(a)—Application Procedures [125]

Proposed § 37.3(a) set forth the application and approval procedures for the registration of new SEFs. The proposed rule required a SEF applicant to apply to the Commission by electronically filing the proposed Form SEF.[126] The proposed rule also provided that the Commission would either approve or deny the application or, if deemed appropriate, register the applicant as a SEF subject to conditions.

(1) Summary of Comments

The Commission received several comments encouraging the harmonization of the registration procedures for SEFs with the SEC's registration procedures for SB–SEFs.[127] In this regard, MarketAxess recommended that the Commission allow an SEC-registered SB–SEF to notice register with the Commission.[128] WMBAA recommended that the Commission and the SEC adopt a common application form, which would provide for a smoother, timelier transition to the new regulatory regime.[129]

Tradeweb requested that the Commission confirm that SEF applicants do not need to file separate applications for each mode of execution that it will offer to participants, provided that the application clearly identifies the different features of the separate marketplaces and that each feature is in compliance with the rules.[130] Additionally, MarketAxess requested clarification that the Commission does not intend proposed § 37.3(a)(6) to require amendments to Form SEF after the Commission approves an application.[131]

(2) Commission Determination

The Commission is adopting § 37.3(a) and Form SEF as proposed, subject to certain modifications discussed below.[132] The Commission notes that there is no CEA provision which provides for SEF notice registration for SB–SEFs. The Commission does note, however, that section 5h(g) of the Act provides that the Commission ''may exempt'' a SEF from registration if the facility is subject to comparable, comprehensive supervision and regulation by the SEC, a prudential regulator, or the appropriate governmental authorities in the home country of the facility.[133] The Commission observes that the SEC and other regulators have not implemented comparable, comprehensive supervision and regulation to the Commission's SEF regulatory scheme at this time. The Commission also observes that, it must comprehensively review and understand a SEF's proposed trading models and operations, which will facilitate trading for a more diverse universe of financial instruments and underlying commodities than SB–SEFs. Therefore, at this time, the Commission is not allowing for exempt SEFs.

In response to Tradeweb's comment about separate applications, the Commission clarifies that a SEF applicant does not need to file separate applications for each mode of execution that it will offer to market participants, but its application, as noted in Exhibit Q to Form SEF, must describe each mode of execution offered.[134] Additionally, in response to MarketAxess's comment about amendments to Form SEF after the Commission registers a SEF, the Commission is revising proposed § 37.3(a)(6) [135] and Form SEF to clarify that an amended Form SEF is required for a SEF applicant amending a pending application for registration or for a SEF requesting an amendment to its order of registration. Otherwise, once registered, a SEF must file any amendments to Form SEF as a submission under part 40 of the Commission's regulations or as specified by the Commission (*e.g.,* by filing quarterly financial resources reports pursuant to § 37.1306 or by filing an amended Form SEF). As stated in the SEF NPRM, the Commission clarifies that if any information contained in Form SEF is or becomes inaccurate for any reason, even after a SEF is registered, the SEF must promptly make the appropriate corrections with the Commission.[136]

The Commission is adding final § 37.3(b)(5) to the rule text that requires the Commission to review an application for registration as a SEF pursuant to the 180-day timeframe and procedures specified in CEA section

[122] Better Markets Comment Letter at 7 (Mar. 8, 2011).

[123] The Commission is renumbering proposed § 37.9(a)(1)(i) to § 37.3(a)(3). The Commission is revising the definition in proposed § 37.9(a)(1)(i)(C) by replacing the word ''can'' with the phrase ''have the ability to'' and deleting the words ''choose to.'' The Commission is also adding the words ''or receive'' after the word ''observe'' so that the definition is technology neutral. *See* ''Through Any Means of Interstate Commerce'' Language in the SEF Definition discussion below under §§ 37.9(b)(1) and (b)(4)—Execution Methods for Required Transactions in the preamble for further details.

[124] *See* discussion below under § 37.9(b)(1) and (b)(4)—Execution Methods for Required Transactions in the preamble.

[125] The Commission is renaming the title of this section from ''Application Procedures'' to ''Procedures for Full Registration'' to provide greater clarity.

[126] Proposed Form SEF, as set forth in proposed appendix A to part 37, was to be used for initial or temporary registration as a SEF as well as for any amendments to an applicant's status otherwise not required to be submitted under part 40 of the Commission's regulations.

[127] *See* Registration and Regulation of Security-Based Swap Execution Facilities, 76 FR 10948 (proposed Feb. 28, 2011). Tradeweb Comment Letter at 3–4 (Jun. 3, 2011); MarketAxess Comment Letter at 20–21 (Mar. 8, 2011); WMBAA Comment Letter at 14 (Mar. 8, 2011); FSR Comment Letter at 10–11 (Mar. 8, 2011); Reuters Comment Letter at 3–4 (Mar. 8, 2011).

[128] MarketAxess Comment Letter at 20–21 (Mar. 8, 2011).

[129] WMBAA Comment Letter at 14 (Mar. 8, 2011).

[130] Tradeweb Comment Letter at 13 (Mar. 8, 2011).

[131] MarketAxess Comment Letter at 29 (Mar. 8, 2011).

[132] The Commission is renumbering proposed § 37.3(a) to § 37.3(b) and making several non-substantive revisions to this provision and Form SEF for clarity. The Commission is also moving proposed § 37.3(a)(7) regarding delegated authority to the Director of DMO to § 37.3(h).

[133] CEA section 5h(g); 7 U.S.C. 7b–3(g).

[134] The Commission notes that subsequent modifications to a SEF's modes of execution or any additional SEF modes of execution would constitute rules; therefore, the SEF must submit such rules to the Commission for review pursuant to the procedures under part 40 of the Commission's regulations.

[135] The Commission is renumbering proposed § 37.3(a)(6) to § 37.3(b)(3).

[136] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1238.

6(a).[137] This section will be effective for SEF applicants who submit their applications for registration as a SEF on or after two years from the effective date of part 37. The Commission is adopting this provision so that SEF applicants are treated comparably to DCM applicants who currently are subject to the 180-day Commission review period under CEA section 6(a). Although Congress did not impose a 180-day review period for SEFs, the Commission believes that harmonization of the review periods for DCM and SEF applicants is appropriate given the fact that both are registered entities for the trading of swaps. The Commission also believes that this requirement will provide greater certainty for SEF applicants regarding the time period for the Commission's review of their applications.

Finally, the Commission is clarifying the standard upon which the Commission will grant or deny registration. Proposed § 37.3(a)(1) stated that ''[t]he Commission shall approve or deny the application or, if deemed appropriate, register the applicant as a swap execution facility subject to conditions.'' In addition, proposed § 37.3(a)(2) stated that ''[t]he application must include information sufficient to demonstrate compliance with the core principles specified in Section 5h of the Act.'' Consistent with these provisions, the Commission is clarifying in final § 37.3(b)(6) that: (i) The Commission will issue an order granting registration upon a Commission determination, in its own discretion, that the applicant has demonstrated compliance with the Act and the Commission's regulations applicable to swap execution facilities; (ii) if deemed appropriate, the Commission may issue an order granting registration subject to conditions; and (iii) the Commission may issue an order denying registration upon a Commission determination, in its own discretion, that the applicant has not demonstrated compliance with the Act and the Commission's regulations applicable to swap execution facilities.

(e) § 37.3(b)—Temporary Grandfather Relief From Registration [138]

Proposed § 37.3(b) provided that an applicant for SEF registration may request that the Commission grant the applicant temporary grandfather relief from the registration requirement. The temporary relief would allow the applicant to continue operating during the pending application review process. Under the proposed rule, to receive temporary relief, the applicant was required to provide the following information to the Commission: (1) An application for SEF registration submitted in compliance with proposed § 37.3(a); (2) a notification of its interest in operating under the temporary relief; (3) transaction data substantiating that swaps have been traded and continue to be traded on the applicant's trading system or platform at the time of its application submission; and (4) a certification that the applicant believes that it will meet the requirements of part 37 of the Commission's regulations when it operates under temporary relief.

Under proposed § 37.3(b)(2), an applicant's grant of temporary relief would expire on the earlier of: (1) The date that the Commission grants or denies SEF registration; or (2) the date that the Commission rescinds the temporary relief. Proposed § 37.3(b)(3) contained a sunset date for the temporary relief provision of 365 days following the effective date of the final SEF regulations. Finally, the Commission proposed that the SEF rules, which include the requirements for temporary relief, would be effective 90 days after their publication in the **Federal Register**.

(1) Summary of Comments

(i) Comments on Temporary Grandfather Relief

MarketAxess commented that the phrase ''temporary grandfather relief'' is ambiguous and recommended that the Commission rename ''temporary grandfather relief'' to ''temporary registration.'' [139]

With respect to the substance of this provision, some commenters expressed concern that the existing trading activity requirement in proposed § 37.3(b)(1)(ii) would prevent new entities from qualifying for temporary relief.[140] In this regard, MarketAxess recommended that the Commission revise proposed § 37.3(b)(1)(ii) to permit SEF applicants, as an alternative to providing transaction data, to provide materials substantiating that the applicant's system is operational and therefore could facilitate trading in listed swaps upon receiving temporary registration from the Commission.[141]

Further, several commenters recommended alternative certification standards under proposed § 37.3(b)(1)(iii).[142] Bloomberg, for example, recommended that SEFs be required to certify only that they have implemented rules ''reasonably designed to ensure'' compliance with part 37.[143] Similarly, MarketAxess recommended a more flexible certification requirement because compliance with certain core principles will need to await the build-out functionality of third-party regulatory service providers.[144]

In addition, Phoenix commented that to avoid any market disruptions, the Commission should permit SEF applicants to operate under temporary relief while awaiting a Commission determination to either grant or deny the temporary relief request.[145] MarketAxess also noted that the Commission should not ''tie its own hands'' by imposing a fixed one-year post-effective time period for reviewing SEF applications.[146]

(ii) Comments on DCM Eligibility

CME commented that if a DCM has listed cleared swaps prior to the adoption of the final rules, then there is no reason to exclude them from applying for temporary relief.[147] NYSE Liffe recommended that temporary relief remain available to DCMs either as long as it is available to SEF applicants or on an ongoing basis so that a DCM required under DCM Core Principle 9 to delist a futures contract at any point in the future would be allowed to seek

[137] CEA section 6(a); 7 U.S.C. 8(a). The Commission notes that under CEA section 6(a), if the Commission notifies an applicant that its application is materially incomplete and specifies the deficiencies in the application, the running of the 180-day period is stayed from the time of such notification. The Commission also notes that if an applicant does not provide a complete Form SEF as provided for under § 37.3(b)(1)(i), the Commission will notify the applicant, pursuant to § 37.3(b)(4), that its application will not be deemed to have been submitted for purposes of the Commission's review. By ''complete'' Form SEF, the Commission means that the SEF applicant provides appropriately responsive answers to each of the informational and exhibit items set forth in Form SEF. The Commission notes that if the application is not deemed to have been submitted for purposes of the Commission's review, then the 180-day review period (when effective) will not have commenced.

[138] The Commission is renaming the title of this section from ''Temporary Grandfather Relief from Registration'' to ''Temporary Registration'' to provide greater clarity.

[139] MarketAxess Comment Letter at 16 (Mar. 8, 2011).

[140] MarketAxess Comment Letter at 16–17 (Mar. 8, 2011); MFA Comment Letter at 4–5 (Mar. 8, 2011).

[141] MarketAxess Comment Letter at 16–17 (Mar. 8, 2011).

[142] MarketAxess Comment Letter at 4 (Jun. 3, 2011); Bloomberg Comment Letter at 5 (Jun. 3, 2011); State Street Comment Letter at 6–7 (Mar. 8, 2011); WMBAA Comment Letter at 14–15 (Mar. 8, 2011); Tradeweb Comment Letter at 13 (Mar. 8, 2011); MarketAxess Comment Letter at 17–19 (Mar. 8, 2011).

[143] Bloomberg Comment Letter at 5 (Jun. 3, 2011).

[144] MarketAxess Comment Letter at 17–19 (Mar. 8, 2011).

[145] Phoenix Comment Letter at 2 (Mar. 7, 2011).

[146] MarketAxess Comment Letter at 20 (Mar. 8, 2011).

[147] CME Comment Letter at 11 (Mar. 8, 2011).

temporary relief from registration as a SEF.[148]

(iii) Comments on 90-Day Effective Date of Regulations

Some commenters recommended a longer time period for the effective date of the final regulations to provide applicants with additional time to implement the large number of changes required.[149] Nodal commented that the short effective date will disadvantage smaller exchanges because its supporting external parties will likely prioritize compliance obligations in order to be responsive to the largest exchanges first.[150] MarketAxess and NFA recommended that the Commission provide SEF applicants 180 days after adoption of the final rules to comply with the final SEF regulations in light of forthcoming operational challenges.[151] However, SDMA supported the 90-day effective date and urged the Commission to be vigilant in preventing further delays that undermine the realization of the goals of the Dodd-Frank Act.[152]

(2) Commission Determination

(i) Temporary Grandfather Relief

The Commission agrees with MarketAxess that ''temporary registration'' is more accurate than ''temporary grandfather relief'' and is accordingly making such change. Additionally, based on the comments, the Commission is adopting proposed § 37.3(b) as final § 37.3(c) subject to a number of modifications.[153]

The Commission further agrees with MarketAxess and other commenters that the trading activity requirement as proposed in § 37.3(b)(1)(ii) may limit temporary registration to incumbent platforms. Therefore, the Commission is eliminating the trading activity requirement and will permit all SEF applicants to apply for temporary registration if they meet the requirements under final § 37.3(c)(1). The Commission views the revised temporary registration provision as promoting competition between SEFs by providing fair opportunities for new entities to establish trading operations in competition with incumbents.

The Commission is deleting the certification requirement under proposed § 37.3(b)(1)(iii) because it is unnecessary. The Commission notes, as stated in the SEF NPRM, that once a SEF applicant is granted temporary registration it must comply with all provisions of the Act and the Commission's regulations that are applicable to SEFs.[154]

The Commission is revising the temporary registration provisions to clarify in final § 37.3(c)(1) that a SEF applicant may apply for temporary registration if it submits a complete Form SEF and a temporary registration notice.[155] The Commission is also revising the temporary registration provisions to require a SEF applicant that is already operating a swaps-trading platform, in reliance upon either an exemption granted by the Commission or some form of no-action relief granted by the Commission staff, to include in the temporary registration notice a certification that it is operating pursuant to such exemption or no-action relief. The Commission also clarifies that a SEF applicant may submit such temporary registration application after the final SEF regulations are published in the **Federal Register** until the termination of the temporary registration provision pursuant to final § 37.3(c)(5).[156]

Pursuant to final § 37.3(c)(1), the Commission notes that it will grant a SEF applicant temporary registration upon a Commission determination that the applicant has provided a complete Form SEF as part of its registration application and submitted a notification requesting that the Commission grant temporary registration. If an applicant has not met these requirements, the Commission may deny its request for temporary registration. By ''complete'' Form SEF, the Commission means that the SEF applicant provides appropriately responsive answers to each of the informational and exhibit items set forth in Form SEF. The Commission notes that it will review a SEF applicant's Form SEF to ensure that it is complete, and will not conduct any substantive review of the form before granting or denying temporary registration. The Commission notes that this temporary registration process is similar to the notice registration process followed by the Commission in the context of other types of registrations.[157] The Commission will review SEF applicants' submissions on a rolling basis and the Commission will issue notices either granting or denying temporary registration.[158] The Commission believes that providing a clear and streamlined path to temporary registration will minimize the potential for regulatory arbitrage, ensure a level playing field, and promote competition among SEFs.

The Commission stresses that a grant of temporary registration does not mean that the Commission has determined that a SEF applicant is fully compliant with the Act and Commission regulations, nor does it guarantee that a SEF applicant will eventually be granted full SEF registration. After granting a SEF applicant temporary registration, the Commission will review the applicant's application to assess whether the applicant is fully compliant with the requirements of the Act and the Commission's regulations applicable to SEFs. During such assessment, the Commission may request from the SEF applicant additional information in order to make a determination whether to issue a final order of registration.

The Commission is also revising the temporary registration provisions to clarify in final § 37.3(c)(2) that an applicant cannot operate as a SEF under temporary registration until the applicant receives a notice from the Commission or the Commission staff granting temporary registration.[159] In response to Phoenix's comment about a SEF operating while its temporary registration is pending, the Commission does not believe that a SEF applicant should be allowed to operate as a SEF

[148] NYSE Liffe Comment Letter at 3–4 (Sep. 2, 2011).

[149] AIMA Comment Letter at 3 (Jun. 10, 2011); Nodal Comment Letter at 3–5 (Jun. 3, 2011); WMBAA Comment Letter at 4–5 (Jun. 3, 2011); CME Comment Letter at 6 (Jun. 3, 2011); MarketAxess Comment Letter at 19 (Mar. 8, 2011); NFA Comment Letter at 2–3 (Mar. 8, 2011); WMBAA Comment Letter at 12–13 (Mar. 8, 2011); ICAP Comment Letter at 6 (Mar. 8, 2011); Nodal Comment Letter at 4–5 (Mar. 8, 2011).

[150] Nodal Comment Letter at 4 (Jun. 3, 2011); Nodal Comment Letter at 4 (Mar. 8, 2011).

[151] MarketAxess Comment Letter at 19 (Mar. 8, 2011); NFA Comment Letter at 2–3 (Mar. 8, 2011).

[152] SDMA Comment Letter at 12 (Mar. 8, 2011).

[153] The Commission is renumbering proposed § 37.3(b) to § 37.3(c) and making several non-substantive revisions for clarity.

[154] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1216.

[155] The applicant must comply with all of the requirements in final § 37.3(b)(1)(i) and must submit a temporary registration notice to the Commission to qualify for temporary registration. *See* Final § 37.3(c)(1) of the Commission's regulations.

[156] The Commission notes that certain entities may continue to operate under current exemptions while their SEF applications are pending, as long as the entities submit a complete application (*i.e.,* the SEF applicant provides substantive answers to each of the informational and exhibit items set forth in Form SEF) and temporary registration notice before the effective date of the final SEF regulations. *See* CFTC No-Action Letter 12–48 (Dec. 11, 2012).

[157] *See* discussion below regarding swap dealer and major swap participant provisional registration rules.

[158] The Commission is delegating to the Director of DMO, upon consultation with the General Counsel, the authority to issue a notice granting or denying temporary registration. *See* Final § 37.3(h) of the Commission's regulations.

[159] This provision is contained in final § 37.3(c)(2) of the Commission's regulations. This rule also states that in no case may an applicant begin operating as a temporarily registered SEF until the effective date of the SEF regulations.

under temporary registration before the Commission has had a chance to review the application to ensure that it is complete. The Commission's review is especially merited given the Commission's decision to permit temporary registration of entities that have not previously traded swaps.

The Commission believes that permitting entities to operate as temporarily registered SEFs, notwithstanding the lack of a substantive review of the SEF's application by the Commission, is not a novel concept and has been followed by the Commission in other contexts where it is important to allow entities to quickly reach the market, before an extensive Commission review. For instance, under the Commission's swap dealer and major swap participant registration rules, provisional registration is granted upon the filing of an application and documentation demonstrating compliance or the ability to comply with the CEA section 4s requirements in effect on such date—and not after review and approval of the documentation by the National Futures Association (''NFA''), as the Commission's delegee.[160] On and after the date on which NFA confirms that the applicant has demonstrated its initial compliance with the applicable requirements, the provisional registration of the applicant ceases and the applicant becomes registered as an SD or an MSP, as the case may be.

The Commission envisions the SEF temporary registration process as operating in a similar fashion, with the Commission reviewing each application for completeness alone before granting temporary registration. Subsequently, and concurrent with the temporarily registered SEF's early operations, the Commission would conduct a comprehensive review of the application for compliance with all applicable SEF requirements.

The Commission is revising proposed § 37.3(b)(2) regarding the expiration of temporary registration to remove the ability of the Commission to rescind temporary registration. The Commission notes that the SEF NPRM did not provide a standard for the Commission to rescind temporary registration. Instead, in final § 37.3(c)(3), the Commission may rely on its ability to deny full registration, which will also cause temporary registration to expire. Therefore, the Commission believes that the ability to rescind temporary registration is unnecessary.

The Commission is extending the 365-day sunset provision for temporary registration to two years from the effective date of these regulations in final § 37.3(c)(5).[161] Given that the projected number of temporary SEF registrations may exceed 20 and the resource constraints faced by the Commission, the Commission may not be able to complete its registration reviews, enable SEFs to remedy any identified deficiencies, and ultimately grant or deny full registration for all of the SEF applicants within the proposed 365-day period. Extending the temporary registration provision will provide the Commission with adequate time to review the SEF registration applications while ensuring that SEFs can continue their operations under temporary registration, without interruption, until the Commission decides on their application for full registration.

The Commission is also revising final § 37.3(c)(5) to state that the temporary registration provision will not terminate for an applicant who applies for temporary registration before the termination of the temporary registration provision and has not been granted or denied registration under § 37.3(b)(6) by the time of the termination of the temporary registration provision. In addition, final § 37.3(c)(5) states that such an applicant may operate as a SEF under temporary registration upon receipt of a notice from the Commission granting temporary registration until the Commission grants or denies full registration pursuant to § 37.3(b)(6). On the termination date of the temporary registration provision, the Commission will review such applicant's application pursuant to the 180-day Commission review period and procedures in § 37.3(b)(5). These revisions will ensure that a temporarily registered SEF who does not have a full registration in place by the time the temporary registration provision terminates will not have to stop operating on such termination date.

(ii) DCM Eligibility

The Commission is withdrawing proposed § 37.3(b)(1)(ii) regarding the existing trading activity requirement so an operational DCM that seeks to create a new SEF would be able to qualify for temporary SEF registration. In consideration of NYSE Liffe's comment that temporary SEF registration for an existing DCM should not be subject to the sunset provision, the Commission is revising proposed § 37.3(b) in final § 37.3(c)(6) to allow for such an exemption.[162] The Commission notes that a DCM is subject to a higher regulatory standard than a SEF such that a non-dormant DCM who seeks to create a new SEF in order to transfer one or more of its contracts should be able to meet many of the SEF requirements. Therefore, the Commission believes that, on an ongoing basis, an operational DCM that also seeks to register as a SEF in order to transfer one or more of its contracts (whether the transfer of the contract is motivated by DCM Core Principle 9 or another reason) may request SEF temporary registration.

(iii) 90-Day Effective Date of Regulations

The Commission is shortening the proposed 90-day effective date to 60 days subsequent to publication in the **Federal Register**. In consideration of the comments received and the availability of the Commission staff resources, the Commission has determined to use its discretion to establish alternative dates for the commencement of its enforcement of regulatory provisions and is setting a general compliance date of 120 days subsequent to **Federal Register** publication.[163] With this use of an effective date and compliance date, a prospective SEF that is already operating a swaps-trading platform in reliance on a Commission staff relief letter (*e.g.,* CFTC No-Action Letter 12–48) could submit a SEF application and receive temporary registration before part 37's effective date so that it might begin operating as a SEF upon that effective date.[164] Alternatively, if such a prospective SEF took additional time to prepare its SEF application, it would have the option of forestalling the submission of its application until after the effective date, so long as it submitted its SEF application by the compliance date.

The Commission believes that this combination of a 60-day effective date and a 120-day compliance date subsequent to **Federal Register** publication for prospective SEF applicants establishes a transition period that appropriately balances the Commission's need to provide regulatory certainty to potential applicants through issuance of final SEF regulations and the Commission's statutory directives to both promote fair

[160] Registration of Swap Dealers and Major Swap Participants, 77 FR 2613 (Jan. 19, 2012).

[161] This provision is contained in final § 37.3(c)(5) of the Commission's regulations.

[162] This provision is contained in final § 37.3(c)(6) of the Commission's regulations.

[163] *See Heckler* v. *Chaney,* 470 U.S. 821 (1985).

[164] This scenario is not limited to a prospective SEF that is already operating a swaps-trading platform in reliance on a Commission staff relief letter. As noted above, all SEF applicants may apply for temporary registration if they meet the requirements under final § 37.3(c)(1).

competition between swaps trading venues [165] and promote the trading of swaps on SEFs.[166] The new transition period ensures swaps market continuity, preserves competition between swaps trading venues, and facilitates the orderly restructuring of the swaps market in compliance with the Act and regulations thereunder. The Commission believes that the 60-day effective date and the 120-day compliance date approach will provide prospective SEF applicants with sufficient time to comply with the final regulations and, if they choose, to prepare an application for temporary registration.

(f) § 37.3(c)—Reinstatement of Dormant Registration

Proposed § 37.3(c) provided procedures for a dormant SEF to reinstate its registration. The Commission received no comments on this section and is adopting § 37.3(c) as proposed.[167]

(g) § 37.3(d)—Request for Transfer of Registration

Proposed § 37.3(d) provided procedures that a SEF must follow when seeking to transfer its registration from its current legal entity to a new legal entity as a result of a corporate event. The Commission received no comments on this section and is adopting § 37.3(d) as proposed.[168]

(h) § 37.3(e)—Request for Withdrawal of Application for Registration

Proposed § 37.3(e) provided that a SEF applicant may withdraw its application for registration. The Commission received no comments on this section and is adopting § 37.3(e) as proposed.[169]

(i) § 37.3(f)—Request for Vacation of Registration

Proposed § 37.3(f) provided that a SEF may vacate its registration. The Commission received no comments on this section and is adopting § 37.3(f) as proposed.[170]

4. § 37.4—Procedures for Listing Products and Implementing Rules

Proposed § 37.4 detailed the approval and self-certification procedures under part 40 of the Commission's regulations that SEF applicants and SEFs must follow to submit its products and rules to the Commission. Proposed § 37.4 also provided that a SEF may request that the Commission consider, under the provisions of section 15(b) of the Act,[171] any of the SEF's rules or policies.

(a) Summary of Comments

WMBAA commented that SEFs should not be required to seek Commission approval for their products and rules.[172] WMBAA recommended that SEFs be allowed to submit to the Commission a simple self-certification that they complied with the applicable requirements.[173] CME stated that the proposed procedures for listing products would increase the burdens associated with new product submissions and rule changes and would create new and costly bureaucratic inefficiencies, competitive disadvantages in the global marketplace, and impediments to innovation.[174] MarketAxess recommended that the Commission revise proposed § 37.4 to clarify that temporarily registered SEFs may list swaps through the Commission's approval or self-certification procedures.[175]

(b) Commission Determination

The Commission is adopting proposed § 37.4 subject to certain modifications. The Commission is removing many of the details from the proposed rule, which are already contained in part 40 of the Commission's regulations, and is instead referring SEFs to part 40.[176] The Commission is also removing the CEA section 15(b) consideration provision because, when reviewing any SEF rule, the Commission is already required to take into consideration the provisions under section 15(b) of the Act.

In response to WMBAA's comments that SEFs should not be required to seek Commission approval of their products and rules, the Commission notes that a SEF is a registered entity under the Act and pursuant to section 5c(c) of the Act, registered entities must submit product terms and conditions and rules to the Commission for approval or under self-certification procedures.[177] In addition, the Commission notes that CME's comments were addressed in the part 40 rulemaking and are outside the scope of this rulemaking.[178] The Commission also clarifies that temporarily registered SEFs may list swaps or submit rules through the Commission's approval or self-certification procedures under part 40 of this chapter, and that the timelines under those procedures shall apply.

5. § 37.5—Information Relating to Swap Execution Facility Compliance

Proposed § 37.5(a) required a SEF to file with the Commission information related to its business as a SEF as specified in the Commission's request. Proposed § 37.5(b) required a SEF to file with the Commission a written demonstration of compliance with the core principles. Proposed § 37.5(d) delegated the Commission's authority to seek information as set forth in § 37.5(b) to the Director of DMO or such other employee as the Director may designate.

Proposed § 37.5(c) required a SEF to file with the Commission a notice of the transfer of ten percent or more of its equity no later than the business day following the date on which the SEF enters into a firm obligation to transfer the equity interest.[179] The proposed rule also required that the notification include any relevant agreement and a representation from the SEF that it meets all of the requirements of section 5h of the Act and Commission regulations adopted thereunder. Additionally, the proposed rule

[165] Section 3(b) of the Act lists the promotion of ''fair competition among boards of trade, other markets, and market participants'' as a purpose of the Act. 7 U.S.C. 5(b).

[166] Section 5h(e) of the Act lists the promotion of ''the trading of swaps on swap executive facilities'' as one goal of the Act. 7 U.S.C. 7b–3(e).

[167] The Commission is renumbering proposed § 37.3(c) to § 37.3(d) and making several non-substantive revisions for clarity.

[168] The Commission is renumbering proposed § 37.3(d) to § 37.3(e) and making several non-substantive revisions for clarity.

[169] The Commission is renumbering proposed § 37.3(e) to § 37.3(f) and making several non-substantive revisions for clarity.

[170] The Commission is renumbering proposed § 37.3(f) to § 37.3(g) and making several non-substantive revisions for clarity.

[171] CEA section 15(b) requires the Commission to take into consideration the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives of the Act, as well as the policies and purposes of the Act. 7 U.S.C. 19(b).

[172] WMBAA Comment Letter at 15–16 (Mar. 8, 2011).

[173] *Id.*

[174] CME Comment Letter at 10, 13 (Feb. 22, 2011). CME also provided its comments to the rulemaking titled Provisions Common to Registered Entities, 76 FR 44776 (Jul. 27, 2011). In addition, rather than repeat its comments that pertain to both the DCM and SEF NPRMs, CME incorporated its entire DCM rulemaking comment letter dated Feb. 22, 2011 as Exhibit A to its SEF comment letter dated Mar. 8, 2011. The Commission notes these comments by referencing the Feb. 22, 2011 date of CME's DCM comment letter. The Commission is also changing CME's reference to ''DCM'' to ''SEF'' for these comments.

[175] MarketAxess Comment Letter at 19 (Mar. 8, 2011). Tradeweb similarly commented that a SEF applicant should be able to introduce new products while it is operating under temporary relief. Tradeweb Comment Letter at 13 (Mar. 8, 2011).

[176] 17 CFR part 40.

[177] CEA section 5c(c); 7 U.S.C. 7a–2(c).

[178] *See* Provisions Common to Registered Entities, 76 FR 44776 (Jul. 27, 2011).

[179] *See generally* Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1217 (explaining the proposed ten percent threshold).

required the SEF to notify the Commission of the consummation of the transaction on the day on which it occurs. Furthermore, the proposed rule required that, upon the transfer of the equity interest, the SEF certify, no later than two business days following the date on which the change in ownership occurs, that the SEF meets all of the requirements of section 5h of the Act and Commission regulations adopted thereunder.

(a) Summary of Comments

The Commission did not receive any comments on proposed § 37.5(a), (b), or (d). The Commission did, however, receive comments on the equity interest transfer provisions in proposed § 37.5(c).

CME commented that the submissions required to be simultaneously filed with the initial notification of an equity interest transfer do not lend themselves to preparation within the 24-hour time frame proposed in the rules.[180] CME further commented that the representation of compliance with the requirements of CEA section 5h and the Commission's regulations adopted thereunder would be more appropriate if required upon consummation of the equity interest transfer, rather than with the initial notification.[181]

MarketAxess commented that public companies should not have to file a notice of an equity interest transfer because the ownership structure of a public company does not implicate the control and influence concerns raised by the Commission in its proposal, and shareholders are already obligated under the SEC's regulations to report threshold acquisitions of equity interests within ten days of such an acquisition.[182]

Lastly, Better Markets recognized the important implications of transferring control in a regulated marketplace and it recommended that the Commission lower the transfer threshold for reporting to five percent as similarly required by the SEC for public equity transfers.[183]

(b) Commission Determination

The Commission is adopting § 37.5(a), (b), and (d) as proposed subject to certain non-substantive clarifications.[184] The Commission is adopting proposed § 37.5(c) with certain revisions discussed below.

The Commission is revising § 37.5(c) to provide that a SEF must submit to the Commission a notification of each transaction involving the transfer of fifty percent or more of the equity interest in the SEF, and that such notification must be provided at the earliest possible time, but in no event later than the open of the business day that is ten business days following the date in which the SEF enters into a firm obligation [185] to transfer the equity interest. However, in all cases, the Commission notes that a SEF must provide the Commission staff with sufficient time, prior to consummating the equity interest transfer, to review and consider the implications of the change in ownership, including whether the change in ownership will adversely impact the operations of the SEF or the SEF's ability to comply with the core principles and the Commission's regulations thereunder.

The Commission acknowledges CME's concern regarding the one business day time period for filing the supporting documents with the equity interest transfer notification. Thus, in addition to extending the time period to up to ten business days for a SEF to file notification with the Commission, the Commission is revising the rule to eliminate the requirement that specific documents be provided with the notification. Rather, the Commission is revising the rule text to clarify that upon receiving a notification of the equity interest transfer, the Commission may request appropriate documentation pursuant to its authority under § 37.5 of the Commission's regulations. For example, such documentation may include, but is not limited to: (i) Relevant agreement(s), including any preliminary agreements (not including draft documents); (ii) associated changes to relevant corporate documents; (iii) a chart outlining any new ownership or corporate or organizational structure, if available; and (iv) a brief description of the purpose and any impact of the equity interest transfer.

The Commission is deleting the requirement for a SEF to provide a representation of compliance with section 5h of the Act and the Commission regulations thereunder with the equity interest transfer notification, as requested by CME. The Commission agrees with CME that this requirement is more appropriate upon consummation of the equity interest transfer, rather than with the initial notification. Therefore, the Commission is maintaining the certification requirement upon consummation of the equity interest transfer as proposed in the SEF NPRM.

With respect to the other comments, the Commission believes that the notice requirements should not be limited to privately-held companies as the Commission's objective is to ensure that equity transfers do not negatively impact the operations of registered entities. The Commission must oversee and ensure the continued compliance of all SEFs with the core principles and the Commission's regulations. In order to fulfill its oversight obligations, and to ensure that SEFs maintain compliance with their self-regulatory obligations, the Commission must receive a notice of an equity interest transfer. The Commission acknowledges the suggestion by Better Markets to lower the equity interest transfer threshold to five percent; however, the Commission believes that the revisions to § 37.5(c) will still allow the Commission to fulfill its oversight obligations, while reducing the costs for SEFs to comply with the equity interest transfer requirements.

Finally, the Commission is revising the rule to remind SEFs that if any aspect of an equity interest transfer requires the SEF to file a rule as defined in part 40 of the Commission regulations, then the SEF must comply with the rule submission requirements of section 5c(c) of the CEA and part 40 of this chapter, and all other applicable Commission regulations.

6. § 37.6—Enforceability

Section 37.6 is intended to provide market participants who execute swap transactions on or pursuant to the rules of a SEF with legal certainty with respect to such transactions. In that regard, proposed § 37.6(a) established that any transaction entered into, on, or pursuant to the rules of a SEF cannot be voided, rescinded, or held unenforceable as a result of: (1) The SEF violating any provision of section 5h of the CEA or part 37; (2) any Commission proceeding to alter or supplement a rule, term, or condition under section 8a(7) of the CEA or to declare an emergency under section 8a(9) of the CEA; or (3) any other proceeding the effect of which is to alter or supplement a specific term or condition or trading rule or procedure, or require a registered

[180] CME Comment Letter at 13 (Feb. 22, 2011).

[181] *Id.*

[182] MarketAxess Comment Letter at 29 (Mar. 8, 2011).

[183] Better Markets Comment Letter at 21–22 (Mar. 8, 2011).

[184] The Commission is removing the reference to ''information relating to data entry and trade details'' in proposed § 37.5(a) because it is unnecessary. The rule text is broad enough to encompass such information as it states that, upon the Commission's request, a SEF shall file with the Commission information related to its business as a SEF.

[185] The Commission interprets ''firm obligation'' to mean when a SEF enters into a letter of intent or any other document that demonstrates a SEF's firm intent to transfer its equity interest as described in § 37.5(c).

SEF to adopt a specific term or condition, trading rule or procedure, or to take or refrain from taking a specific action. Proposed § 37.6(b) required that all transactions executed on or pursuant to the rules of a SEF include written documentation memorializing all terms of the swap transaction, the legal effect of which is to supersede any previous agreement between the counterparties. The proposed rule also required that the confirmation of all terms of the transaction take place at the same time as execution.[186]

(a) Summary of Comments

Three commenters addressed the practicality of a SEF confirming all terms of a transaction at the same time as execution. MarketAxess recommended that a SEF be responsible for confirming only the swap creation data in its possession at the time of execution, consistent with the Commission's approach in its proposed part 45 regulations.[187] MarketAxess also requested that the Commission clarify that SEFs are only responsible for producing a confirmation for swaps entered into on, and not just pursuant to the rules of, a SEF.[188]

MarkitSERV stated that when counterparties choose to execute a swap on a SEF that is not subject to the clearing mandate and not submitted for clearing to a clearinghouse, the parties will require a long-term credit relationship to be in place, often memorialized in an ISDA Master Agreement.[189] MarkitSERV further stated that the confirmation terms provided by a SEF may not be able to accommodate the specificity of such a master agreement, thus making the SEF's confirmation inadequate for purposes of complying with the Commission's regulations.[190]

Similarly, the Energy Working Group expressed concern over the provision's requirement that the SEF's confirmation supersede any previous agreement between the transacting parties, noting that this language appears to prevent a master agreement from operating between counterparties transacting on a SEF.[191] The Energy Working Group also stated that confirmation cannot take place at the same time as execution because they are two distinct steps in the swap transaction process.[192]

(b) Commission Determination

The Commission is adopting § 37.6(a) as proposed.[193] The Commission is also adopting § 37.6(b) as proposed subject to the two revisions discussed below. Although the comments received regarding proposed § 37.6(b) did not cite ambiguity in the SEF NPRM regarding a SEF's affirmative duty to provide confirmation documentation to counterparties, the Commission has determined to revise § 37.6(b) to state explicitly that a ''swap execution facility shall provide each counterparty'' with written documentation of all terms of the transaction to serve as confirmation of such transaction. In response to MarketAxess's comments, the Commission notes that § 37.6(b) is consistent with the requirement in final part 45 of the Commission's regulations that a SEF report confirmation data consisting of all terms of a transaction to a swap data repository (''SDR'') for each swap executed on or pursuant to the rules of the SEF.[194]

With regard to the specific comments received about the role of master agreements in the written confirmation provided by a SEF, the Commission has determined that counterparties choosing to execute a transaction not submitted for clearing on or pursuant to the rules of a SEF must have all terms, including possible long-term credit support arrangements, agreed to no later than execution, such that the SEF can provide a written confirmation inclusive of those terms at the time of execution and report complete, non-duplicative, and non-contradictory data to an SDR as soon as technologically practicable after execution.[195] This requirement, as mentioned above, is necessary to provide market participants who execute swap transactions on or pursuant to the rules of a SEF with legal certainty with respect to such transactions, and to promote the Commission's policy goal of achieving ''straight-through processing'' of swap

[186] The Commission proposed § 37.6(b) to facilitate the process contemplated by the confirmation definition. A swap ''confirmation'' is defined as the consummation (electronically or otherwise) of legally binding documentation (electronic or otherwise) that memorializes the agreement of the counterparties to all of the terms of a swap. A confirmation must be in writing (whether electronic or otherwise) and must legally supersede any previous agreement (electronically or otherwise). 17 CFR 45.1; Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136, 2197 (Jan. 13, 2012).

[187] MarketAxess Comment Letter at 28–29 (Mar. 8, 2011). Proposed § 45.3 required that for all transactions executed on a SEF, regardless of whether the swap was cleared, the SEF would be responsible for reporting to a swap data repository only the primary economic terms of the transaction in its possession at the time of execution, and that reporting of confirmation data consisting of all terms of the transaction would be the responsibility of either the derivatives clearing organization (if cleared) or one of the counterparties (if uncleared). Swap Data Recordkeeping and Reporting Requirements, 75 FR 76574, 76580–81 (proposed Dec. 8, 2010). As adopted by the Commission, however, § 45.3 requires a SEF to report both the primary economic terms data as well as all confirmation data consisting of all transaction terms for each swap executed on or pursuant to the rules of the SEF as soon as technologically practicable after execution of the swap. 17 CFR 45.3; Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136, 2199 (Jan. 13, 2012).

[188] MarketAxess Comment Letter at 29 (Mar. 8, 2011).

[189] MarkitSERV Comment Letter at 4–5 (Mar. 8, 2011).

[190] *Id.* MarkitSERV also expressed concern that the SEF NPRM is conflating the concepts of confirmation and affirmation with the audit trail requirements in proposed § 37.205. For example, MarkitSERV sought clarification regarding the SEF NPRM's statement that ''[v]oice transactions must be entered into some form of electronic affirmation system immediately upon execution.'' Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1221. Given the audit trail requirement in proposed § 37.205(b)(1), which states that SEFs that ''permit intermediation must require that all orders or requests for quotes received by phone that are executable be immediately entered into the trading system or platform[,]'' MarkitSERV recommended that the Commission use the term ''electronic processing system'' instead of ''electronic affirmation system'' because audit trail records and affirmation are different concepts. *Id.* at 1244. MarkitSERV Comment Letter at 4, 6 (Mar. 8, 2011). ABC/CIEBA also sought clarification as to whether SEFs must enter Permitted Transactions into an affirmation system, and if so, ABC/CIEBA noted that the SEF NPRM is inconsistent with other rules. ABC/CIEBA Comment Letter at 7–8 (Mar. 8, 2011). The Commission notes that the final SEF rules do not require the use of an ''electronic affirmation system.'' The Commission also clarifies that confirmation and the creation of an audit trail in § 37.205 are two separate and distinct requirements. In addition, the Commission notes that § 37.205(b) merely establishes the requirement that SEFs must capture audit trail data for regulatory purposes and does not address affirmation, confirmation, or the public reporting or dissemination of such data.

[191] Energy Working Group Comment Letter at 5 (Mar. 8, 2011).

[192] *Id.*

[193] The Commission is making certain non-substantive revisions to § 37.6(a) for clarity.

[194] Part 45 requires a SEF to report all confirmation data and all primary economic terms data as defined in part 23 and § 45.1 of the Commission's regulations for each swap executed on or pursuant to the rules of the SEF as soon as technologically practicable after execution of the swap. 17 CFR 45.3; Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136, 2199 (Jan. 13, 2012). Part 45 defines confirmation data as ''all of the terms of a swap matched and agreed upon by the counterparties in confirming the swap.'' *Id.* at 2197.

[195] The Commission notes that swap trading relationship documentation is not required for swaps cleared by a derivatives clearing organization. *See* § 23.504(a)(1) of the Commission's regulations. The Commission also notes that the commenters' concerns are most relevant to those transactions that are truly bespoke, not subject to the clearing mandate, and not voluntarily cleared. There is no reason why a SEF's written confirmation terms cannot incorporate by reference the privately negotiated terms of a freestanding master agreement for these types of transactions, provided that the master agreement is submitted to the SEF ahead of execution and the counterparties ensure that nothing in the confirmation terms contradict the standardized terms intended to be incorporated from the master agreement. *See also* Real-Time Public Reporting of Swap Transaction Data, 77 FR 1182, 1193 (Jan. 9, 2012) (discussing confirmation and incorporating documents by reference).

transactions in order to facilitate orderly markets, whether bilateral or facility traded.[196] Furthermore, the Commission believes that credit-support arrangements for uncleared transactions can impact the ultimate price of a swap, and thus should be agreed to no later than the time of trade execution in order to promote the statutory goal of pre-trade price transparency.[197]

Finally, in response to the Energy Working Group's comment that confirmation cannot take place at the same time as execution, the Commission is revising § 37.6(b) to state that ''. . . specific customer identifiers for accounts included in bunched orders involving swaps need not be included in confirmations provided by a swap execution facility if the applicable requirements of § 1.35(b)(5) of this chapter are met.'' The Commission acknowledges that for bunched orders the post-execution allocation of trades is required for confirmation. The above revisions to § 37.6 are consistent with Commission regulation 1.35(b)(5) and provide sufficient time for the post-execution allocation of bunched orders, but allow SEFs to meet the requirement that confirmation takes place at the same time as execution.[198]

7. § 37.7—Prohibited Use of Data Collected for Regulatory Purposes

Proposed § 37.7 prohibited a SEF from using for commercial purposes proprietary data or personal information that it obtains from or on behalf of any person for regulatory purposes. The purpose of this provision was to protect customer privacy and prevent a SEF from using such information to advance its commercial interests.[199]

(a) Summary of Comments

Several commenters recommended that the Commission adopt a more flexible approach toward the use of data collected for regulatory purposes.[200] CME, for example, stated that a SEF should be allowed to use information that is provided for both regulatory and non-regulatory purposes for commercial purposes, as long as transparent rules or policies are in place.[201] Some commenters believed that commercial use should be allowed, provided that market participants' identities are protected[202] or prior consent is obtained.[203] For example, FSR believed that commercial use should be allowed for aggregate data as long as the sources of the information are not revealed.[204]

However, SIFMA AMG stated that, given the broad authority under the proposed rules for SEFs to acquire information, the term ''proprietary data'' is too narrow to adequately protect market participants from improper disclosure.[205] Freddie Mac requested that the Commission strengthen the proposed rule to additionally prohibit any SEF from asserting ownership rights over the trading information of any transacting party.[206]

Finally, WMBAA requested that the Commission clarify the meaning of ''proprietary data or personal information,'' and recommended limiting the rule to information obtained outside the ordinary course of trade execution and related to market surveillance activities.[207]

(b) Commission Determination

The Commission is adopting § 37.7 as proposed, subject to certain modifications. In response to the commenters, the Commission is modifying the proposed rule to allow SEFs to use proprietary data or personal information for business or marketing purposes if the person from whom it collects or receives such information clearly consents to the use of its information in such manner. The Commission is also revising the proposed rule to prohibit a SEF from conditioning access to its facility based upon such consent. The Commission believes that the consent requirement will protect persons by allowing them to first weigh the benefits and consequences of allowing a SEF to make commercial use of their information. In response to CME's comment about information provided for both regulatory and non-regulatory purposes, the Commission notes that a SEF may use information that it receives for both regulatory and non-regulatory purposes for business or marketing purposes if the source of the information clearly consents to the use in such a manner.

In response to comments about the definition of ''proprietary data and personal information,'' the Commission declines to adopt a further definition and is maintaining a flexible approach. However, the Commission notes that some examples of proprietary data and personal information would include information that separately discloses business transactions, market positions, or trade secrets. The Commission recommends that SEFs define these terms in their rulebooks, which will be subject to Commission review during the SEF registration process.

8. § 37.8—Boards of Trade Operating Both a Designated Contract Market and a Swap Execution Facility

Proposed § 37.8(a) required that a board of trade that operates a DCM and also intends to operate a SEF must separately register the SEF under part 37, and on an ongoing basis, comply with the core principles under section 5h of the Act and the part 37 regulations issued thereunder. Proposed § 37.8(b) implemented CEA section 5h(c) by requiring a board of trade that operates both a DCM and SEF and uses the same electronic trade execution system for executing and trading swaps on both registered entities to clearly identify to market participants for each swap

[196] The OTC Derivatives Supervisors' Group, a collaboration of market participant leadership headed by the Federal Reserve Bank of New York, recognized the potential of electronic trading to facilitate the objectives of straight-through processing in the wake of the 2008 financial crisis. *See* Confirmation, Portfolio Reconciliation, and Portfolio Compression Requirements for Swap Dealers and Major Swap Participants, 75 FR 81519, 81521–22 (proposed Dec. 28, 2010) (noting that ''[t]imely and accurate confirmation of transactions is critical for all downstream operational and risk management processes, including the correct calculation of cash flows and discharge of settlement obligations as well as accurate measurement of counterparty credit exposures.'').

[197] *See* CEA section 5h(e); 7 U.S.C. 7b–3(e) (stating that the goal of this section is to promote pre-trade price transparency in the swaps market). While straight-through processing may not be as relevant to credit risk associated with transactions executed on or pursuant to the rules of a SEF but not submitted for clearing, the data and real-time reporting requirements already finalized by the Commission mandate reporting by the SEF of all swap transaction terms ''as soon as technologically practicable'' in order to effectuate the statutory mandate of post-trade price transparency. *See* 17 CFR 43.3(b)(1) (real-time reporting); 17 CFR 45.3(a)(1) (swap data recordkeeping and reporting requirements). This allowance of a slight timing delay, however, is meant to account for ''the prevalence, implementation and use of technology by comparable market participants,'' and not post-execution confirmation of other terms such as credit agreements for uncleared swaps. *See, e.g.,* 17 CFR 43.2; Real-Time Public Reporting of Swap Transaction Data, 77 FR 1182, 1191 (Jan. 9, 2012) (discussing the definition of ''as soon as technologically practicable'').

[198] *See* 17 CFR 1.35; Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management, 77 FR 21278, 21286–287, 306 (Apr. 9, 2012); Confirmation, Portfolio Reconciliation, Portfolio Compression, and Swap Trading Relationship Documentation Requirements for Swap Dealers and Major Swap Participants, 77 FR 55904, 55923 (Sep. 11, 2012) for further details.

[199] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1218 n. 34.

[200] MarketAxess Comment Letter at 31 (Mar. 8, 2011); FSR Comment Letter at 9 (Mar. 8, 2011); ICE Comment Letter at 5–6 (Mar. 8, 2011); CME Comment Letter at 14 (Feb. 22, 2011).

[201] CME Comment Letter at 14 (Feb. 22, 2011).

[202] MarketAxess Comment Letter at 31 (Mar. 8, 2011); FSR Comment Letter at 9 (Mar. 8, 2011).

[203] CME Comment Letter at 14 (Feb. 22, 2011); MarketAxess Comment Letter at 31 (Mar. 8, 2011).

[204] FSR Comment Letter at 9 (Mar. 8, 2011).

[205] SIFMA AMG Comment Letter at 15–16 (Mar. 8, 2011).

[206] Freddie Mac Comment Letter at 5 (Mar. 8, 2011).

[207] WMBAA Comment Letter at 17 (Mar. 8, 2011).

whether the execution or trading of such swaps is taking place on the DCM or the SEF.[208]

(a) Summary of Comments

CME stated that the rules of a DCM and SEF would clearly identify, as necessary, the trade platform upon which a swap was being executed, rendering the requirements of proposed § 37.8 unnecessary.[209] CME requested that the Commission clarify whether proposed § 37.8 created additional substantive obligations on the part of DCMs and SEFs given that market participants often interface with electronic platforms via proprietary or third-party front end systems not under the control of DCMs or SEFs.[210]

(b) Commission Determination

The Commission is adopting § 37.8(a) as proposed, subject to one revision. Proposed § 37.8(a) only addressed the SEF registration and compliance of a board of trade that already operates a DCM and intends to operate a SEF. To address all situations regarding DCM and SEF registration and compliance, the Commission is revising § 37.8(a) to apply to ''[a]n entity that intends to operate both a [DCM] and a [SEF].'' The rule requires the entity to separately register the DCM and SEF pursuant to part 38 and part 37 of the Commission's regulations, respectively, and to comply with the applicable core principles and regulations.

As to CME's comments regarding § 37.8(b), the Commission clarifies that it would not be sufficient for a board of trade that operates both a DCM and a SEF to simply have rules that identify whether a transaction is being executed on the DCM or the SEF. The Commission notes that section 5h(c) of the Act clearly requires a board of trade that operates both a DCM and a SEF to identify to market participants whether each swap is being executed on the DCM or the SEF.[211] Accordingly, a consolidated DCM/SEF trading screen must identify whether the execution is occurring on the DCM or the SEF, irrespective of how proprietary or third-party front end systems eventually present that data to market participants.[212]

9. § 37.9—Permitted Execution Methods[213]

As mentioned above, the SEF NPRM required a SEF to offer a minimum trading functionality (*i.e.,* a centralized electronic trading screen upon which any market participant can post both firm and indicative bids and offers that are transparent to all other market participants of the SEF). The SEF NPRM provided that Required Transactions (*i.e.,* transactions subject to the trade execution mandate under section 2(h)(8) of the CEA and not block trades) must be executed through the SEF's minimum trading functionality, Order Book meeting the minimum trading functionality, or RFQ System that operates in conjunction with the SEF's minimum trading functionality.[214] The SEF NPRM made it clear that for Required Transactions, pre-trade transparency must be met.[215] The SEF NPRM also allowed a SEF to provide additional execution methods for Permitted Transactions (*i.e.,* transactions not subject to the clearing and trade execution mandates, illiquid or bespoke swaps, and block trades), including Voice-Based System.

The Commission is restructuring the order of the rule text in § 37.9 and this corresponding preamble discussion to provide clarity. Despite the order of other preamble sections, which generally follows the order of the SEF NPRM, the Commission's preamble discussion of § 37.9 generally follows the order of the restructured rule text. Additionally, as discussed above in the registration section, the Commission is moving the minimum trading functionality and Order Book sections from proposed § 37.9 to final § 37.3.

(a) § 37.9(a)(1)(iv)—Required Transactions and § 37.9(a)(1)(v)—Permitted Transactions

Proposed § 37.9(a)(1)(iv) defined Required Transactions as transactions that are subject to the execution requirements under the Act and are made available for trading pursuant to § 37.10, and are not block trades. Proposed § 37.9(a)(1)(v) defined Permitted Transactions as transactions that meet any of the following requirements: (A) Are block trades; (B) are not swaps subject to the Act's clearing and execution requirements; or (C) are illiquid or bespoke swaps.

(1) Summary of Comments

Several commenters recommended revisions to the definition of Permitted Transactions.[216] To ensure that there are no gaps between the definitions of Required Transactions and Permitted Transactions, MarketAxess recommended that the proposed definition of Permitted Transactions in § 37.9(a)(1)(v) be revised to include all transactions that are not Required Transactions as defined in proposed § 37.9(a)(1)(iv).[217] Freddie Mac recommended that the Commission revise the proposed definition of Permitted Transactions to incorporate hedging transactions by any end-user (*i.e.,* non-dealer) counterparty.[218]

[208] CEA section 5h(c); 7 U.S.C. 7b–3(c).

[209] CME Comment Letter at 14 (Feb. 22, 2011).

[210] *Id.*

[211] The Commission notes that only eligible contract participants may execute a swap on a SEF so a board of trade that operates both a DCM and a SEF must ensure that its SEF does not allow for non-eligible contract participant trading on the SEF. *See* CEA section 2(e); 7 U.S.C. 2(e).

[212] The Commission notes that it is not replacing the term ''board of trade'' in § 37.8(b) with the term ''entity'' as in § 37.8(a) because in § 37.8(b) only a board of trade would be able to use the same electronic trade execution system for executing and trading swaps on the DCM and on the SEF (*i.e.,* a trading facility). The Commission also notes that § 37.8(b) implements CEA section 5h(c), which uses the term ''board of trade.''

[213] The Commission is renaming the title of this section from ''Permitted Execution Methods'' to ''Methods of Execution for Required and Permitted Transactions'' to provide greater clarity.

[214] By ''in conjunction with the SEF's minimum trading functionality,'' the Commission means that the SEF NPRM required a SEF to offer the minimum trading functionality, and if that SEF also offered an RFQ System, it was required to communicate any bids or offers resting on the minimum trading functionality to the RFQ requester along with the responsive quotes. *See* the discussion below regarding ''Taken Into Account and Communicated'' Language in the RFQ System Definition under § 37.9(a)(1)(ii)—Request for Quote System in the preamble for further details.

[215] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1220.

[216] Additionally, WMBAA commented that the distinction between Required Transactions and Permitted Transactions is not required or authorized by the CEA. WMBAA Comment Letter at 6–7 (Mar. 8, 2011). In this regard, the Commission notes that the CEA sets out specific trading requirements for swaps that are subject to the trade execution mandate. *See* CEA sections 2(h)(1) and 2(h)(8); 7 U.S.C. 2(h)(1) and 2(h)(8). To meet these statutory requirements, final § 37.9(a)(1) defines these swaps as Required Transactions and provides specific methods of execution for such swaps. To distinguish these swaps from other swaps that are not subject to the trade execution mandate, the Commission defines such swaps in final § 37.9(c)(1) as Permitted Transactions and allows these swaps to be voluntarily traded on a SEF by using any method of execution. *See* discussion below regarding execution methods for Required and Permitted Transactions under § 37.9(b)(1) and (b)(4)—Execution Methods for Required Transactions and § 37.9(c)—Execution Methods for Permitted Transactions in the preamble.

[217] MarketAxess Comment Letter at 32 (Mar. 8, 2011). Similarly, ISDA/SIFMA and the Energy Working Group requested clarity regarding the definition of Permitted Transactions. ISDA/SIFMA Comment Letter at 7 (Mar. 8, 2011); Energy Working Group Comment Letter at 4 (Mar. 8, 2011).

[218] Freddie Mac Comment Letter at 3 (Mar. 8, 2011). Similarly, MFA recommended that the Commission expand the definition of Permitted Transactions to include other transactions, such as exchanges for physical, exchanges for swaps, and linked or packaged transactions. MFA Comment Letter at 8 (Mar. 8, 2011). The Commission interprets MFA's comment to be a request that the Commission create through rulemaking an

Continued

Additionally, the Coalition commented that the Commission should define illiquid or bespoke transactions to include typical end-user trades.[219]

Several commenters also commented on the reference to block trades in the definition of Permitted Transactions.[220] ISDA/SIFMA commented that the definition of block trade in part 43 of the Commission's regulations should apply to blocks executed on a SEF.[221] Tradeweb sought confirmation that block size trades in swaps that are required to be cleared and made available to trade would not be subject to the minimum trading requirements for Required Transactions, but would be required to be reported to and processed through a SEF in a manner prescribed by the SEF.[222] Similarly, GFI requested the Commission to confirm that block transactions must be effected on a SEF, but may be subject to special rules.[223]

(2) Commission Determination

To ensure that there is consistency in the definitions, and in response to MarketAxess's comment, the Commission is: (1) Revising the definition of Required Transaction to mean any transaction involving a swap that is subject to the trade execution requirement in section 2(h)(8) of the Act[224]; and (2) revising the definition of Permitted Transaction to mean any transaction not involving a swap that is subject to the trade execution requirement in section 2(h)(8) of the Act.[225] The Commission is not revising the definition of Permitted Transaction to explicitly include ''hedging transactions involving end-users'' or ''typical end-user'' transactions because the Commission's revisions to the definition of Permitted Transaction are consistent with the CEA section 2(h)(8) trade execution requirement.[226]

With respect to the treatment of block transactions, the Commission notes that the definition of block trade in part 43 of the Commission's regulations applies to such transactions involving swaps that are listed on a SEF.[227] The Commission also notes that the definition of block trade states, in part, that block trades occur away from the registered SEF's or DCM's trading system or platform and is executed pursuant to the registered SEF's or DCM's rules and procedures.[228] As such, block trades are not subject to the execution methods for Required Transactions and Permitted Transactions in final § 37.9(a)(2) and § 37.9(c)(2), respectively.[229]

(b) § 37.9(a)(1)(ii)—Request for Quote System

Proposed § 37.9(a)(1)(ii)(A) defined an RFQ System as a trading system or platform in which a market participant must transmit a request for quote to buy or sell a specific instrument to no less than five market participants in the trading system or platform, to which all such market participants may respond. Under the proposed rule, any bids or offers resting on the trading system or platform pertaining to the same instrument must be taken into account and communicated to the requester along with the responsive quotes.

In addition, proposed § 37.9(a)(1)(ii)(B) defined an RFQ System as a trading system or platform in which multiple market participants can both: (1) View real-time electronic streaming quotes, both firm and indicative, from multiple potential counterparties on a centralized electronic screen; and (2) have the option to complete a transaction by: (i) Accepting a firm streaming quote, or (ii) transmitting a request for quote to no less than five market participants, based upon an indicative streaming quote, taking into account any resting bids or offers that have been communicated to the requester along with any responsive quotes. Finally, proposed § 37.9(a)(1)(ii)(C) provided that an RFQ System means any such other trading system or platform as may be determined by the Commission.

(1) Summary of Comments

(i) Comments on RFQ System Definition and Transmission to Five Market Participants

In general, some commenters stated that the Commission's definition of an RFQ System imposes rigid requirements that are not supported by the SEF definition.[230] Other commenters stated that the defined RFQ System preserves ''the single-dealer status quo,'' threatens to diminish the transparency and efficiency of the regulated swaps

exception to the CEA section 2(h)(8) trade execution requirement similar to the centralized market trading exception established by DCM Core Principle 9 for certain exchange of futures for related positions. *See* CEA section 5(d)(9); 7 U.S.C. 7(d)(9); *see also* Regulation of Noncompetitive Transactions Executed on or Subject to the Rules of a Contract Market, 63 FR 3708 (Jan. 26, 1998). The Commission notes that while DCM Core Principle 9 does permit certain exceptions to the centralized market trading requirements, such exceptions are all premised on there being some ''bona fide business purpose'' for the exception. MFA does not offer a specific bona fide business purpose for any of its three suggested off-exchange exceptions, nor is the Commission aware of any. In addition, MFA does not explain why an exchange of swaps for swaps transaction, where each leg of the transaction can presumably be executed on a SEF, needs to be executed off-exchange. The Commission observes that should swaps based on physical commodities become subject to the trade execution mandate, there might be some bona fide business purpose for executing exchanges of swaps for physicals transactions. However, the market participants who are most likely to engage in such transactions are also likely to be eligible for the end-user exception in CEA section 2(h)(7). As an initial matter, the Commission observes that swaps based on physical commodities may be subject to the trade execution requirement if the Commission determines that they are subject to the clearing requirement under CEA section 2(h)(1) and part 50 of the Commission's regulations. Should the circumstances arise where the Commission is determining whether physical commodity swaps should become subject to the clearing requirement and there are parties who seek to engage in exchanges of swaps for physicals transactions that are not eligible for the end-user exception, the Commission could at that time entertain requests to permit a trade execution requirement exception for swaps that are components of such exchanges of swaps for physicals transactions. However, for the above reason, the Commission believes that a broad exception for such off-exchange transactions in the absence of bona fide business purposes could undermine the trade execution requirement by allowing market participants to execute swaps subject to the trade execution requirement bilaterally rather than on a SEF or DCM.

[219] Coalition Comment Letter at 8 (Mar. 8, 2011).

[220] ISDA/SIFMA Comment Letter at 10 (Mar. 8, 2011); Tradeweb Comment Letter at 5 (Mar. 8, 2011); GFI Comment Letter at 4 (Mar. 8, 2011).

[221] ISDA/SIFMA Comment Letter at 10 (Mar. 8, 2011).

[222] Tradeweb Comment Letter at 5 (Mar. 8, 2011).

[223] GFI Comment Letter at 4 (Mar. 8, 2011).

[224] The Commission is renumbering proposed § 37.9(a)(1)(iv) to § 37.9(a)(1). Several commenters requested clarification from the Commission whether inter-affiliate trades would be subject to the CEA section 2(h)(8) trade execution requirement. JP Morgan Comment Letter at 5 (Jun. 3, 2011); Rosen et al. Comment Letter at 20–21 (Apr. 5, 2011); Coalition Comment Letter at 5 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 11 (Mar. 8, 2011). *See* Clearing Exemption for Swaps Between Certain Affiliated Entities, 77 FR 50425 (proposed Aug. 21, 2012) for further details.

[225] The Commission is renumbering proposed § 37.9(a)(1)(v) to § 37.9(c)(1).

[226] *See* CEA section 2(h)(8) trade execution requirement discussion above under § 37.3—Requirements for Registration; *see also* discussion below under § 37.9(c)—Execution Methods for Permitted Transactions.

[227] Section 43.2 of the Commission's regulations states that ''block trade'' means a publicly reportable swap transaction that: (1) Involves a swap that is listed on a registered SEF or DCM; (2) Occurs away from the registered SEF's or DCM's trading system or platform and is executed pursuant to the registered SEF's or DCM's rules and procedures; (3) Has a notional or principal amount at or above the appropriate minimum block size applicable to such swap; and (4) Is reported subject to the rules and procedures of the registered SEF or DCM and the rules described in this part, including the appropriate time delay requirements set forth in § 43.5 of this part. 17 CFR 43.2.

[228] *Id.*

[229] The Commission notes that the execution methods for Required Transactions in final § 37.9(a)(2) excludes block trades.

[230] Rosen et al. Comment Letter at 10 (Apr. 5, 2011); Goldman Comment Letter at 2 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 2 (Mar. 8, 2011); FXall Comment Letter at 7–8 (Mar 8, 2011); SIFMA AMG Comment Letter at 4–5 (Mar. 8, 2011).

market, and is inconsistent with the Dodd-Frank Act.[231]

As noted above, § 37.9(a)(1)(ii) of the SEF NPRM contained a requirement that a market participant transmit an RFQ to no less than five market participants. In the SEF NPRM, the Commission specifically asked for public comment on whether five is the appropriate minimum number of respondents that the Commission should require to potentially interact with a request for quote.[232] The Commission also asked for public comment on the appropriate minimum number, if not five.[233] The Commission received the following comments regarding the five market participant requirement and has responded to those comments below.

Several commenters objected to the requirement in proposed § 37.9(a)(1)(ii) that a market participant transmit an RFQ to no less than five market participants.[234] The commenters raised various concerns with this requirement, including the potential for increased trading costs,[235] decreased liquidity,[236] decreased transparency,[237] and breaking trades into smaller sizes.[238] Several commenters specifically noted that the five market participant requirement may result in increased spreads for participants because non-executing market participants in the RFQ could ''front run'' the transaction in anticipation of the executing market participant's forthcoming and offsetting transactions.[239] Many of these commenters additionally noted that these risks would be most pronounced in illiquid swaps or large-sized trades (*i.e.,* transactions approaching the block trade threshold).[240] As a result, many of the commenters noted that it will be difficult and costly to enter into hedging transactions.[241]

In this regard, some commenters noted that the SEC's SB–SEF proposal[242] permitted RFQs to be transmitted to one or more SEF participant(s).[243] Morgan Stanley commented that, given the impact of signaling transactions to multiple market participants, as trade size grows, participants may receive better execution if their RFQs are transmitted to fewer than five participants.[244] Similarly, MetLife commented that participants should have the flexibility to determine the appropriate number of respondents for a particular trade, which could vary based on the size and liquidity of the trade.[245] Additionally, Commissioner Sommers' dissent suggested an alternative approach to RFQ Systems that would permit a market participant to transmit an RFQ to ''more than one'' potential counterparty.[246]

Other commenters, however, stated that an RFQ should be transmitted to all participants on the SEF.[247] Mallers et al. stated that participants would not be disadvantaged by disclosing an RFQ to the entire market for transactions below

[231] IECA Comment Letter at 3 (May 24, 2011); Mallers et al. Comment Letter at 3–5 (Mar. 21, 2011); AFR Comment Letter at 4, 5 (Mar. 8, 2011). The Mallers et al. comment letter represents the view of a number of high frequency trading firms: Allston Trading, LLC, Atlantic Trading USA LLC, Bluefin Trading LLC, Chopper Trading LLC, DRW Holdings, LLC, Eagle Seven, LLC, Endeavor Trading, LLC, GETCO, Hard Eight Futures, LLC, HTG Capital Partners, IMC Financial Markets, Infinium Capital Management LLC, Kottke Associates, LLC, Liger Investments Limited, Marquette Partners, LP, Nico Holdings LLC, Optiver US LLC, Quantlab Financial, LLC, RGM Advisors, LLC, Traditum Group LLC, WH Trading, and XR Trading LLC.

[232] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1221. The Commission asked, ''[i]n light of the 'multiple participant to multiple participant' requirement, the Commission has proposed that requests for quotes be requested of at least five possible respondents. Is this the appropriate minimum number of respondents that the Commission should require to potentially interact with a request for quote? If not, what is an appropriate minimum number? Some pre-proposal commenters have suggested that market participants should transmit a request for quote to 'more than one' market participant. The Commission is interested in receiving public comment on this matter.'' *Id.*

[233] *Id.*

[234] Representative Garrett et al. Comment Letter at 1 (Apr. 5, 2013); Eaton Vance Comment Letter at 2 (Feb. 17, 2012); Reuters Comment Letter at 6 (Dec. 12, 2011); Tradeweb Comment Letter at 5 (Jun. 3, 2011); Traccr Limited Comment Letter at 2 (Jun. 3, 2011); FHLB Comment Letter at 12–13 (Jun. 3, 2011); AII Comment Letter at 5 (Jun. 2, 2011); Rosen et al. Comment Letter at 11 (Apr. 5, 2011); JP Morgan Comment Letter at 2–3 (Mar. 8, 2011); Bloomberg Comment Letter at 2–3 (Mar. 8, 2011); FXall Comment Letter at 8–9 (Mar. 8, 2011); Reuters Comment Letter at 3 (Mar. 8, 2011); BlackRock Comment Letter at 3–4 (Mar. 8, 2011); Tradeweb Comment Letter at 7 (Mar. 8, 2011); FSR Comment Letter at 3 (Mar. 8, 2011); MFA Comment Letter at 6 (Mar. 8, 2011); MetLife Comment Letter at 2–3 (Mar. 8, 2011); SIFMA AMG Comment Letter at 5–7 (Mar. 8, 2011); Deutsche Comment Letter at 3–4 (Mar. 8, 2011); MarketAxess Comment Letter at 31 (Mar. 8, 2011); Barclays Comment Letter at 5–6 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 3 (Mar. 8, 2011); ABC/CIEBA Comment Letter at 6 (Mar. 8, 2011); Global FX Comment Letter at 3 (Mar. 8, 2011); TruMarx Comment Letter at 6 (Mar. 8, 2011); Coalition Comment Letter at 5–7 (Mar. 8, 2011); WMBAA Comment Letter at 6 (Mar. 8, 2011); CME Comment Letter at 8 (Mar. 8, 2011); Morgan Stanley Comment Letter at 2–3 (Mar. 2, 2011); CanDeal Comment Letter at 2–3 (Feb. 25, 2011). The Commission notes that some commenters in addressing this provision used the term ''liquidity providers'' to refer to the minimum number of ''market participants'' that must receive RFQs. *See, e.g.,* Tradeweb Comment Letter at 5 (Jun. 3, 2011); AII Comment Letter at 5 (Jun. 2, 2011); Bloomberg Comment Letter at 2 (Mar. 8, 2011); FXall Comment Letter at 9 (Mar. 8, 2011); FSR Comment Letter at 3 (Mar. 8, 2011). The Commission clarifies that the proposed five market participant requirement did not imply any requirement that the requested market participants operate in any particular manner, such as one that regularly provides liquidity or makes markets in the particular swap.

[235] Eaton Vance Comment Letter at 2 (Feb. 17, 2012); JP Morgan Comment Letter at 2–3 (Mar. 8, 2011); BlackRock Comment Letter at 4 (Mar. 8, 2011); MetLife Comment Letter at 3 (Mar. 8, 2011); Global FX Comment Letter at 3 (Mar. 8, 2011); Morgan Stanley Comment Letter at 2 (Mar. 2, 2011); CanDeal Comment Letter at 2–3 (Feb. 25, 2011).

[236] Tradeweb Comment Letter at 5 (Jun. 3, 2011); Traccr Limited Comment Letter at 2 (Jun. 3, 2011); FHLB Comment Letter at 12 (Jun. 3, 2011); JP Morgan Comment Letter at 2–3 (Mar. 8, 2011); BlackRock Comment Letter at 3 (Mar. 8, 2011); Tradeweb Comment Letter at 7 (Mar. 8, 2011); MetLife Comment Letter at 3 (Mar. 8, 2011); CanDeal Comment Letter at 2–3 (Feb. 25, 2011).

[237] Tradeweb Comment Letter at 5 (Jun. 3, 2011); MetLife Comment Letter at 3 (Mar. 8, 2011).

[238] BlackRock Comment Letter at 4 (Mar. 8, 2011).

[239] FHLB Comment Letter at 12 (Jun. 3, 2011); AII Comment Letter at 5 (Jun. 2, 2011); Bloomberg Comment Letter at 2–3 (Mar. 8, 2011); FXall Comment Letter at 8–9 (Mar. 8, 2011); BlackRock Comment Letter at 3–4 (Mar. 8, 2011); MetLife Comment Letter at 3 (Mar. 8, 2011); SIFMA AMG Comment Letter at 5–6 (Mar. 8, 2011); Barclays Comment Letter at 5–6 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 3 (Mar. 8, 2011); ABC/CIEBA Comment Letter at 6 (Mar. 8, 2011); Global FX Comment Letter at 3 (Mar. 8, 2011); Coalition Comment Letter at 5–6 (Mar. 8, 2011); Morgan Stanley Comment Letter at 2 (Mar. 2, 2011).

[240] FHLB Comment Letter at 12 (Jun. 3, 2011); AII Comment Letter at 5 (Jun. 2, 2011); Bloomberg Comment Letter at 2–3 (Mar. 8, 2011); FXall Comment Letter at 8–9 (Mar. 8, 2011); MetLife Comment Letter at 3 (Mar. 8, 2011); SIFMA AMG Comment Letter at 5–6 (Mar. 8, 2011); Barclays Comment Letter at 5–6 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 3 (Mar. 8, 2011); Global FX Comment Letter at 3 (Mar. 8, 2011); Coalition Comment Letter at 5–6 (Mar. 8, 2011); Morgan Stanley Comment Letter at 2 (Mar. 2, 2011).

[241] FHLB Comment Letter at 12 (Jun. 3, 2011); AII Comment Letter at 5 (Jun. 2, 2011); Bloomberg Comment Letter at 2–3 (Mar. 8, 2011); FXall Comment Letter at 8–9 (Mar. 8, 2011); BlackRock Comment Letter at 3–4 (Mar. 8, 2011); MetLife Comment Letter at 3 (Mar. 8, 2011); SIFMA AMG Comment Letter at 5–6 (Mar. 8, 2011); Barclays Comment Letter at 5–6 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 3 (Mar. 8, 2011); ABC/CIEBA Comment Letter at 6 (Mar. 8, 2011); Global FX Comment Letter at 3 (Mar. 8, 2011); Coalition Comment Letter at 5–6 (Mar. 8, 2011); Morgan Stanley Comment Letter at 2 (Mar. 2, 2011).

[242] Registration and Regulation of Security-Based Swap Execution Facilities, 76 FR 10948 (proposed Feb. 28, 2011).

[243] Reuters Comment Letter at 6 (Dec. 12, 2011); Traccr Limited Comment Letter at 2 (Jun. 3, 2011); AII Comment Letter at 5 (Jun. 2, 2011); Rosen et al. Comment Letter at 11 (Apr. 5, 2011); JP Morgan Comment Letter at 5 (Mar. 8, 2011); Reuters Comment Letter at 3 (Mar. 8, 2011); Tradeweb Comment Letter at 7 (Mar. 8, 2011); FSR Comment Letter at 3 (Mar. 8, 2011); MetLife Comment Letter at 3 (Mar. 8, 2011); SIFMA AMG Comment Letter at 5 (Mar. 8, 2011); Deutsche Comment Letter at 4 (Mar. 8, 2011); MarketAxess Comment Letter at 31 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 3 (Mar. 8, 2011); Global FX Comment Letter at 3 (Mar. 8, 2011); Goldman Comment Letter at 2 (Mar. 8, 2011); TruMarx Comment Letter at 6 (Mar. 8, 2011).

[244] Morgan Stanley Comment Letter at 2 (Mar. 2, 2011).

[245] MetLife Comment Letter at 3 (Mar. 8, 2011).

[246] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1259.

[247] IECA Comment Letter at 3 (May 24, 2011); Mallers et al. Comment Letter at 4–5 (Mar. 21, 2011); Better Markets Comment Letter at 9 (Mar. 8, 2011); AFR Comment Letter at 4–5 (Mar. 8, 2011).

the block trade threshold, which would not move the market.[248] In their view, the five market participant requirement would allow a participant to conduct semi-private deals with a few favored participants to the exclusion of other market participants, which would ultimately decrease liquidity and create a substantial barrier to entry to the swaps market.[249] On the other hand, SDMA supported the five market participant requirement.[250] In its view, this requirement promotes price discovery and liquidity, whereas the single market participant model facilitates abusive trading practices, such as pre-arranged trading and ''painting the screen'' (*i.e.,* posting of non-competitive quotes to confuse the market).[251]

(ii) Comments on ''Taken Into Account and Communicated'' Language in the RFQ System Definition

Some commenters recommended that the Commission delete the requirement that resting orders be ''taken into account and communicated'' to the RFQ requester.[252] FXall and Barclays stated that this requirement is not necessary because the RFQ requester already has the ability to view the resting orders on the SEF's minimum trading functionality or Order Book.[253] Several commenters stated that this requirement is mandating that SEFs offer RFQ systems in conjunction with the SEF's minimum trading functionality, which is not required.[254] Similarly, JP Morgan stated that the resting order functionality is not mandated by the statute.[255]

Several commenters requested clarification regarding the interaction between resting bids and offers and the RFQ system.[256] Some commenters thought that the ''taken into account and communicated'' language should mean that a SEF must only communicate to the RFQ requester the resting bids and offers, and that the RFQ requester has sole discretion to either respond to, or ignore, these resting bids and offers.[257] ISDA/SIFMA and SIFMA AMG requested clarification that the resting bids and offers do not include indicative prices.[258] Several commenters also stated that SEFs should not be required to inform the providers of resting bids and offers of the RFQs; otherwise, the RFQ system would be subject to market abuse by opportunistic third parties seeking market information, and the requirement would open up RFQs beyond the minimum number of participants.[259]

(iii) Comments on RFQ Disclosure Issues

AFR and Better Markets stated that SEFs should be required to disclose RFQ responses to all market participants.[260] For example, AFR commented that responses to RFQs should be made transparent to all market participants prior to trade execution, which would serve the statutory goal of pre-trade price transparency and would increase price competition.[261] Several commenters objected to the recommendation by AFR and Better Markets.[262] Some of these commenters noted that such a requirement could raise the same information leakage concerns as with the five market participant requirement.[263]

FSR commented that market participants receiving the RFQ should have relevant information about the identity of the RFQ requester.[264] However, Tradeweb commented that the Commission should not impose a specific requirement that the identity of the RFQ requester be disclosed or anonymous.[265] FSR also stated that SEFs should not be required to publish RFQs until after the trade has been completed, and then only as part of aggregated disclosures.[266] Finally, State Street requested that the Commission clarify that an RFQ System is not required to provide functionality to make RFQs visible to the entire market, although it may voluntarily choose to do so.[267]

(2) Commission Determination

Based on the comments, the Commission is adopting proposed § 37.9(a)(1)(ii) as final § 37.9(a)(3), subject to a number of modifications discussed below.[268]

(i) RFQ System Definition and Transmission to Five Market Participants

The Commission is adopting the definition of RFQ System in proposed § 37.9(a)(1)(ii)(A), subject to certain modifications described below. As explained in the SEF NPRM, the Commission believes that an RFQ System, as defined in § 37.9, operating in conjunction with a SEF's minimum trading functionality (*i.e.,* Order Book) is consistent with the SEF definition and promotes the goals provided in section 733 of the Dodd-Frank Act, which are to: (1) Promote the trading of swaps on SEFs and (2) promote pre-trade price transparency in the swaps market.[269] The Commission notes that the RFQ System definition requires SEFs to provide market participants the ability to access multiple market participants, but not necessarily the entire market, in conformance with the SEF definition.

The Commission agrees with SDMA that the proposed five market

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[248] Mallers et al. Comment Letter at 4 (Mar. 21, 2011).

[249] *Id.*

[250] SDMA Comment Letter at 3 (Mar. 8, 2011). *See also* Better Markets Comment Letter at 2 (Apr. 12, 2013) and Allston et al. Comment Letter at 1 (Feb. 28, 2013).

[251] SDMA Comment Letter at 5 (Feb. 28, 2013); SDMA Comment Letter at 3 (Mar. 8, 2011).

[252] Tradeweb Comment Letter at 5 (Jun. 3, 2011); JP Morgan Comment Letter at 5–6 (Mar. 8, 2011); FXall Comment Letter at 9–10 (Mar. 8, 2011); SIFMA AMG Comment Letter at 9 (Mar. 8, 2011); Barclays Comment Letter at 7 (Mar. 8, 2011); Tradeweb Comment Letter at 6 (Mar. 8, 2011).

[253] FXall Comment Letter at 9 (Mar. 8, 2011); Barclays Comment Letter at 7 (Mar. 8, 2011).

[254] ISDA/SIFMA Comment Letter at 5–6 (Mar. 8, 2011); FXall Comment Letter at 4 (Mar. 8, 2011); MarketAxess Comment Letter at 33 (Mar. 8, 2011); SIFMA AMG Comment Letter at 4 (Mar. 8, 2011).

[255] JP Morgan Comment Letter at 5 (Mar. 8, 2011).

[256] Reuters Comment Letter at 1 (Jun. 13, 2012); Rosen et al. Comment Letter at 12–14 (Apr. 5, 2011); JP Morgan Comment Letter at 5–6 (Mar. 8, 2011); FXall Comment Letter at 9–10 (Mar. 8, 2011); Tradeweb Comment Letter at 8 (Mar. 8, 2011); FSR Comment Letter at 5 (Mar. 8, 2011); MetLife Comment Letter at 3 (Mar. 8, 2011); SIFMA AMG Comment Letter at 9 (Mar. 8, 2011); MarketAxess Comment Letter at 32 (Mar. 8, 2011); Barclays Comment Letter at 7 (Mar. 8, 2011); ABC/CIEBA Comment Letter at 6–7 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 3–4; Evolution Comment Letter at 5–6 (Mar. 8, 2011).

[257] JP Morgan Comment Letter at 5–6 (Mar. 8, 2011); FSR Comment Letter at 5 (Mar. 8, 2011); MetLife Comment Letter at 3 (Mar. 8, 2011); SIFMA AMG Comment Letter at 9 (Mar. 8, 2011); MarketAxess Comment Letter at 32 (Mar. 8, 2011); ABC/CIEBA Comment Letter at 6–7 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 3–4 (Mar. 8, 2011); Evolution Comment Letter at 5–6 (Mar. 8, 2011).

[258] ISDA/SIFMA Comment Letter at 3–4 (Mar. 8, 2011); SIFMA AMG Comment Letter at 9 (Mar. 8, 2011).

[259] FXall Comment Letter at 9–10 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 3–4 (Mar. 8, 2011); SIFMA AMG Comment Letter at 9 (Mar. 8, 2011). FSR also commented that the provider of the resting bid should not be provided with information about the identity of the RFQ requester. FSR Comment Letter at 5 (Mar. 8, 2011).

[260] AFR Comment Letter at 3 (Feb. 27, 2013); AFR Comment Letter at 5 (Mar. 8, 2011); Better Markets Comment Letter at 8 (Mar. 8, 2011).

[261] AFR Comment Letter at 5 (Mar. 8, 2011).

[262] Rosen et al. Comment Letter at 14 (Apr. 5, 2011); MarketAxess Comment Letter at 32 (Mar. 8, 2011); Barclays Comment Letter at 10 (Mar. 8, 2011); Tradeweb Comment Letter at 7–8 (Mar. 8, 2011); State Street Comment Letter at 4 (Mar. 8, 2011); Deutsche Comment Letter at 4 (Mar. 8, 2011).

[263] Tradeweb Comment Letter at 7 (Mar. 8, 2011); State Street Comment Letter at 4 (Mar. 8, 2011); Deutsche Comment Letter at 4 (Mar. 8, 2011).

[264] FSR Comment Letter at 3 (Mar. 8, 2011).

[265] Tradeweb Comment Letter at 8 (Mar. 8, 2011).

[266] FSR Comment Letter at 3 (Mar. 8, 2011).

[267] State Street Comment Letter at 4 (Mar. 8, 2011).

[268] The Commission is renumbering proposed § 37.9(a)(1)(ii) to § 37.9(a)(3).

[269] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1220–21.

participant requirement would promote pre-trade price transparency, as the RFQ requester would be required to solicit executable orders, on a pre-trade basis, from a larger group of potential responders.[270] A broader group of potential responders, in turn, encourages price competition between the potential responders to the RFQ and may provide a more reliable assessment of market value than SEF functionality that would permit a market participant to rely on a quote from a single RFQ requestee. The Commission nevertheless recognizes commenters' concerns about the proposed five market participant requirement, such as the potential for increased trading costs and information leakage to the non-executing market participants in the RFQ. To address these concerns, while still complying with the multiple-to-multiple requirement in the statutory SEF definition and promoting the goals of pre-trade price transparency and trading of swaps on SEFs provided in section 733 of the Dodd-Frank Act, the Commission is requiring that a market participant transmit an RFQ to no less than two market participants during a phase-in compliance period and, subsequent to that period, to no less than three market participants.[271] The Commission believes, as noted above, that sending an RFQ to a greater number of market participants increases the potential for price competition among responders and provides a more reliable assessment of market value. The Commission also believes that the three market participant requirement, with the two market participant phase-in period, appropriately balances the benefits of pre-trade price transparency and the information leakage concerns raised by commenters. The revision from five to three minimum market participants will also provide market participants with greater flexibility in sending RFQs for Required Transactions, while still complying with the statutory SEF definition and promoting pre-trade price transparency.

The Commission has also determined to clarify that the market participants required for inclusion in an RFQ in all cases may not be affiliated with or controlled by the RFQ requester and may not be affiliated with or controlled by each other, and is revising final § 37.9(a)(3) to clarify this point.[272] For an RFQ requester to send an RFQ to another entity who is affiliated with or controlled by the RFQ requester is inconsistent with the purpose of requiring that RFQs be sent to more than one market participant, as explained both in the SEF NPRM and this release. The Commission notes that if an RFQ is transmitted to one non-affiliate and two affiliates of the requester or if an RFQ is transmitted to three requestees who are affiliates of each other, then the policy objective of promoting the goal of pre-trade price transparency and complying with the multiple-to-multiple requirement in the SEF definition could be undermined. The Commission is also concerned that such an outcome could disincentivize entities from responding to an RFQ, which would reduce price competition and liquidity.

The Commission believes, moreover, that the three market participant requirement is consistent with current market practice where, in certain markets, many market participants already choose to send an RFQ to multiple market participants. Tradeweb, for example, noted that in its experience in the U.S. Treasuries market, market participants on average send an RFQ to three market participants.[273] In addition, the Commission understands that many pension and other managed funds with fiduciary obligations routinely obtain quotes from at least three market participants in certain securities markets. The Commission believes that the three market participant requirement, with the two market participant transition period, supports a common industry practice of querying multiple market participants, while still complying with the statutory SEF definition and promoting the goals provided in section 733 of the Dodd-Frank Act.

Furthermore, the Commission believes that the three minimum market participant requirement heightens the probability that multiple participants will respond to an RFQ and, thus, will facilitate the pricing improvements attendant to competition among RFQ responders. The Commission is aware of numerous legal, business, and technological issues that could prevent a market participant from responding to a specific RFQ. The Commission notes, for example, that DCM market maker programs often require participants to quote two-sided markets for 75 to 85 percent of the trading day.[274] Therefore, a participant in the market maker program may not provide quotes for a portion of the trading day. While there is no guarantee that even a minimum market participant requirement will ensure that multiple responses are available for all RFQs, it increases the probability that the goal of pre-trade price transparency is achieved and that a competitive market exists for all market participants.

Finally, the Commission believes that setting the minimum RFQ requirement at a uniform number for all Required Transactions in all asset classes provides regulatory and market efficiencies and is appropriate for the SEF market structure at this particular time. SEFs and market participants will benefit from a clear and uniform standard that would not require them to be subject to different minimum RFQ requirements, and to monitor compliance with such requirements, for every swap or class of swaps subject to

[270] The Commission notes that a SEF market participant may send an RFQ to the entire market. *See id.* at 1220 and discussion below. The Commission also notes that there are generally two distinct differences between the requirements finalized in this release and the RFQ-type functionality offered by DCMs. First, RFQ functionality used by DCMs disseminates RFQs to all market participants. Second, the responses to the RFQs take the form of executable bids or offers that are entered into the DCM's order book or other centralized market, such that orders from any market participant, not just the one submitting the RFQ, can be matched against such responsive bids or offers. Although the Commission considered a minimum RFQ-to-all requirement similar to the current practice in DCMs, given that swaps tend to be less standardized than futures, the Commission believes that rules pertaining to the execution methods for SEFs should provide appropriate flexibility for market participants trading swaps. The Commission notes that the less restrictive minimum market participant requirement established by part 37 reflects the more flexible statutory provisions for SEFs as compared to DCMs.

[271] The Commission clarifies that the three market participant requirement does not imply any requirement that the requested market participants operate in any particular manner, such as a requirement that such participants be dedicated liquidity providers or market makers in the particular swap. The RFQ requester may send the RFQ to any three market participants on the RFQ system, subject to the affiliate prohibition discussed below. *See supra* footnote 234 for further details.

[272] The Commission notes that ''affiliate'' means: (i) One party, directly or indirectly, holds a majority ownership interest in the other party, and the party that holds the majority interest in the other party reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of the majority-owned party; or (ii) a third party, directly or indirectly, holds a majority ownership interest in both parties, and the third party reports its financial statements on a consolidated basis under Generally Accepted Accounting Principles or International Financial Reporting Standards, and such consolidated financial statements include the financial results of both of the parties. A party or third party directly or indirectly holds a majority ownership interest if it directly or indirectly holds a majority of the equity securities of an entity, or the right to receive upon dissolution, or the contribution of, a majority of the capital of a partnership. *See* Commission regulation 50.52.

[273] Tradeweb Comment Letter at 7 (Mar. 8, 2011).

[274] The Commission understands that such provisions are in place to accommodate various operational and other reasons that could cause a market participant to not comply with the quoting obligations.

the CEA section 2(h)(8) trade execution requirement.

For the reasons discussed above, at this time, the Commission believes that the three market participant requirement implements the multiple-to-multiple requirement in the statutory SEF definition and will create an appropriate level of pre-trade price transparency for Required Transactions (*i.e.,* transactions involving swaps that are subject to the trade execution mandate of section 2(h)(8) of the CEA) for market participants initiating RFQs. However, the Commission is also aware of the fact that a phased implementation of this requirement will assist market participants and prospective SEFs to make an efficient transition from the swap industry's current market structure to the more transparent execution framework set forth in these final rules. Therefore, to provide market participants, SEFs, and the swaps industry with time to adapt to the new SEF regime, the Commission is phasing-in the three market participant requirement. From the effective date of the final SEF regulations until one year from the compliance date of these final regulations, a market participant transmitting an RFQ for Required Transactions under § 37.9(a)(2) must still comply with the RFQ definition in § 37.9(a)(3), but may transmit the quote to no less than two market participants.[275]

Some comments expressed support for the SEC's SB–SEF proposal, which allows for one-to-one RFQs. If the Commission eliminated the multiple market participant requirement and instead permitted RFQ requesters to send RFQs to a single market participant, then the multiple-participant-to-multiple-participant requirement in the SEF definition and the pre-trade price transparency goal would be undermined. In this regard, the Commission notes that while the SEC's SB–SEF proposal allows for one-to-one RFQs, it proposed to fulfill the multiple to multiple requirement by mandating full order interaction or best execution for RFQs.[276] Under the SEC's SB–SEF proposal, an RFQ requester must execute against the best priced orders of any size within and across a SEF's modes of execution, a requirement that the Commission is not recommending at this time.[277]

The Commission notes that some commenters expressed concerns about the risks with respect to information leakage for illiquid swaps or large-size trades, and the potential risk of a winner's curse for the market participant whose quote is accepted by the RFQ requester. According to the commenters, the other market participants in the RFQ will be aware of the RFQ, and some or all of those participants will attempt to front-run the trades by the winning responder to hedge or layoff the risk from the RFQ transaction.[278]

With respect to commenters' concerns about the potential winner's curse for illiquid swaps, the Commission clarifies that the minimum market participant requirement only applies to RFQ Systems for Required Transactions (*i.e.,* transactions involving swaps that are subject to the trade execution mandate of section 2(h)(8) of the CEA); such swaps generally should be more liquid than swaps that are not subject to the trade execution mandate because they are subject to the clearing mandate of section 2(h)(1) of the CEA and are made available to trade.[279] In this regard, the Commission notes that the interest rate swaps and credit default swaps that the Commission has determined are required to be cleared under CEA section 2(h)(1) (and are likely to be subject to the trade execution mandate of CEA section 2(h)(8)) are some of the most liquid swaps.[280] The Commission also notes that 77 swap dealers have registered with the Commission and nearly all of them make markets in such swaps.[281] Further, SEFs may offer RFQ systems without the three market participant requirement for Permitted Transactions (*i.e.,* transactions not involving swaps that are subject to the trade execution mandate of section 2(h)(8) of the CEA).

With respect to commenters' concerns about the potential winner's curse for large-sized trades, the Commission notes that block trades would not be subject to the execution methods for Required Transactions, including the three market participant requirement.[282] Therefore, excluding block trades from the execution methods for Required Transactions will address the potential risk of a winner's curse for such trades. The Commission also clarifies that SEFs are not required to display a requester's RFQ to market participants not participating in the RFQ.[283]

The Commission believes, in response to commenters' concerns about increased trading costs, that an increased number of participants receiving and responding to RFQs will tighten the bid-ask spreads, and result in lower transaction costs for market participants. The Commission notes that the relationship between spreads and the industry practice for the minimum number of RFQ recipients will vary across swaps and over time. Further, the Commission believes that as SEFs compete to grow their swaps trading volumes and deliver improved liquidity and lower transaction costs for their customers, the final rules in this release will provide them with the flexibility to experiment with different minimum numbers of recipients that is higher than the minimum articulated in this regulation. The final RFQ requirement will provide some protection to RFQ requesters that at least a minimum number of market participants will receive their RFQs, and thus increase the likelihood of receiving multiple, competitive quotes.

Finally, the Commission is deleting the additional definition of RFQ System in proposed § 37.9(a)(1)(ii)(B) because it is unnecessary.[284] A SEF that chooses to offer an RFQ System to facilitate Required Transactions is required to offer the RFQ System in conjunction with the SEF's Order Book, which would encompass the requirements in proposed § 37.9(a)(1)(ii)(B)(1) and

[275] The Commission notes that the affiliate prohibition in § 37.9(a)(3) applies during the interim RFQ-to-2 period.

[276] Registration and Regulation of Security-Based Swap Execution Facilities, 76 FR at 10953–54, 10971–74.

[277] *Id.*

[278] To the extent such risks potentially exist for Required Transactions, the reduction of the minimum market participant requirement from the proposed five will help mitigate this risk.

[279] Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284 (Dec. 13, 2012); Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available To Trade, 76 FR 77728 (proposed Dec. 14, 2011).

[280] Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284. The Commission notes that these swaps already went through a Commission determination process that included a five factor review, including a liquidity review. *Id.* ISDA, in its letter requesting interpretive relief regarding the obligation to provide a pre-trade mid-market mark, recognized that many of the swaps that the Commission has determined are required to be cleared under CEA section 2(h)(1) are ''highly-liquid, exhibit narrow bid-ask spreads and are widely quoted by SD/MSPs in the marketplace . . . '' ISDA Comment Letter at 2 (Nov. 30, 2012).

[281] The Commission recognizes that not all swap dealers will be active in all Required Transactions. The Commission also notes that of the 77 currently registered swap dealers, 35 swap dealers are not affiliated with any other swap dealers.

[282] *See* definition of block trade in § 43.2 of the Commission's regulations.

[283] Similarly, as noted below, SEFs are not required to display responses to an RFQ to anyone but the RFQ requester.

[284] The Commission is also deleting the catch-all RFQ definition in proposed § 37.9(a)(1)(ii)(C) as it is unnecessary. As discussed below, a SEF may petition the Commission under § 13.2 to amend § 37.9(a)(2) to include additional execution methods for Required Transactions. *See* discussion below under § 37.9(b)(1) and (b)(4)—Execution Methods for Required Transactions in the preamble.

(2)(i).[285] Additionally, a market participant is already required to send an RFQ to three market participants, which would also be the case if it is based upon an indicative quote as stated in proposed § 37.9(a)(1)(ii)(B)(2)(ii).[286]

(ii) ''Taken Into Account and Communicated'' Language in the RFQ System Definition

To address commenters' concern that the SEF NPRM was ambiguous with respect to the communication requirement, the Commission is modifying the definition of RFQ System in proposed § 37.9(a)(1)(ii)(A) to state that a SEF must provide the RFQ requester: (1) With any firm resting bid or offer in the same instrument from any of the SEF's Order Books at the same time as the first responsive bid or offer is received by the RFQ requester and (2) with the ability to execute against such firm resting bids or offers along with the responsive orders.[287] For example, a market participant transmits an RFQ to three market participants to buy a US $1 million notional 10-year fixed-to-floating US$ LIBOR interest rate swap. Any firm offer resting on the SEF's Order Book for a 10-year fixed-to-floating US$ LIBOR interest rate swap must be transmitted to the RFQ requester at the same time that the first responsive offer is received by the RFQ requester. The SEF must provide the RFQ requester with the ability to lift the firm offers and execute against any of the responsive orders. The final rule requires that SEFs communicate any resting bid or offer pertaining to the same instrument back to the RFQ requester, while the requester retains the discretion to decide whether to execute against the resting bids or offers or responsive orders.

Similar to the three market participant requirement, the Commission believes that the communication requirement promotes pre-trade price transparency and the trading of swaps on SEFs, as the RFQ requester will have the ability to access competitive quotes and quote providers will be able to have their quotes viewed by the RFQ requester. The Commission also clarifies that the resting bids and offers being communicated are not required to include indicative prices, to the extent that indicative prices are facilitated by the Order Book, and that SEFs are not required to inform the providers of the resting bids and offers on the Order Book of the RFQs.

(iii) RFQ Disclosure Issues

The Commission is clarifying that SEFs are not required to disclose responses to RFQs to all market participants. While the Commission understands that the RFQ functionality offered by some DCMs disseminates responses to RFQs to all market participants, it also notes that the less restrictive disclosure requirement for SEFs reflects the more flexible statutory provisions for SEFs as compared to DCMs. As noted in the SEF NPRM, a market participant may access fewer market participants than the entire market in certain situations.[288] In response to FSR's and Tradeweb's comments about the identity of the RFQ requester, the Commission clarifies that it is not imposing a specific requirement that the identity of the RFQ requester be disclosed or anonymous. The Commission is also not providing a specific requirement regarding the publishing of the ''request'' for a quote and notes that SEFs must comply with all reporting obligations as required in the Act and Commission's regulations. Finally, as noted in the SEF NPRM, acceptable RFQ Systems must permit RFQ requesters the option to make an RFQ visible to the entire market.[289]

(iv) Other RFQ Issues

As noted in the SEF NPRM, an acceptable RFQ System may allow for a transaction to be consummated if the original request to five potential counterparties receives fewer than five responses.[290] Although the Commission received no comment letters on this issue, some commenters in meetings asked the Commission to clarify the amount of time required to elapse before the RFQ requester can execute against the responsive quotes since fewer than five responses may be received. As such, the Commission is modifying the RFQ System definition in final § 37.9(a)(3) to state that a SEF must ensure that its trading protocols provide each of its market participants with equal priority in receiving requests for quotes and in transmitting and displaying for execution responsive orders. The SEF does not need to establish a minimum latency or specific period of time for the transmission of responsive orders, provided that the SEF's rulebook and prohibition on transmission and display priorities are appropriately designed to prevent market participants from seeking to avoid the three market participant requirement. A SEF's RFQ System and rulebook must account for this prohibition.

(c) § 37.9(a)(1)(iii)—Voice-Based System

Proposed § 37.9(a)(1)(iii) defined Voice-Based System as a trading system or platform in which a market participant executes or trades a Permitted Transaction using a telephonic line or other voice-based service.

(1) Commission Determination

The Commission did not receive any comments on the definition of Voice-Based System. However, the Commission is deleting the definition of Voice-Based System in proposed § 37.9(a)(1)(iii) given its decision below to allow SEFs to provide any execution method for Permitted Transactions.

(d) §§ 37.9(b)(1) and (b)(4)—Execution Methods for Required Transactions

Proposed § 37.9(b)(1) stated that Required Transactions may be executed on an Order Book or an RFQ System. As noted in the SEF NPRM, a SEF must offer the minimum trading functionality in proposed § 37.9(b)(2) (*i.e.,* a centralized electronic screen with the ability to post both firm and indicative quotes visible to all market participants).[291] Therefore, the SEF NPRM provided that Required Transactions must be executed through the SEF's minimum trading functionality, Order Book that meets the minimum trading functionality, or RFQ System that operates in conjunction with the minimum trading functionality.[292] The SEF NPRM made it clear that for Required Transactions, pre-trade transparency must be met.[293] Additionally, proposed § 37.9(b)(4) stated that the Commission may, in its discretion, require a SEF to offer a different trading method for a particular swap.

For Required Transactions, the SEF NPRM did not provide for a specific

[285] *See* discussion below under § 37.9(b)(1) and (b)(4)—Execution Methods for Required Transactions in the preamble. As noted above in the registration section, a SEF is not required to offer indicative quotes.

[286] *Id.*

[287] The Commission is renumbering proposed § 37.9(a)(1)(ii)(A) to § 37.9(a)(3). The Commission notes that after the RFQ responses and resting bids or offers on the Order Book are communicated to the RFQ requester, the RFQ requester may make a counter request or order as long as it is submitted to 3 market participants, whether it be to the same 3 market participants as the original RFQ request, 3 different market participants, or some combination of both.

[288] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1220 (stating that market participants may desire to interact with a limited number of market participants (*i.e.,* fewer than the entire market) and are permitted to do so under the proposal).

[289] *Id.*

[290] *Id.*

[291] *Id.* at 1219–20.

[292] *Id.*

[293] *Id.* at 1220.

execution method incorporating voice. The proposal stated that trading systems or platforms facilitating the execution of Required Transactions via voice exclusively are not multiple participant to multiple participant and do not provide for pre-trade price transparency.[294] However, the SEF NPRM noted that, while not acceptable as the sole method of execution for Required Transactions, voice would be appropriate under certain circumstances such as for a market participant to communicate an order to a SEF's employee or for a SEF's employee to assist a market participant in executing a trade.[295] The SEF NPRM stated that the core principles and the Commission's regulations would fully apply to such communications, including, but not limited to, transparency, audit trail, impartial access, and standards for RFQs.[296]

Although the SEF NPRM did not provide for a specific execution method incorporating voice for Required Transactions, it did contemplate the possibility of certain functionalities that operate in conjunction with the SEF's minimum trading functionality.[297] In this regard, the SEF NPRM stated that, in addition to the SEF's minimum trading functionality, a SEF may offer other functionalities that provide multiple participants with the ability to access multiple participants, but not necessarily the entire market, if the market participant so chooses.[298] The SEF NPRM noted that certain defined RFQ Systems or other systems that meet the SEF definition and comply with the core principles applicable to SEFs may qualify.[299]

(1) Summary of Comments

(i) Comments on Execution Methods for Required Transactions

Some commenters supported the use of order books for Required Transactions.[300] For example, Mallers et al. contended that a central order book market structure for all Required Transactions provides the most accurate valuation of the market, reduces systemic risks, and results in better prices.[301] Other commenters supported the use of order book structures and RFQ models for Required Transactions.[302] SDMA, for example, stated that all cleared swaps should be executed through a central limit order book or an RFQ System.[303]

Nodal recommended that the Commission explicitly include blind auctions as an acceptable method of execution for Required Transactions.[304] Nodal commented [305] that pre-trade transparency for Required Transactions should not apply to blind auctions.[306] Nodal articulated its view that the twin goals of pre-trade transparency and promoting on-exchange trading of swaps on SEFs should be balanced against each other, instead of being read in conjunction with one another.[307]

(ii) Comments on ''Through Any Means of Interstate Commerce'' Language in the SEF Definition

Given the phrase ''through any means of interstate commerce'' in the CEA section 1a(50) SEF definition, many commenters supported the use of multiple methods of execution, such as voice, for Required Transactions on a SEF.[308] JP Morgan, for example, stated that the SEF NPRM assumes that SEFs will always be electronic platforms, which it contended, appears to directly contradict the phrase ''through any means of interstate commerce'' in the SEF definition.[309] According to WMBAA, the phrase ''through any means of interstate commerce'' in the SEF definition supports multiple methods of execution for Required Transactions on a SEF, including a combination of voice and electronic systems.[310] In this regard, WMBAA stated that the Commission should allow any execution method for Required Transactions as long as it meets the multiple participant to multiple participant requirement in the SEF definition and the other statutory requirements for SEFs.[311]

Furthermore, some members of the industry requested that the Commission clarify in the final rules whether ''work-up'' sessions would be considered an acceptable method of execution for Required Transactions.[312] GFI explained one example of a work-up session where, after a trade is executed on an order book, one of the counterparties to the trade may wish to buy or sell additional quantities of the same instrument at the previously executed price.[313] In this case, the parties initiate a work-up session to execute such additional quantity.[314] After the initial counterparty exercises its right of first refusal, other market participants may also join in the trade at the previously executed price.[315]

(iii) Comments on Liquidity-Based Execution Mandates

Several commenters stated that the Dodd-Frank Act does not require certain methods of trading, such as an order book, based upon the amount of trading activity in a particular instrument.[316] MarketAxess contended that nothing in the Dodd-Frank Act supports the requirement in proposed § 37.9(b)(4) that methods of execution on a SEF should be based upon characteristics of a particular swap.[317] MarketAxess stated that such a requirement would create uncertainty regarding a SEF's operational structure [318] and, according to Tradeweb, would likely decrease the trading activity and liquidity of those swaps subject to the requirement.[319] On the other hand, AFR contended that mandatorily cleared swaps meeting a certain level of trading activity should

[294] *Id.* at 1221.

[295] *Id.*

[296] *Id.*

[297] *Id.* at 1220.

[298] *Id.*

[299] *Id.*

[300] Mallers et al. Comment Letter at 3 (Mar. 21, 2011); Better Markets Comment Letter at 5–6 (Mar. 8, 2011); AFR Comment Letter at 4 (Mar. 8, 2011). Similarly, SDMA supports the sole use of order books for certain products. SDMA Comment Letter at 2 (Apr. 30, 2013).

[301] Mallers et al. Comment Letter at 3 (Mar. 21, 2011).

[302] Tradeweb Comment Letter at 4 (Jun. 3, 2011); SDMA Comment Letter at 2 (Mar. 8, 2011); Deutsche Comment Letter at 3 (Mar. 8, 2011); MFA Comment Letter at 5–6 (Mar. 8, 2011); MetLife Comment Letter at 2 (Mar. 8, 2011); Barclays Comment Letter at 4 (Mar. 8, 2011); Bloomberg Comment Letter at 2 (Mar. 8, 2011); BlackRock Comment Letter at 4–5 (Mar. 8, 2011).

[303] SDMA Comment Letter at 2 (Mar. 8, 2011).

[304] Nodal Comment Letter at 3 (Mar. 8, 2011).

[305] *Id.* at 2–3; Nodal Comment Letter at 3 (Jun. 3, 2011).

[306] *See* discussion above under § 37.3—Requirements for Registration in the preamble for a description of Nodal's blind auction.

[307] Nodal Comment Letter at 2 (Mar. 8, 2011).

[308] Representative Scott Garrett Comment Letter at 1 (Feb. 27, 2013); WMBAA Comment Letter at 2–3 (Jul. 18, 2011); WMBAA Comment Letter at 6–8 (Jun. 3, 2011); Rosen et al. Comment Letter at 15 (Apr. 5, 2011); JP Morgan Comment Letter at 6 (Mar. 8, 2011); WMBAA Comment Letter at 4–6 (Mar. 8, 2011); ICAP Comment Letter at 3, 4–5 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 4–5 (Mar. 8, 2011); CME Comment Letter at 7–8 (Mar. 8, 2011).

[309] JP Morgan Comment Letter at 6 (Mar. 8, 2011).

[310] WMBAA Comment Letter at 2 (Jul. 18, 2011).

[311] WMBAA Comment Letter at 5 (Mar. 8, 2011).

[312] Meetings with ICAP dated Mar. 21, 2012, Mar. 9, 2012, Feb. 16, 2012, Feb. 14, 2012; Meetings with GFI dated Mar. 14, 2012, Feb. 16, 2012; Meeting with WMBAA dated Feb. 16, 2012; ICAP Comment Letter at 4 (Mar. 8, 2011).

[313] Meetings with GFI dated Mar. 14, 2012, Feb. 16, 2012.

[314] *Id.*

[315] *Id.*

[316] Rosen et al. Comment Letter at 10 (Apr. 5, 2011); Barclays Comment Letter at 11 (Mar. 8, 2011); ISDA/SFMA Comment Letter at 5 (Mar. 8, 2011); Tradeweb Comment Letter at 6 (Mar. 8, 2011); MarketAxess Comment Letter at 33 (Mar. 8, 2011).

[317] MarketAxess Comment Letter at 33 (Mar. 8, 2011).

[318] *Id.*

[319] Tradeweb Comment Letter at 6 (Mar. 8, 2011).

only be traded through order book systems.[320]

(2) Commission Determination

(i) Execution Methods for Required Transactions

The Commission is revising proposed § 37.9(b)(1) as final § 37.9(a)(2) to clarify that each Required Transaction that is not a block trade as defined in § 43.2 of the Commission's regulations shall be executed on a SEF in accordance with one of the following methods of execution: (1) An Order Book as defined in § 37.3(a)(3) or (2) an RFQ System, as defined in § 37.9(a)(3), that operates in conjunction with an Order Book.[321] As explained in this final rulemaking, the Commission believes that these execution methods are consistent with the SEF definition and promote the goals provided in section 733 of the Dodd-Frank Act. The Commission notes, however, that a SEF may petition the Commission under § 13.2 of the Commission's regulations to amend § 37.9(a)(2) to include additional execution methods.[322] This ability of SEFs to petition the Commission replaces similar provisions in the SEF NPRM that were included in the Order Book and RFQ System definitions and provides SEFs with additional flexibility as existing execution methods evolve or new methods are developed.[323]

In keeping with the statutory instruction that the Dodd-Frank Act goal of SEFs is to both ''promote the trading of swaps on swap execution facilities *and* to promote pre-trade price transparency in the swaps market'' [324] (emphasis added), the Commission is reaffirming its view articulated in the SEF NPRM that these goals can be achieved for Required Transactions by providing for the execution of such transactions on trading systems or platforms that allow market participants to post bids and offers or accept bids and offers that are transparent to the entire market.[325] Promoting trading on a SEF should not result in eliminating the need to provide some degree of pre-trade transparency. Therefore, even when recognizing the importance of promoting the trading of swaps on SEFs, some degree of pre-trade transparency must be met for Required Transactions.[326] As a result, the Commission is declining to accept Nodal's recommendation to explicitly include blind auctions as an acceptable method of execution for Required Transactions under this rulemaking.[327]

(ii) ''Through Any Means of Interstate Commerce'' Language in the SEF Definition

In consideration of the comments regarding possible limitations on how the Commission interprets the phrase ''through any means of interstate commerce'' in the SEF definition, the Commission is revising the final rule text to clarify that in providing either one of the execution methods for Required Transactions in § 37.9(a)(2)(i)(A) or (B) of this final rulemaking (*i.e.,* Order Book or RFQ System that operates in conjunction with an Order Book), a SEF may for purposes of execution and communication use ''any means of interstate commerce,'' including, but not limited to, the mail, internet, email, and telephone, provided that the chosen execution method satisfies the requirements provided in § 37.3(a)(3) for Order Books or in § 37.9(a)(3) for Request for Quote Systems.[328] With this use of the phrase ''any means of interstate commerce,'' the Commission is not limiting the means of execution or communication that a SEF may utilize in implementing the required execution methods for Required Transactions in § 37.9(a)(2)(i)(A) or (B), provided that the chosen execution method satisfies the requirements provided in § 37.3(a)(3) for Order Books or in § 37.9(a)(3) for Request for Quote Systems. In this regard, the Commission notes that as the swaps market evolves, SEFs may develop new means of execution or communication for use in implementing the required execution methods. Although the Commission notes that its regulations are technology neutral given the ''any means of interstate commerce'' language, it also emphasizes that, regardless of the means of interstate commerce utilized, a SEF must comply with the Act and the Commission's regulations, including the § 37.9 execution method, impartial access, audit trail, and surveillance requirements. Furthermore, all transactions on the SEF must comply with the SEF's rules.

For example, to meet the RFQ System definition for Required Transactions, a SEF must satisfy all of the following functions, and in doing so, all or some of these functions may be performed over the telephone: (1) Receiving a request from a market participant to execute a trade, (2) submitting that request to at least 3 market participants in accordance with the RFQ System definition, (3) communicating the RFQ responses and resting bids or offers on the Order Book to the RFQ requester, and (4) executing the transaction. The Commission notes that regardless of the means of interstate commerce utilized, including the telephone, the SEF must submit the transaction into its system or platform so that the SEF is able to comply with the Act and the Commission's regulations, including audit trail, clearing, and reporting requirements. Given the different means of interstate commerce that a SEF may utilize for purposes of communication and execution in implementing the execution methods for Required Transactions in § 37.9(a)(2)(i)(A) or (B), the Commission notes that it must evaluate each system or platform to determine whether it meets the requirements of § 37.9(a)(2).

The Commission, in order to provide further clarity regarding the means of

[320] AFR Comment Letter at 5–6 (Mar. 8, 2011).

[321] The Commission is renumbering proposed § 37.9(b)(1) to § 37.9(a)(2).

[322] *See* 17 CFR 13.2 for further details. This will allow the Commission to consider if a broader model for executing on SEFs, consistent with the suggestion in Commissioner Sommers' dissent, would be appropriate on a case-by-case basis, in conformance with the CEA and the Commission's regulations. Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1259.

[323] *See* proposed § 37.9(a)(1)(i)(D) and § 37.9(a)(1)(ii)(C).

[324] CEA section 5h(e); 7 U.S.C. 7b–3(e) (emphasis added).

[325] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1220.

[326] The Commission notes below that pre-trade transparency can help promote the trading of swaps on SEFs. *See* the Introduction section of the Cost Benefit Considerations section for further details.

[327] The Commission further notes that this determination does not accept Nodal's assertion that ''this type of blind auction trading platform is permissible on DCMs.'' *See* Nodal Comment Letter at 3 (Mar. 8, 2011).

[328] The Commission interprets the phrase ''through any means of interstate commerce'' in CEA § 1a(50) to allow a SEF to utilize a variety of means of execution or communication, including, but not limited to, telephones, internet communications, and electronic transmissions. *Overstreet* v. *North Shore Corp.,* 318 U.S. 125, 129–30 (1943) (in general, ''instrument'' of interstate commerce is to be interpreted broadly); *United States* v. *Barlow,* 568 F.3d 215, 220 (5th Cir. 2009) (''It is beyond debate that internet and email are facilities or means of interstate commerce.''); *United States* v. *Weathers,* 169 F.3d 336, 341 (6th Cir. 2000) (''It is generally well established that telephones, even when used intrastate, constitute instrumentalities of interstate commerce.''); *SEC* v. *Solucorp Indus.,* 274 F.Supp.2d 379, 419 (S.D.N.Y. 2003) (defendants ''used the means and instrumentalities of interstate commerce, including, among other things, the mails and wires, including the Internet, news wires and telephone lines'' to commit securities fraud). While the Commission's interpretation of ''any means of interstate commerce'' allows a SEF to utilize a wide variety of execution or communication means, all SEFs, regardless of the execution or communication means they employ, must comply with all of the substantive SEF requirements, including, but not limited to, requirements that pertain to execution. For example, a SEF using the telephone to execute Required Transactions must satisfy the execution requirements set forth in § 37.9(a)(2)(i)(A) or (B).

interstate commerce that a SEF may utilize in order to satisfy the execution methods for Required Transactions in § 37.9(a)(2), is providing the following example, which the Commission intends to be instructive, though not comprehensive. The Commission emphasizes that the following example should not be construed as bright-line rules:

• *RFQ System example*—a market participant calls an employee of the SEF with a request for a quote to buy or sell a swap subject to the trade execution requirement in CEA section 2(h)(8). The SEF employee disseminates the request for a quote to no less than three market participants on the SEF (directly or through other SEF employees or both) by telephone, email, instant messaging, squawk box, some other means of communication, or some combination thereof. Based on the responses of these market participants, the SEF employee communicates the responsive bids or offers and the resting bids or offers on the SEF's Order Book [329] to the RFQ requester by one of the above referenced means of communication. The RFQ requester communicates acceptance of one of the bids or offers to the SEF employee by one of the above referenced means of communication. The SEF employee informs those two market participants by one of the above referenced means of communication that the swap transaction is executed. The SEF employee enters the transaction into the SEF's system or platform so that the SEF is able to comply with the Act and the Commission's regulations, including audit trail, clearing, and reporting requirements. The Commission views this example as demonstrating acceptable uses of different means of interstate commerce while meeting the RFQ System method of execution in § 37.9(a)(2).

In response to commenters, the Commission will generally allow work-up sessions if such trading protocols are utilized after a transaction is executed on the SEF's Order Book or RFQ System.[330] The Commission, in order to provide further clarity regarding work-up sessions, is providing the following two examples, which the Commission intends to be instructive, though not comprehensive. The Commission notes that the following examples are two types of work-up session that may be acceptable:

• After two counterparties execute a transaction on a SEF's Order Book, the SEF may establish a short time period for a work-up session. The SEF must open up the work-up session to all market participants so that they may trade an additional quantity of the same instrument at the same price previously executed by the initial counterparties. In addition, any resting bids or offers on the SEF's Order Book equal to or better than the work-up session price must be included in the work-up session.[331] The SEF may provide the initial counterparties execution priority in the work-up session.

• After two counterparties execute a transaction on a SEF's RFQ System, the SEF may establish a short time period for a work-up session. The SEF must open up the work-up session to all market participants so that they may trade an additional quantity of the same instrument at the same price previously executed by the initial counterparties. In addition, any resting bids or offers on the SEF's Order Book equal to or better than the work-up session price must be included in the work-up session.[332] The SEF may provide the initial counterparties execution priority in the work-up session.

The SEF must have rules governing the operation of any work-up mechanism, including the length of the session, any priorities accorded the counterparties to the transaction that triggered the work-up session, and the handling of any orders submitted during the session that are not executed. A SEF must also have systems or procedures in place to ensure that a work-up session is accessible by, and work-up session information (*e.g.,* the work-up session's trade price and ongoing volume) is available to, all market participants. The Commission believes that, if properly conducted, work-up sessions may enhance price discovery and foster liquidity.

The Commission believes that a work-up session would be a trading protocol and, thus, constitute a rule under § 40.1 of the Commission's regulations. Any such rule or amendment thereto must be codified and included in a SEF's rulebook in accordance with the rule review or approval procedures of part 40 of the Commission's regulations or during the SEF application process. Additionally, all transactions executed through a work-up session must comply with the SEF's rules. The Commission staff will provide informal guidance to SEF applicants on whether such work-up sessions are in compliance with the Act and the Commission's regulations.

(iii) Liquidity-Based Execution Mandates

The Commission is deleting proposed § 37.9(b)(4). Given the incipience of the regulated swaps market, at this time, the Commission is not imposing a requirement for specific methods of execution for Required Transactions based upon the amount of trading activity in such transactions.

(e) § 37.9(b)(3)—Time Delay Requirement

Proposed § 37.9(b)(3) stated that SEFs must require that traders who have the ability to execute against a customer's order or to execute two customers against each other be subject to a 15-second timing delay between the entry of the two orders, such that one side of the potential transaction is disclosed and made available to other market participants before the second side of the potential transaction (whether for the trader's own account or for a second customer) is submitted for execution. The SEF NPRM stated that this requirement will provide other market participants the opportunity to join in the trade.[333]

(1) Summary of Comments

SDMA and Mallers et al. supported the proposed 15-second delay requirement as necessary to increase price transparency and market integrity.[334] Mallers et al. stated that the 15-second rule provides a meaningful opportunity for other SEF participants to execute against the individual sides of the cross transaction, and that such crossing delays have been successfully

[329] *See* final § 37.9(a)(3) and the preamble for details regarding the communication of the resting bids or offers on the Order Book to the RFQ requester.

[330] The Commission notes that a work-up transaction does not qualify as a block trade even if an individual market participant's transactions as part of the work-up transaction has a notional or principal amount at or above the appropriate minimum block size applicable to such swap. The Commission believes that the concepts of work-up transactions and block trades are mutually exclusive. Block trades are executed pursuant to a SEF's rules, but negotiated and executed off of the SEF's trading platform. A work-up transaction is conducted on a SEF's trading platform. *See* block trade definition in § 43.2 of the Commission's regulations; *see also* Rules Prohibiting the Aggregation of Orders To Satisfy Minimum Block Sizes or Cap Size Requirements, and Establishing Eligibility Requirements for Parties to Block Trades, 77 FR 38229 (proposed Jun. 27, 2012). Accordingly, each individual transaction that is part of the work-up transaction must be reported as it occurs pursuant to the SEF's reporting obligations.

[331] These resting bids or offers would be included at the work-up session price. The Commission notes that ''equal to or better than the work-up session price'' means any resting bids that are equal to or greater than the work-up price or any resting offers that are equal to or less than the work-up price.

[332] *Id.*

[333] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1220.

[334] Mallers et al. Comment Letter at 5 (Mar. 21, 2011); SDMA Comment Letter at 4 (Mar. 8, 2011).

implemented in the futures markets.[335] However, several commenters objected to the 15-second delay requirement.[336] Some commenters stated that there is no statutory authority for the timing delay requirement.[337] Commenters also stated that the timing delay will increase prices and expose traders to market risk.[338] Freddie Mac, for example, stated that liquidity providers may increase prices to account for anticipated market movements.[339] Some commenters also noted that the timing delay requirement may lead to unwillingness on the part of dealers to provide liquidity because they will not know whether they will ultimately serve as their customers' principal counterparty or merely as their executing agent.[340]

ABC/CIEBA commented that the proposed rule is unclear as to what limitations, if any, apply to pre-execution communications.[341] ABC/CIEBA recommended that the Commission revise the proposed rule to permit pre-execution communications between counterparties as long as parties comply with the requirement to execute the trade on the SEF.[342]

Several commenters recommended that the Commission provide flexibility with respect to the time period of the timing delay.[343] Goldman recommended that the Commission, in consultation with market participants and SEFs, set the delay at 1–3 seconds depending on the complexity of the product.[344] FXall stated that each SEF should be able to decide upon the appropriate delay, taking into account the particular characteristics of that market.[345]

Several commenters requested clarification that the 15-second delay requirement only applies to SEFs that operate an Order Book and not an RFQ System.[346] In this regard, SIFMA AMG commented that the timing delay should not apply to an RFQ System because firm quotes transmitted in response to an RFQ would already be exposed to the market.[347] However, Better Markets contended that the requirement should apply to responsive orders in RFQ systems.[348]

Finally, some commenters requested that the Commission clarify the term ''trader'' in the proposed rule.[349] WMBAA stated that it is not clear whether the term ''trader'' refers to a counterparty, broker, or another entity.[350] SIFMA AMG noted that the timing delay should not apply to asset managers executing trades on behalf of their clients.[351]

(2) Commission Determination

The Commission is adopting the time delay requirement for Required Transactions in proposed § 37.9(b)(3) as final § 37.9(b)(1), subject to the modifications described below.[352] The Commission clarifies that the purpose of the time delay requirement is to ensure a minimum level of pre-trade price transparency for Required Transactions on a SEF's Order Book by allowing other market participants the opportunity to join or participate in a trade where a broker or dealer engages in some form of pre-arrangement or pre-negotiation of a transaction and then attempts, through the SEF's Order Book, to either internalize the order by executing opposite a customer or cross two customer orders.[353] In addition to ensuring a minimum level of pre-trade price transparency, the Commission believes that the time delay requirement will incentivize competition between market participants.[354] The Commission is revising proposed § 37.9(b)(3) to clarify the purpose of the time delay requirement as described above.

In response to ABC/CEIBA's comment about any limitations on pre-execution communications, the Commission notes that a SEF that allows pre-execution communications must adopt rules regarding such communications that have been certified to or approved by the Commission.[355] The Commission also notes that orders that result from pre-execution communications would be subject to the time delay requirement in the final rule text. The Commission notes that pre-execution communications are communications between market participants for the purpose of discerning interest in the execution of a transaction prior to the exposure of the market participants' orders (*i.e.,* price, size, and other terms) to the market. Any communication that involves discussion of the size, side of market, or price of an order, or a potentially forthcoming order, constitutes a pre-execution communication.

The Commission acknowledges commenters' concerns that the time delay requirement should take into account a product's characteristics. Therefore, the Commission believes that the 15-second time delay requirement should serve as a default time delay. The Commission is revising the rule to allow SEFs to adjust the time period of the delay, based upon liquidity or other product-specific considerations as stated in final § 37.9(b)(2). The Commission notes that such adjustments and accompanying justifications, as well as any establishment of a 15-second time delay requirement at a SEF, must be submitted

[335] Mallers et al. Comment Letter at 5 (Mar. 21, 2011).

[336] WMBAA Comment Letter at 3 (Jul. 18, 2011); FHLB Comment Letter at 13 (Jun. 3, 2011); WMBAA Comment Letter at 9 (Jun. 3, 2011); Rosen et al. Comment Letter at 15–16 (Apr. 5, 2011); BlackRock Comment Letter at 6 (Mar. 8, 2011); Global FX Comment Letter at 3–4 (Mar. 8, 2011); JP Morgan Comment Letter at 7 (Mar. 8, 2011); Evolution Comment Letter at 6 (Mar. 8, 2011); WMBAA Comment Letter at 7 (Mar. 8, 2011); SIFMA AMG Comment Letter at 7 (Mar. 8, 2011); TruMarx Comment Letter at 7 (Mar. 8, 2011); Deutsche Comment Letter at 5 (Mar. 8, 2011); FCC Comment Letter at 2 (Mar. 8, 2011); Phoenix Comment Letter at 2–3 (Mar. 7, 2011).

[337] WMBAA Comment Letter at 3 (Jul. 18, 2011); WMBAA Comment Letter at 9 (Jun. 3, 2011); WMBAA Comment Letter at 7 (Mar. 8, 2011); SIFMA AMG Comment Letter at 8 (Mar. 8, 2011); Deutsche Comment Letter at 5 (Mar. 8, 2011); MFA Comment Letter at 8 (Mar. 8, 2011).

[338] FHLB Comment Letter at 13 (Jun. 3, 2011); BlackRock Comment Letter at 6 (Mar. 8, 2011); WMBAA Comment Letter at 7–8 (Mar. 8, 2011); SIFMA AMG Comment Letter at 7 (Mar. 8, 2011); FCC Comment Letter at 2 (Mar. 8, 2011).

[339] Freddie Mac Comment Letter at 3 (Mar. 8, 2011).

[340] WMBAA Comment Letter at 9 (Jun. 3, 2011); BlackRock Comment Letter at 6 (Mar. 8, 2011); MFA Comment Letter at 9 (Mar. 8, 2011); Phoenix Comment Letter at 3 (Mar. 7, 2011).

[341] ABC/CIEBA Comment Letter at 9 (Mar. 8, 2011).

[342] *Id.* at 10.

[343] Reuters Comment Letter at 5 (Dec. 12, 2011); Goldman Comment Letter at 3 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 6 (Mar. 8, 2011); FXall Comment Letter at 10 (Mar. 8, 2011); MFA Comment Letter at 8–9 (Mar. 8, 2011).

[344] Goldman Comment Letter at 3 (Mar. 8, 2011).

[345] FXall Comment Letter at 10 (Mar. 8, 2011).

[346] Reuters Comment Letter at 5 (Dec. 12, 2011); Rosen et al. Comment Letter at 15–16 (Apr. 5, 2011); Goldman Comment Letter at 3 (Mar. 8, 2011); Global FX Comment Letter at 3–4 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 6 (Mar. 8, 2011); Barclays Comment Letter at 9 (Mar. 8, 2011); FSR Comment Letter at 7 (Mar. 8, 2011).

[347] SIFMA AMG Comment Letter at 7 (Mar. 8, 2011).

[348] Better Markets Comment Letter at 9 (Mar. 8, 2011).

[349] WMBAA Comment Letter at 7 (Mar. 8, 2011); SIFMA AMG Comment Letter at 8 (Mar. 8, 2011); FSR Comment Letter at 6–7 (Mar. 8, 2011).

[350] WMBAA Comment Letter at 7 (Mar. 8, 2011).

[351] SIFMA AMG Comment Letter at 8 (Mar. 8, 2011).

[352] The Commission is renumbering proposed § 37.9(b)(3) to § 37.9(b)(1).

[353] The Commission clarifies that the exposure of ''orders'' subject to the 15 second time delay into the Order Book in final § 37.9(b)(1) means exposure of the price, size, and other terms of the orders.

[354] The Commission also notes that the time delay requirement is similar to certain timing delays for cross trades applicable to futures transactions executed on DCMs where one side of a potential transaction (*i.e.,* price, size, and other terms) is exposed to the market for a certain period of time before the second side of the potential transaction is submitted for execution. *See, e.g.,* NYMEX rule 533, which provides for a 5-second delay for futures and a 15-second delay for options, *available at http://www.cmegroup.com/rulebook/NYMEX/1/5.pdf.*

[355] *See, e.g.,* CME Rule 539.C Pre-Execution Communications Regarding Globex Trades, *available at http://www.cmegroup.com/rulebook/CME/I/5/39.html* (setting forth rules regarding pre-execution communications in the DCM context).

for the Commission's review pursuant to the procedures described in part 40 of the Commission's regulations.

The Commission is clarifying that the 15-second time delay requirement is not applicable to trades that are executed through an RFQ System. As noted above, the purpose of the time delay requirement is to ensure a minimum level of pre-trade price transparency for Required Transactions on a SEF's Order Book. The Commission notes that an RFQ System already provides pre-trade price transparency to the RFQ requester and that a dealer attempting to cross or internalize trades through an RFQ System would be subject to such pre-trade price transparency. As such, the Commission is revising the rule text to clarify that the 15-second time delay requirement only applies to a SEF's Order Book.

Finally, the Commission is replacing the term ''traders'' in proposed § 37.9(b)(3) with the phrase ''brokers or dealers.'' The Commission intended the provision to apply only to brokers or dealers attempting to internalize or cross trades through a SEF's Order Book and acknowledges that the proposal was unclear with respect to the meaning of the term ''traders.'' [356] In response to SIFMA AMG's concern, the Commission does not have sufficient information at this time to make a determination whether asset managers executing trades on behalf of their clients would be subject to the time delay requirement. The Commission staff will work with SEFs to determine if the time delay requirement applies to asset managers or other market participants.

(f) § 37.9(c)—Execution Methods for Permitted Transactions

Proposed § 37.9(c)(1) provided that Permitted Transactions may be executed by an Order Book, RFQ System, a Voice-Based System, or any such other system for trading as may be permitted by the Commission. In addition, proposed § 37.9(c)(2) stated that a registered SEF may submit a request to the Commission to offer trading services to facilitate Permitted Transactions, and that when doing so, the SEF must certify its compliance with § 37.11 (Identification of non-cleared swaps or swaps not made available to trade). As noted in the SEF NPRM, market participants would not be required to utilize the minimum trading functionality in § 37.9(b) to execute Permitted Transactions.[357]

(1) Summary of Comments

SIFMA AMG stated that the Commission should not limit the execution modalities available to market participants who execute Permitted Transactions on a SEF.[358] SIFMA AMG also stated that no statutory basis exists for regulatory execution requirements for Permitted Transactions.[359] Additionally, several commenters stated that the Commission should not prescribe execution methods for swaps executed off a SEF.[360]

(2) Commission Determination

The Commission is revising proposed § 37.9(c)(1) to state that a SEF may offer any method of execution for each Permitted Transaction.[361] The Commission agrees that it should not limit the execution methods that are available to market participants or require market participants to utilize certain execution methods for Permitted Transactions, which are not required to be executed on a SEF. The Commission clarifies, however, that, in accordance with the minimum trading functionality requirement in final § 37.3(a)(2), a SEF must offer an Order Book for Permitted Transactions. The Commission further clarifies that a market participant has the option to utilize the Order Book or any other method of execution that a SEF provides for Permitted Transactions. Additionally, the Commission clarifies that this section only applies to Permitted Transactions listed or traded on a SEF, and that this section does not apply to transactions not listed or traded on a SEF.[362] Finally, the Commission is deleting proposed § 37.9(c)(2) given the deletion to proposed § 37.11 as described below.

(g) Future Review

Consistent with the Commission's practice of reviewing and monitoring its regulatory programs, the Commission directs the Commission staff to conduct a general review of SEFs' experience with the execution methods prescribed in Commission regulations 37.3(a)(2) (minimum trading functionality), 37.3(a)(3) (Order Book), and 37.9 (execution methods for Required and Permitted Transactions and time delay requirement for Required Transactions). If appropriate, the review should include any Commission staff recommendations regarding possible modifications to Commission regulations 37.3(a)(2), 37.3(a)(3), or 37.9 that are consistent with the Act (*e.g.,* a recommendation to modify the minimum number of RFQ requestees required by the RFQ definition, including whether a trading protocol in which the minimum number of RFQ requestees differed by swap class or another category would be appropriate). The Commission staff's review should be completed within four years of the effective date of these final SEF regulations, within which time the Commission believes that staff will have gained sufficient experience and will have three years' worth of data with respect to the execution methods.

10. § 37.10—Swaps Made Available for Trading

The Dodd-Frank Act added section 2(h)(8) of the CEA to require that transactions involving swaps subject to the clearing requirement must be executed either on a DCM or SEF, unless no DCM or SEF makes the swap ''available to trade'' or the related transaction is subject to the clearing exception under section 2(h)(7) (*i.e.,* the end-user exception).[363] In the SEF NPRM, the Commission proposed to require SEFs to conduct annual assessments and to submit reports to the Commission regarding whether it has made a swap available to trade.[364] In the DCM notice of proposed rulemaking (''NPRM''),[365] the Commission did not establish any obligation for DCMs under section 2(h)(8) of the Act. After reviewing the SEF NPRM comments regarding the proposed available to trade process, and in light of the fact that the DCM NPRM did not establish any obligation for DCMs under section

[356] For example, a futures commission merchant or other market participant acting in the role of a broker who has the ability to execute against its customer's order or to execute two of its customers' orders against each other would be subject to the time delay requirement.

[357] The SEF NPRM stated that pre-trade price transparency is not required for Permitted Transactions. Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1220.

[358] SIFMA AMG Comment Letter at 10 (Mar. 8, 2011).

[359] *Id.*

[360] Rosen et al. Comment Letter at 19–20 (Apr. 5, 2011); Deutsche Comment Letter at 6 (Mar. 8, 2011); FSR Comment Letter at 8 (Mar. 8, 2011); Global FX Comment Letter at 3 (Mar. 8, 2011); Barclays Comment Letter at 10 (Mar. 8, 2011); ABC/CIEBA Comment Letter at 7 (Mar. 8, 2011).

[361] The Commission is renumbering proposed § 37.9(c)(1) to § 37.9(c)(2).

[362] This section does not apply to those entities that do not have to register as a SEF. As noted above in the registration section, swap transactions that are not subject to the CEA section 2(h)(8) trade execution requirement would not have to be executed on a registered SEF.

[363] CEA sections 2(h)(7) and 2(h)(8); 7 U.S.C. 2(h)(7) and 2(h)(8).

[364] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1241.

[365] Core Principles and Other Requirements for Designated Contract Markets, 75 FR 80572 (proposed Dec. 22, 2010).

2(h)(8) of the CEA, the Commission determined to separately issue a further notice of proposed rulemaking to establish a process for a DCM or SEF to make a swap available to trade under section 2(h)(8) of the Act.[366] The Commission may implement the available to trade provision in a separate rulemaking.

11. § 37.11—Identification of Non-Cleared Swaps or Swaps Not Made Available to Trade

Proposed § 37.11 required a SEF that chooses to offer swaps: (1) Not subject to the clearing mandate under section 2(h) of the Act, (2) that are subject to the end-user exception from the clearing mandate under section 2(h)(7) of the Act, or (3) that have not been made available to trade pursuant to § 37.10 of the Commission's regulations to clearly identify to market participants that the particular swap is to be executed bilaterally between the parties pursuant to one of the applicable exemptions from execution and clearing.

(a) Summary of Comments

MarketAxess expressed concern that proposed § 37.11 could be read to require that all transactions described in the provision must only be executed bilaterally, and not on a SEF.[367] To address this concern, MarketAxess requested the Commission clarify that § 37.11 requires a SEF choosing to facilitate Permitted Transactions to identify to market participants why the particular swap is a Permitted Transaction (*i.e.,* falls under one of the three categories described in the provision).[368]

(b) Commission Determination

The Commission believes that proposed § 37.11 is unnecessary and therefore is deleting it in its entirety. Market participants should have sufficient notice of the swaps subject to the clearing and trade execution requirements. Therefore, in conjunction with the definitions contained in part 37 as adopted, market participants will know which swaps are Required Transactions and which swaps are Permitted Transactions, and thus the execution methods deemed acceptable for each.

C. Regulations, Guidance, and Acceptable Practices for Compliance With the Core Principles

As noted above, this final part 37 rulemaking establishes the relevant regulations, guidance, and acceptable practices applicable to the 15 core principles that SEFs are required to comply with initially and on a continuing basis as part of the conditions of registration. The regulations applicable to the 15 core principles are set out in separate subparts B through P to part 37, which includes a codification within each subpart of the statutory language of the respective core principle. The guidance and acceptable practices are set out in appendix B to part 37.

1. Subpart B—Core Principle 1 (Compliance With Core Principles)

Core Principle 1 requires a SEF to comply with the core principles set forth in CEA section 5h(f) and any requirement that the Commission may impose by rule or regulation pursuant to CEA section 8a(5) as a condition of obtaining and maintaining registration as a SEF.[369] Additionally, Core Principle 1 provides a SEF with reasonable discretion in establishing the manner in which it complies with the core principles unless the Commission determines otherwise by rule or regulation.[370] In the SEF NPRM, the Commission proposed to codify the statutory text of Core Principle 1 in proposed § 37.100, and adopts that rule as proposed.

2. Subpart C—Core Principle 2 (Compliance With Rules)

(a) § 37.200—Core Principle 2—Compliance With Rules

Core Principle 2 requires a SEF to establish and enforce compliance with its rules, including the terms and conditions of the swaps traded or processed on or through the SEF and any limitations on access to the SEF.[371] It also requires a SEF to establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules.[372] A SEF must also establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades.[373] Finally, Core Principle 2 requires a SEF to provide by its rules that when a swap dealer or major swap participant enters into or facilitates a swap that is subject to the mandatory clearing requirement of section 2(h) of the Act, the swap dealer or major swap participant is responsible for complying with the mandatory trading requirement under section 2(h)(8) of the Act.[374] In the SEF NPRM, the Commission proposed to codify the statutory text of Core Principle 2 in proposed § 37.200, and adopts that rule as proposed.

(1) Summary of Comments

Some commenters expressed general concerns regarding the proposed rules under Core Principle 2.[375] FXall and State Street believed that the proposed rules under Core Principle 2 would require a SEF to act as a de facto self-regulatory organization (''SRO'') and impose burdens that would impede the growth of the swaps market.[376] These commenters also noted that the proposed requirements were too similar to the regulations applicable to DCMs, which would place SEFs at a disadvantage compared to DCMs given that SEFs will operate in a competitive environment while DCMs operate in a monopolistic environment.[377] ICE urged the Commission to limit its prescriptive rulemaking to issues that it believes require specific, binding rules.[378] In this regard, several commenters recommended that the Commission adopt greater flexibility in implementing Core Principle 2.[379]

Some commenters recommended limiting the scope of the proposed rules under Core Principle 2.[380] Specifically, WMBAA argued that SEFs may not be able to satisfy all of the requirements of the proposed rules given that SEFs cannot be held responsible for what

[366] Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available To Trade, 76 FR 77728 (proposed Dec. 14, 2011).

[367] MarketAxess Comment Letter at 33–34 (Mar. 8, 2011).

[368] *Id.* at 34.

[369] CEA section 5h(f)(1)(A); 7 U.S.C. 7b–3(f)(1)(A).

[370] CEA section 5h(f)(1)(B); 7 U.S.C. 7b–3(f)(1)(B).

[371] CEA section 5h(f)(2)(A); 7 U.S.C. 7b–3(f)(2)(A).

[372] CEA section 5h(f)(2)(B); 7 U.S.C. 7b–3(f)(2)(B). This section also requires a SEF to provide market participants with impartial access to the market and to capture information that may be used in establishing whether rule violations have occurred.

[373] CEA section 5h(f)(2)(C); 7 U.S.C. 7b–3(f)(2)(C).

[374] CEA section 5h(f)(2)(D); 7 U.S.C. 7b–3(f)(2)(D).

[375] FXall Comment Letter at 3–4, 11 (Mar. 8, 2011); State Street Comment Letter at 5–6 (Mar. 8, 2011); ICE Comment Letter at 2 (Mar. 8, 2011); WMBAA Comment Letter at 18 (Mar. 8, 2011).

[376] FXall Comment Letter at 3–4, 11 (Mar. 8, 2011); State Street Comment Letter at 5–6 (Mar. 8, 2011).

[377] *Id.*

[378] ICE Comment Letter at 2 (Mar. 8, 2011).

[379] Reuters Comment Letter at 4 (Mar. 8, 2011); FXall Comment Letter at 3–4, 11 (Mar. 8, 2011); ICE Comment Letter at 2 (Mar. 8, 2011); State Street Comment Letter at 5–6 (Mar. 8, 2011).

[380] WMBAA Comment Letter at 18 (Mar. 8, 2011); FXall Comment Letter at 11 (Mar. 8, 2011); MarketAxess Comment Letter at 34 (Mar. 8, 2011); SIFMA AMG Comment Letter at 14–15 (Mar. 8, 2011).

happens on a competitor's platform.[381] Similarly, FXall believed that SEFs would not have the requisite market data to conduct meaningful compliance oversight.[382] SIFMA AMG believed that the Commission's vague use of the terms ''members,'' ''market participants,'' and ''participants'' could potentially subject dealers' customers, and thus asset managers and their clients, to ''onerous'' requirements of multiple SEFs.[383] Therefore, SIFMA AMG requested clarification that a SEF's rules would only regulate entities that actually execute transactions on the SEF.[384]

(2) Commission Determination

In response to comments by FXall and State Street about treating SEFs as SROs, the Commission notes that like DCMs, it views SEFs as SROs and amended the Commission's regulations to include them as SROs.[385] Treating a SEF as an SRO is consistent with a SEF's self-regulatory obligations pursuant to CEA section 5h(f). Therefore, where appropriate, the Commission is adopting surveillance, audit trail, investigation, enforcement, and other requirements for SEFs.

In response to commenters' concerns that the proposed requirements were similar to the regulations applicable to DCMs, the Commission believes that adopting similar requirements for both types of entities is warranted given the similar statutory self-regulatory obligations for both types of entities. Given that both DCMs and SEFs, regardless of whether they are new or existing entities, are required to fulfill similar self-regulatory functions, the Commission does not believe that this approach will adversely affect competition between DCMs and SEFs.

In response to commenters' requests for less prescriptive rules and greater flexibility in applying the rules, the Commission is moving various provisions of the proposed rules to guidance and eliminating other provisions, as discussed below. The provisions that are adopted as final rules reflect the Commission's opinion of what is required, at a minimum, for any SEF to comply with the core principles. SEFs may take any additional steps necessary, beyond the requirements of the rules, to satisfy statutory obligations.

In response to WMBAA's and FXall's comments regarding certain limitations faced by SEFs in terms of oversight, the Commission recognizes the limitations faced by SEFs with respect to position monitoring, cross-market surveillance, and rule enforcement and addresses them in the context of comments received below. In response to SIFMA AMG's comment about the ambiguous use of terms, the Commission clarifies that ''market participant'' when used with respect to a SEF means a person that directly or indirectly effects transactions on the SEF. This includes persons with trading privileges on the SEF and persons whose trades are intermediated. The Commission also clarifies that ''member'' has the meaning set forth in CEA section 1a(34).[386]

(b) § 37.201—Operation of Swap Execution Facility and Compliance With Rules

Proposed § 37.201(a) required a SEF to establish rules governing the operation of the SEF, including rules specifying trading procedures for entering and executing orders traded or posted on the SEF, including block trades.[387] Proposed § 37.201(b) further required a SEF to establish and impartially enforce compliance with its rules, including, but not limited to: (1) The terms and conditions of any swaps traded or processed on or through the SEF; (2) access to the SEF; (3) trade practice rules; (4) audit trail requirements; (5) disciplinary rules; and (6) mandatory clearing requirements.[388]

(1) Summary of Comments

MarketAxess recommended that the Commission withdraw proposed § 37.201(b)(6), which required a SEF to adopt and enforce mandatory clearing requirements, on the basis that clearing of a swap occurs outside of a SEF's main responsibility to facilitate the transaction.[389]

(2) Commission Determination

The Commission is adopting § 37.201 as proposed, subject to two modifications. To address the comment by MarketAxess, the Commission notes that proposed § 37.201(b)(6) contained a drafting error, and therefore is replacing the term ''mandatory clearing'' with ''mandatory trading.'' The Commission also notes that the citation to ''part 45'' in proposed § 37.201(a) should instead cite to ''part 43.'' Therefore, the Commission is modifying the final rule to include these technical changes.

Additionally, the Commission notes that a SEF must establish and enforce rules for its employees. These rules must be reasonably designed to prevent violations of the Act and the rules of the Commission.[390] Towards that end, the Commission also notes that a SEF must have systems in place reasonably designed to ensure that its employees are operating in accordance with the SEF's rules.[391] For example, a SEF that is utilizing an RFQ System in conjunction with an Order Book for Required Transactions must establish rules specifying order handling procedures for its employees who receive and execute orders over the telephone, email, instant messaging, squawk box, some other method of communication, or some combination thereof so that the employees may comply with the RFQ System requirements as specified in final § 37.9(a)(3).[392]

Furthermore, the Commission notes that a SEF's employees have certain obligations under the Commission's existing regulations. For example, under § 1.59, a SEF's employees are prohibited from disclosing for any purpose inconsistent with the performance of its official duties any material, non-public information obtained through special access related to the performance of its duties.[393]

Finally, the Commission notes that under § 1.2 of the Commission's regulations, a SEF is liable for the acts, omissions, or failures of its employees

[381] WMBAA Comment Letter at 18 (Mar. 8, 2011).

[382] FXall Comment Letter at 11 (Mar. 8, 2011).

[383] SIFMA AMG Comment Letter at 14–15 (Mar. 8, 2011).

[384] *Id.*

[385] *See* Adaptation of Regulations to Incorporate Swaps, 77 FR 66288 (Nov. 2, 2012). Section 1.3(ee) states that a self-regulatory organization ''means a contract market (as defined in § 1.3(h)), a swap execution facility (as defined in § 1.3(rrr)), or a registered futures association under section 17 of the Act.'' *Id.* at 66318.

[386] CEA section 1a(34) defines ''member'' as ''an individual, association, partnership, corporation, or trust—(A) owning or holding membership in, or admitted to membership representation on, the registered entity . . . or (B) having trading privileges on the registered entity. . . .'' 7 U.S.C. 1a(34).

[387] The Commission notes that § 37.201(a) codifies CEA section 5h(f)(2)(C). 7 U.S.C. 7b–3(f)(2)(C).

[388] The Commission notes that § 37.201(b) codifies certain sections of CEA section 5h(f)(2). 7 U.S.C. 7b–3(f)(2).

[389] MarketAxess Comment Letter at 34 (Mar. 8, 2011).

[390] The Commission notes that under § 37.1501(d), a duty of the Chief Compliance Officer is to establish and administer written policies and procedures reasonably designed to prevent violations of the Act and the rules of the Commission.

[391] The Commission notes that under § 37.1501(d), a duty of the Chief Compliance Officer is to take reasonable steps to ensure compliance with the Act and the rules of the Commission, and to establish and administer a compliance manual designed to promote compliance with applicable laws, rules, and regulations.

[392] *See* WMBAA Comment Letter at 2 (Feb. 15, 2013) (explaining that employees of a SEF provide services such as disseminating bids and offers, helping to understand market conditions, and executing transactions between counterparties).

[393] Commission regulation 1.59(d).

acting within the scope of their employment.[394]

(c) § 37.202—Access Requirements

Proposed § 37.202 addressed Core Principle 2's requirements that SEFs provide market participants with impartial access to the market and that SEFs adopt and enforce rules with respect to any limitations placed on access to the SEF.[395]

(1) § 37.202(a)—Impartial Access by Members and Market Participants [396]

Proposed § 37.202(a) required that a SEF provide any eligible contract participant (''ECP'') and any independent software vendor (''ISV'') with impartial access to its market(s) and market services (including any indicative quote screens or any similar pricing data displays), providing: (1) Access criteria that are impartial, transparent, and applied in a fair and nondiscriminatory manner; (2) a process for confirming ECP status prior to being granted access to the SEF; and (3) comparable fees for participants receiving comparable access to, or services from, the SEF.

(i) Summary of Comments

Several commenters sought clarification that SEFs would be permitted to use their own reasonable discretion to determine individual access criteria, provided that the criteria are impartial, transparent, and applied in a fair and non-discriminatory manner.[397] In this regard, ISDA/SIFMA commented that a SEF should be able to limit access to its trading systems or platforms to certain types of market participants in order to maintain the financial integrity and operational safety of the trading platform.[398] JP Morgan also stated that a SEF should be able to limit access to certain types of market participants such as swap dealers.[399] JP Morgan commented, however, that the SEF NPRM's preamble language about financial and operational soundness is problematic because it would not allow SEFs to limit access to certain types of market participants.[400] This could disrupt business models such as that of inter-dealer brokers whose model is intimately tied to the idea of serving as an intermediary to wholesale liquidity providers.[401] Similarly, Rosen et al. recommended that SEFs should be able to use selective access criteria such as objective minimum capital or credit requirements or limits on participation to objective classes of sophisticated market participants.[402] MarketAxess commented that the meaning of the term ''impartial'' is unclear and recommended that the Commission revise proposed § 37.202(a)(1) as follows: ''Criteria that are transparent and objective and are applied in a fair and nondiscriminatory manner[.]'' [403] Tradeweb noted that, because it offers multiple marketplaces, its access criteria may reasonably differ for each mode of execution and within one mode of execution given that each market will offer different services and may have different types of participants.[404]

Mallers et al. supported the impartial access requirement and its purpose of preventing a SEF's owners or operators from using discriminatory access requirements as a competitive tool against certain participants.[405] Mallers et al. stated that impartial access is a prerequisite to having an open market in which ECPs can compete on a level playing field, and that the participation of additional liquidity providers will improve the pricing and efficiency of the market and reduce systemic risk.[406] SDMA also supported the impartial access requirement and stated that the ability to obtain intellectual property licenses and the amount of royalties for intellectual property licenses should be fair and not used to create anticompetitive advantages for a particular SEF or group of market participants.[407] UBS requested that the Commission clarify in the final rulemaking that SEFs may not exclude or discriminate against participants providing agency services solely as a result of engaging in these activities.[408]

MarketAxess and WMBAA stated that a SEF should be able to restrict access to ISVs because the Dodd-Frank Act does not require SEFs to provide ISVs with impartial access.[409] MarketAxess further commented that the Commission must permit a SEF to restrict access to an ISV who would use such direct access to provide a competitive advantage to another SEF or DCM.[410] Similarly, WMBAA stated that SEFs could qualify as ISVs in order to seek access to competitors' trading systems or platforms, which would defeat the existing structure of competitive sources of liquidity.[411] Bloomberg commented that the SEF NPRM's characterization of ISV is too broad; [412] therefore, an ISV may be able to replicate the services of a SEF without having to register as a SEF.[413] Bloomberg also requested that the Commission clarify that a user of an ISV service must be a participant of a SEF in order to access the SEF's data and/or to execute swap transactions on that SEF.[414]

Under proposed § 37.202(a)(2), MarketAxess recommended that SEFs be permitted to rely on a written or electronically signed representation by a participant seeking access to the SEF regarding its status as an ECP.[415] MarketAxess stated that SEFs may then adopt rules to require that the participant notify the SEF immediately of any change to its status after the participant makes the representation.[416]

Better Markets commented that proposed § 37.202(a)(3) should make clear that any form of preferential access to a SEF through fee arrangements should not be allowed because it would defeat the goal of impartial access.[417] However, MarketAxess stated that SEFs should be able to provide their market participants with volume discounts and other pricing arrangements as long as such discounts and arrangements are based upon objective criteria that are applied uniformly.[418]

(ii) Commission Determination

The Commission is adopting § 37.202(a) as proposed, subject to the

[394] Commission regulation 1.2.

[395] CEA section 5h(f)(2)(A)(ii) and (2)(B)(i); 7 U.S.C. 7b–3(f)(2)(A)(ii) and (2)(B)(i).

[396] The Commission is renaming the title of this section from ''Impartial Access by Members and Market Participants'' to ''Impartial Access to Markets and Market Services'' to provide greater clarity.

[397] Reuters Comment Letter at 5 (Mar. 8, 2011); Goldman Comment Letter at 4 (Mar. 8, 2011); Tradeweb Comment Letter at 10 (Mar. 8, 2011).

[398] ISDA/SIFMA Comment Letter at 11 (Mar. 8, 2011).

[399] JP Morgan Comment Letter at 11 (Mar. 8, 2011).

[400] *Id.*

[401] *Id.*

[402] Rosen et al. Comment Letter at 17 (Apr. 5, 2011).

[403] MarketAxess Comment Letter at 23–24 (Mar. 8, 2011).

[404] Tradeweb Comment Letter at 10 (Mar. 8, 2011).

[405] Mallers et al. Comment Letter at 2–3 (Mar. 21, 2011).

[406] *Id.* at 3.

[407] SDMA Comment Letter at 4–5 (Mar. 8, 2011).

[408] UBS Comment Letter II at 1 (May 18, 2012). UBS submitted two comment letters on May 18, 2012. The Commission is referencing UBS's comment letter regarding impartial access as ''UBS Comment Letter II.''

[409] MarketAxess Comment Letter at 24 (Mar. 8, 2011); WMBAA Comment Letter at 19 (Mar. 8, 2011).

[410] MarketAxess Comment Letter at 25 (Mar. 8, 2011).

[411] WMBAA Comment Letter at 19 (Mar. 8, 2011).

[412] *See* Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1222 n. 53 (providing examples of ISVs).

[413] Meeting with Bloomberg dated Jan. 18, 2012.

[414] *Id.*

[415] MarketAxess Comment Letter at 25 (Mar. 8, 2011).

[416] *Id.*

[417] Better Markets Comment Letter at 11–12 (Mar. 8, 2011).

[418] MarketAxess Comment Letter at 25 (Mar. 8, 2011).

modifications discussed below.[419] The Commission does not believe that the statute allows a SEF to adopt rules that limit access as requested by ISDA/SIFMA, JP Morgan, and Rosen et al. The statutory language of Core Principle 2 requires that SEFs establish and enforce participation rules, including means to provide market participants with *impartial access* to the market, and that SEFs adopt and enforce rules with respect to any limitations they place on access (emphasis added).[420] As stated in the SEF NPRM, the Commission reiterates that the purpose of the impartial access requirements is to prevent a SEF's owners or operators from using discriminatory access requirements as a competitive tool against certain ECPs or ISVs. The Commission also agrees with Mallers et al. who stated that the impartial access requirement allows ECPs to compete on a level playing field, and that the participation of additional liquidity providers will improve the pricing and efficiency of the market and reduce systemic risk. As such, the Commission believes that access to a SEF should be determined, for example, based on a SEF's impartial evaluation of an applicant's disciplinary history and financial and operational soundness against objective, pre-established criteria. As one example of such criteria, any ECP should be able to demonstrate financial soundness either by showing that it is a clearing member of a derivatives clearing organization (''DCO'') that clears products traded on that SEF or by showing that it has clearing arrangements in place with such a clearing member.

In this regard, the Commission believes that the impartial access requirement of Core Principle 2 does not allow a SEF to limit access to its trading systems or platforms to certain types of ECPs or ISVs as requested by some commenters.[421] The Commission notes that the rule states ''impartial'' criteria and not ''selective'' criteria as recommended by some commenters. The Commission is using the term ''impartial'' as intended in the statute. ''Impartial'' should be interpreted in the ordinary sense of the word: fair, unbiased, and unprejudiced. Subject to these requirements, a SEF may use its own reasonable discretion to determine its access criteria, provided that the criteria are impartial, transparent and applied in a fair and non-discriminatory manner, and are not anti-competitive.

In response to Tradeweb's comment about different access criteria for different markets, the Commission notes that a SEF may establish different access criteria for each of its markets. Core Principle 2 does not specify whether impartial access criteria must be the same for all of a SEF's markets or may differ for each market. Therefore, the Commission believes that it is within its discretion to allow a SEF to establish different access criteria for each of its markets. However, the Commission reiterates that the access criteria must be impartial and must not be used as a competitive tool against certain ECPs or ISVs. The Commission also reiterates that each similarly situated group of ECPs and ISVs must be treated similarly.

In response to MarketAxess's and WMBAA's comments regarding ISVs, the Commission notes that Congress required SEFs to establish participation rules, including means to provide market participants with impartial access to the market.[422] The Commission believes that ISVs [423] provide market participants with additional opportunities to access SEFs and that, similar to ECPs, SEFs should apply impartial criteria in a fair and non-discriminatory manner when deciding whether or not to grant an ISV access. In response to MarketAxess's and WMBAA's comments regarding ISVs providing a competitive advantage to other SEFs, the Commission notes that SEFs may set rules for ISVs so they do not misuse data, for example, by providing the data to another SEF for purely competitive reasons to the exclusion of market participants. The Commission also notes that SEFs may charge fees to ISVs based on the access or services they receive from the SEF.

In response to Bloomberg's comments, the Commission agrees that ISVs should not be able to replicate the services of a SEF without having to register as a SEF. The Commission notes that an ISV that merely provides a service to SEFs will not, merely because it provides such a service, be deemed to be a SEF as defined in CEA section 1a(50). However, pursuant to the registration requirements in final § 37.3(a), if an ISV offers a trading system or platform in which more than one market participant has the ability to execute or trade swaps with more than one other market participant on that system or platform, then the ISV has to register as a SEF.[424] The Commission also notes that the user of an ISV must have been granted access by a SEF in order to access that SEF's data and/or to execute a swap transaction on that SEF through the ISV.[425]

The Commission notes that under § 37.202(a)(2), a SEF that is determining whether to grant an ECP access to its facilities may rely on a signed representation of its ECP status.[426] By not prescribing a process, the Commission is providing SEFs with flexibility and discretion on how to meet this requirement. The Commission also notes that for SEFs that permit intermediation, customers of ECPs must also be ECPs.[427] In this regard, a SEF must obtain a signed representation

[419] The Commission is also making certain non-substantive clarifications to the rule.

[420] CEA sections 5h(f)(2)(A)(ii) and (2)(B)(i); 7 U.S.C. 7b–3(f)(2)(A)(ii) and (2)(B)(i).

[421] In this regard, the Commission is clarifying in response to UBS's comment that a SEF may not exclude or discriminate against a market participant providing agency services subject to any limitation on such services contained in this final rulemaking.

[422] CEA section 5h(f)(2)(B)(i); 7 U.S.C. 7b–3(f)(2)(B)(i). WMBAA also commented that ISVs should comply with a SEF's rules, the SEF core principles, and the oversight or supervision by the SEF in the same manner as a market participant. WMBAA Comment Letter at 19 (Mar. 8, 2011). The Commission disagrees with WMBAA's comment because ISVs provide market participants with greater options to access SEFs and ISVs are not executing swaps on a SEF as are market participants. Therefore, the Commission believes that ISVs should not be subject to the same requirements as market participants.

[423] The Commission notes that examples of independent software vendors include: smart order routers, trading software companies that develop front-end trading applications, and aggregator platforms. Smart order routing generally involves scanning of the market for the best-displayed price and then routing orders to that market for execution. Software that serves as a front-end trading application is typically used by traders to input orders, monitor quotations, and view a record of the transactions completed during a trading session. As noted above in the registration section, aggregator platforms generally provide a portal to market participants so that they can access multiple SEFs, but do not provide for execution as execution remains on SEFs. Aggregator platforms may also provide access to news and analytics. The Commission believes that transparency and trading efficiency would be enhanced as a result of innovations in this field for market services. For instance, certain providers of market services with access to multiple trading systems or platforms could provide consolidated transaction data from such trading systems or platforms to market participants.

[424] *See* Aggregation Services or Portals discussion above under § 37.3—Requirements for Registration in the preamble. The Commission notes that footnote 423 above classifies aggregator platforms as a type of ISV so the discussion in this section regarding ISVs also applies to aggregator platforms.

[425] The Commission notes, however, that the user of an ISV may not need to have been granted access to the SEF if the ISV is only providing a composite quote or top level quote for multiple SEFs.

[426] The Commission is replacing the term ''participant'' in proposed § 37.202(a)(2) with the term ''eligible contract participant'' in final § 37.202(a)(2) because the term ''participant'' was not defined in the SEF NPRM and the revised term more clearly communicates the persons to whom this rule applies. In this regard, the Commission notes that, prior to granting a person access to its facility, a SEF must obtain confirmation from the person of its ECP status.

[427] For example, the Commission notes that a customer of a futures commission merchant must be an ECP and a customer of a broker must be an ECP.

from an intermediary that its customers are ECPs.

To address comments submitted in connection with proposed § 37.202(a)(3) regarding fees, the Commission clarifies that § 37.202(a)(3) neither sets nor limits the fees that SEFs may charge. A SEF may establish different categories of ECPs or ISVs seeking access to, or services from, the SEF, but may not discriminate with respect to fees within a particular category.[428] The Commission notes that § 37.202(a)(3) is not designed to be a rigid requirement that fails to take into account legitimate business justifications for offering different fees to different categories of entities seeking access to the SEF. For example, a SEF may consider the services it receives from members such as market making services when it determines its fee structure.

(2) § 37.202(b)—Jurisdiction

Proposed § 37.202(b) required that prior to granting any ECP access to its facilities, a SEF must require that the ECP consents to its jurisdiction.

(i) Summary of Comments

CME recommended that the Commission withdraw the proposed rule.[429] CME contended that requiring clearing firms to obtain every customer's consent to the regulatory jurisdiction of each SEF would be costly.[430] Moreover, CME commented that even if such consent were obtained, the proposed rule would be entirely ineffective in achieving the Commission's desired outcome.[431] CME explained that if a non-member, who had consented to the SEF's jurisdiction under the proposed rule, committed a rule violation and subsequently elected not to cooperate in the investigation or disciplinary process, the SEF's only recourse would be to deny the non-member access and, if appropriate, refer the matter to the Commission.[432] CME further explained that a SEF's enforcement options, and the regulatory outcomes, do not change based on whether or not there is a record of the non-member consenting to jurisdiction, but rather depend on whether the non-member chooses to participate in the SEF's investigative and disciplinary processes.[433]

Similarly, Bloomberg requested that the Commission clarify that proposed § 37.202(b) would only apply to a SEF's members and not customers of members whose orders are executed on a SEF.[434] Bloomberg stated that, rather than subject all market participants to a SEF's jurisdiction, it would be sufficient and more practical for each SEF member to provide to the SEF specific information about its customers.[435] WMBAA noted that a SEF may only exercise jurisdiction over a market participant with respect to its own rules and that the SEF's ultimate sanction would be to ban a market participant from its trading system or platform.[436] WMBAA also stated that prohibiting a market participant from trading on one particular SEF has little utility because a market participant could continue to execute swaps on other SEFs.[437]

(ii) Commission Determination

The Commission is adopting § 37.202(b) as proposed. While acknowledging the comments described above, the Commission believes that § 37.202(b) codifies jurisdictional requirements necessary to effectuate the statutory mandate of Core Principle 2 that a SEF shall have the capacity to detect, investigate, and enforce rules of the SEF.[438] In the Commission's view, jurisdiction must be established by a SEF prior to granting eligible contract participants access to its markets in order to effectively investigate and sanction persons that violate SEF rules. In particular, a SEF should not be in the position of asking market participants to voluntarily submit to its jurisdiction and cooperate in investigatory proceedings after a potential rule violation has been found. Similarly, market participants should have advanced notice that their trading practices are subject to the rules of a SEF, including rules that require cooperating in investigatory and disciplinary processes.

For the avoidance of doubt, the Commission clarifies that the scope of § 37.202(b) is not limited to members. To the contrary, all members and market participants of a SEF, as defined above under § 37.200, are within the scope of § 37.202(b).

In response to CME's and WMBAA's comments, the Commission notes that a SEF's ultimate recourse against a market participant is to deny such market participant access to the SEF and, if appropriate, refer the market participant to the Commission. The Commission has the authority to issue broader sanctions for market participants who commit SEF rule violations that also violate the CEA and Commission regulations. Therefore, the Commission expects that a SEF would not only sanction market participants as appropriate, but also refer matters to the Commission for additional action when necessary. The Commission does not agree that this action absolves SEFs from their responsibility to establish jurisdiction over members and market participants.

(3) § 37.202(c)—Limitations on Access

Proposed § 37.202(c) required a SEF to establish and impartially enforce rules governing any decision to allow, deny, suspend, or permanently bar participants' access to the SEF, including when such decisions are made as part of a disciplinary or emergency action taken by the SEF.

(i) Commission Determination

Although no comments were received on § 37.202(c), the Commission is adopting the proposed rule subject to one modification.[439] The Commission is replacing the term ''participant'' with ''eligible contract participant'' because the term ''participant'' was not defined in the SEF NPRM and the revised term more clearly communicates the persons to whom this rule applies.[440] The Commission notes that § 37.202(c) implements Core Principle 2's requirement regarding limitations on access to the SEF.[441]

(d) § 37.203—Rule Enforcement Program

Proposed § 37.203 required a SEF to establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules.[442]

(1) § 37.203(a)—Abusive Trading Practices Prohibited

Proposed § 37.203(a) required a SEF to prohibit certain abusive trading practices, including front-running, wash trading, pre-arranged trading, fraudulent

[428] The Commission is replacing the term ''participant'' in proposed § 37.202(a)(3) with the terms ''eligible contract participants'' and ''independent software vendors'' in final § 37.202(a)(3) because the term ''participant'' was not defined in the SEF NPRM and the revised terms more clearly communicates the persons to whom this rule applies.

[429] CME Comment Letter at 17 (Feb. 22, 2011).

[430] *Id.* at 16.

[431] *Id.*

[432] *Id.*

[433] *Id.*

[434] Bloomberg Comment Letter at 6 (Mar. 8, 2011).

[435] *Id.*

[436] WMBAA Comment Letter at 19 (Mar. 8, 2011).

[437] *Id.*

[438] CEA section 5h(f)(2)(B); 7 U.S.C. 7b–3(f)(2)(B).

[439] The Commission is making certain non-substantive clarifications to the rule.

[440] For the avoidance of doubt, the Commission notes that this rule applies to the SEF's members and market participants.

[441] CEA section 5h(f)(2)(A)(ii); 7 U.S.C. 7b–3(f)(2)(A)(ii).

[442] The Commission notes that § 37.203 codifies CEA section 5h(f)(2)(B). 7 U.S.C. 7b–3(f)(2)(B).

trading, money passes, and any other trading practices that the SEF deems to be abusive. The proposed rule further obligated a SEF to ''prohibit any other manipulative or disruptive trading practices prohibited by the Act or by the Commission pursuant to Commission regulations.'' SEFs permitting intermediation were required to prohibit additional trading practices, such as trading ahead of customer orders, trading against customer orders, accommodation trading, and improper cross trading. As explained in the SEF NPRM, prohibited trading practices include those proscribed by section 747 of the Dodd-Frank Act.[443]

(i) Summary of Comments

CME and ABC/CIEBA commented that the proposed rule is problematic because it enumerated prohibited trade practices without specifically defining them.[444] CME stated that SEFs should have reasonable discretion to establish rules appropriate to their markets that are consistent with the CEA and that satisfy the core principles.[445] CME questioned, in particular, how to interpret the proposed prohibition on pre-arranged trading with respect to rules that allow for block trading, exchange for related position transactions, and pre-execution communications subject to specified conditions.[446]

WMBAA contended that the enumerated abusive trading practices appear more commonly in markets with retail participants, and therefore are more likely to occur on a DCM rather than a SEF.[447] Accordingly, WMBAA recommended that the Commission include in the final rule abusive trading practices that are more likely to occur on a SEF.[448] Finally, Better Markets recommended that the Commission expand its list of prohibited trade practices to ban certain high-frequency trading practices, including exploiting a large quantity or block trade, price spraying (which it views as a form of front-running), rebate harvesting, and layering the market (which it analogizes to spoofing).[449]

(ii) Commission Determination

The Commission is adopting proposed § 37.203(a), subject to one modification described below. In response to CME's and ABC/CIEBA's comments regarding the perceived vagueness of the enumerated trading practices, the Commission notes that the enumerated abusive trading practices reflect the trading practices that are typically accepted as prohibited conduct by regulators and derivatives exchanges in the industry. In the SEF NPRM, the Commission stated that the proposed prohibited trading practices are a compilation of abusive trading practices that DCMs already prohibit.[450] The Commission also noted in the final DCM rulemaking that the prohibited trading practices are typically already prohibited in DCM rulebooks.[451] Although the Commission believes, as noted by CME, that a SEF should have reasonable discretion to establish rules for its markets, the Commission believes, at a minimum, that a SEF must prohibit the abusive trading practices identified in the rule.

In response to CME's comment about how to interpret the prohibition on pre-arranged trading with respect to rules that allow for block trading and other types of trading, the Commission is amending proposed § 37.203(a) to clarify that a SEF must prohibit pre-arranged trading, except for block trades permitted under part 43 of the Commission's regulations or other types of transactions certified to or approved by the Commission pursuant to the procedures under part 40 of the Commission's regulations. This change clarifies that these types of transactions will not be subject to the prohibition on pre-arranged trading. The Commission also clarifies, as discussed above under the time delay requirement, that the prohibition on pre-arranged trading does not limit pre-execution communications between market participants, subject to the rules of the SEF. Accordingly, SEFs that permit pre-execution communications must establish and enforce rules relating to such communications.

In response to WMBAA's comment that the enumerated abusive trading practices are more suited to DCMs rather than SEFs, the Commission believes that similar prohibitions are necessary to promote consistent protection for all market participants across the swaps market. Therefore, the Commission believes that the enumerated abusive trading practices should be prohibited by DCMs and SEFs. The Commission notes that requiring SEFs to proscribe trading practices which are prohibited by the Act and Commission regulations does not create any additional obligations beyond the existing statutory and regulatory requirements applicable to all SEFs.

The Commission agrees with WMBAA and Better Markets that other abusive trading practices may exist. In this regard, § 37.203(a) provides a non-exhaustive, non-exclusive list. The regulations adopted in this final release provide a SEF with reasonable discretion to establish rules that prohibit additional abusive trading practices. Additionally, not only must a SEF prohibit any other trading practices that a SEF deems abusive,[452] it must also establish and enforce rules that will deter abuses under statutory Core Principle 2.[453] Therefore, if a SEF identifies additional abusive trading practices that are likely to occur on its trading systems and platforms, then the SEF is required, by statute and Commission regulation, to prohibit such abusive trading practices. The Commission anticipates that as SEFs gain experience with exchange-listed swaps, it may periodically revisit the list of prohibited abusive trading practices under § 37.203(a).

(2) § 37.203(b)—Capacity to Detect and Investigate Rule Violations

Proposed § 37.203(b) required a SEF to have arrangements and resources for effective rule enforcement, which included a SEF's authority to collect information and examine books and records of SEF members and market participants. As discussed in the preamble to the SEF NPRM, the Commission believes that a SEF can best administer its compliance and rule enforcement obligations by having the ability to reach the books and records of all market participants.[454] Proposed § 37.203(b) also required a SEF's arrangements and resources to facilitate

[443] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1223 n.61. Section 747 of the Dodd-Frank Act amended CEA section 4c(a) to make it unlawful for any person to engage in any trading, practice, or conduct on or subject to the rules of a registered entity that—(A) violates bids or offers; (B) demonstrates intentional or reckless disregard for the orderly execution of transactions during the closing period; or (C) is, is of the character of, or is commonly known to the trade as, spoofing (bidding or offering with the intent to cancel the bid or offer before execution). *See* Antidisruptive Practices Authority, 76 FR 14943 (proposed Mar. 18, 2011) for proposed interpretive guidance on these three new statutory provisions of CEA section 4c(a)(5).

[444] ABC/CIEBA Comment Letter at 9 (Mar. 8, 2011); CME Comment Letter at 17–18 (Feb. 22, 2011).

[445] CME Comment Letter at 17 (Feb. 22, 2011).

[446] *Id.* at 17–18.

[447] WMBAA Comment Letter at 20 (Mar. 8, 2011).

[448] *Id.*

[449] Better Markets Comment Letter at 13–17 (Mar. 8, 2011).

[450] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1223.

[451] Core Principles and Other Requirements for Designated Contract Markets, 77 FR 36612, 36626 (Jun. 19, 2012).

[452] *See* Final § 37.203(a) in the Commission's regulations.

[453] CEA section 5h(f)(2); 7 U.S.C. 7b–3(f)(2).

[454] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1223.

the direct supervision of the market and the analysis of data collected to determine whether a rule violation has occurred.

(i) Summary of Comments

FXall and CME requested that the Commission clarify the provision in proposed § 37.203(b) that requires a SEF to have the authority to examine the books and records of its members and market participants.[455] Specifically, CME expressed concern that the proposed rule would subject non-registered market participants to recordkeeping requirements that currently apply only to member, registrants, and direct access clients of its platform, which it does not believe would be effective.[456] CME also commented that the proposed rule does not detail which books, records, and information a SEF must be able to obtain from its non-member market participants.[457] FXall expressed concern that the requirement for a SEF to have the authority to examine the books and records of its members and market participants could be interpreted to require a SEF to conduct a full regulatory examination program.[458] FXall, therefore, recommended that the Commission clarify that this requirement only applies as may be necessary for a SEF to investigate a specific potential rule violation that the SEF has detected in the ordinary course of its trade practice surveillance routine or has otherwise been brought to its attention.[459]

(ii) Commission Determination

The Commission is adopting § 37.203(b) as proposed, subject to the following modification. To address CME's concerns about the scope of proposed § 37.203(b), the Commission is replacing the term ''market participant'' with ''persons under investigation.'' The Commission recognizes that using the term ''market participant'' could significantly increase the regulatory responsibilities for SEFs. Thus, the Commission clarifies that § 37.203(b) places upon a SEF an affirmative obligation to have the authority to examine books and records from its members and from any persons under investigation for effective enforcement of its rules. The Commission also notes that the books and records collected by the SEF should encompass all information and documents that are necessary to detect and prosecute rule violations. In response to FXall's comment, the Commission clarifies that the requirement for a SEF to have the authority to examine books and records does not require a SEF to conduct a full regulatory examination program. However, the Commission notes that in addition to the SEF's obligations pursuant to § 37.203(b), the audit trail requirements in § 37.205(c)(2) require a SEF to establish a program for effective enforcement of its audit trail and recordkeeping requirements, which would require the examination of books and records.

(3) § 37.203(c)—Compliance Staff and Resources

Proposed § 37.203(c)(1) provided that a SEF must establish and maintain sufficient compliance staff and resources to conduct a number of enumerated tasks, such as audit trail reviews, trade practice surveillance, market surveillance, and real-time monitoring. Proposed § 37.203(c)(2) required a SEF to continually monitor the size and workload of its compliance staff and, on at least an annual basis, formally evaluate the need to increase its compliance staff and resources. The proposed rule also set forth certain factors that a SEF should consider in determining the appropriate level of compliance staff and resources.

(i) Summary of Comments

Two commenters sought clarification regarding a SEF's compliance resources.[460] WMBAA requested that the Commission clarify whether the resources and staff of a compliance department may be shared with affiliates or between multiple SEFs, and if so, how these shared resources would be considered in meeting the requirements for sufficient compliance staff and resources.[461] WMBAA also requested clarification as to whether a SEF could consider its third party service provider's resources and staff for purposes of evaluating the adequacy of its compliance staff and resources.[462] MarketAxess believed that the process by which a SEF must conduct a formal evaluation of its compliance resources was unclear.[463] MarketAxess also noted that while the findings of such an evaluation could result in the need to increase a SEF's compliance staff and resources, it could also result in a decrease.[464] Accordingly, MarketAxess suggested that the Commission remove the term ''formally'' and clarify that the evaluation of compliance resources could result in either an increase or decrease in compliance staff and resources.[465]

(ii) Commission Determination

The Commission is adopting § 37.203(c) as proposed, subject to one modification discussed below.[466] The Commission agrees in part with WMBAA's recommendation that some SEF compliance staff can be shared among affiliated entities under the appropriate circumstances. However, such arrangements would require prior review by the Commission staff and appropriate legal documentation between the affiliated entities with respect to any shared staff (*e.g.,* secondment or regulatory services agreements that define responsibilities; establish decision-trees for matters of regulatory consequence; and provide for exclusive authority and responsibility by each SEF with respect to matters on its markets). The Commission also emphasizes that any sharing of compliance staff does not diminish each SEF's obligation to maintain sufficient staff to meet its own regulatory needs. The Commission believes that compliance resources may not be shared between non-affiliated SEFs given potential conflict issues. However, the Commission recognizes that a SEF may provide regulatory services to a non-affiliated SEF pursuant to a regulatory services agreement.

The Commission believes that a SEF may take into consideration the staff and resources of its regulatory service provider when evaluating the sufficiency of its own compliance staff. Regardless of whether a SEF utilizes a regulatory service provider or shares its compliance staff with an affiliate, the Commission emphasizes that the SEF must maintain sufficient internal compliance staff to oversee the quality and effectiveness of the regulatory services provided and to make certain regulatory decisions, as required by § 37.204.

Finally, the Commission is deleting proposed § 37.203(c)(2), which required that a SEF monitor the size and workload of its compliance staff on a continuous basis and, on at least an annual basis, formally evaluate the need to increase its compliance resources and

[455] FXall Comment Letter at 11–12 (Mar. 8, 2011); CME Comment Letter at 18 (Feb. 22, 2011).

[456] CME Comment Letter at 18 (Feb. 22, 2011).

[457] *Id.*

[458] FXall Comment Letter at 11–12 (Mar. 8, 2011).

[459] *Id.*

[460] WMBAA Comment Letter at 21 (Mar. 8, 2011); MarketAxess Comment Letter at 35 (Mar. 8, 2011).

[461] WMBAA Comment Letter at 21 (Mar. 8, 2011).

[462] *Id.*

[463] MarketAxess Comment Letter at 35 (Mar. 8, 2011).

[464] *Id.*

[465] *Id.*

[466] The Commission is making certain non-substantive clarifications to proposed § 37.203(c)(1). The Commission is also renumbering proposed § 37.203(c)(1) to § 37.203(c).

staff. The Commission believes that the obligation that a SEF monitor the adequacy of its compliance staff and resources are implicit in proposed § 37.203(c)(1). The final rule provides greater flexibility to SEFs in determining their approach to monitoring their compliance resources.

(4) § 37.203(d)—Automated Trade Surveillance System

Proposed § 37.203(d) required a SEF to maintain an automated trade surveillance system capable of detecting and investigating potential trade practice violations. The proposed rule also required that an acceptable automated trade surveillance system must have the capability to generate alerts on a trade date plus one day (T+1) basis to assist staff in detecting potential violations. The automated trade surveillance system, among other requirements, must maintain all trade and order data, including order modifications and cancellations, and must have the capability to compute, retain, and compare trading statistics; compute trade gains and losses; and reconstruct the sequence of trading activity.

(i) Summary of Comments

CME and WMBAA expressed concern about the capabilities required of an automated trade surveillance system under the proposed rule.[467] Specifically, CME stated that it has been unable to design an automated surveillance system that automates the actual investigation of potential trade practice violations.[468] CME also challenged the use of what it deemed as ''broad and ambiguous'' terms to describe the required capabilities of such a system, and recommended that the Commission consider applying a more flexible, core principles-based approach to implementing the requirement.[469] WMBAA argued that it would be impossible to create an automated trade surveillance system with the capabilities described in the proposed rule without knowledge of a participant's complete trading activity, including trading activity that takes place on other SEFs.[470]

Better Markets recommended that data recorded by an automated trade surveillance system be time-stamped at intervals consistent with the capabilities of high-frequency traders that will transact on SEFs.[471]

(ii) Commission Determination

The Commission is adopting proposed § 37.203(d), subject to two modifications discussed below. First, the Commission is moving the requirement that an automated trade surveillance system maintain all data reflecting the details of each order entered into the trading system to final § 37.205(b). The Commission believes that § 37.205(b) is a more logical place in the Commission's rules to address this aspect of a SEF's automated surveillance system because it also specifies the requirements for a SEF's audit trail program, including a history of all orders and trades.

Second, the Commission is deleting the word ''investigating'' from proposed § 37.203(d) to remove any confusion, as noted by CME. The Commission notes, in response to CME's comment, that the final rules do not require a SEF's automated trade surveillance system to conduct the actual investigations. The Commission believes that the actual investigation would be carried out by a SEF's compliance staff with the assistance of automated surveillance tools.

In response to CME's comment pertaining to the breadth of the rule, the Commission believes that effective surveillance of trading markets requires that a SEF maintain an automated trade surveillance system capable of detecting trade practice violations to assist compliance staff in analyzing large data sets and investigating patterns of conduct that may go otherwise unnoticed. The Commission also believes that the analytical tools enumerated in the rule are a necessary component of an effective trade surveillance system. This rule, as modified, therefore fulfills the statutory requirement of Core Principle 2 by assisting the SEF in detecting, investigating, and enforcing trading rules that will deter abuses.[472]

The Commission acknowledges the inter-SEF surveillance limitations expressed by WMBAA. The Commission notes that the purpose of § 37.203(d) is to ensure that a SEF's compliance staff has the necessary tools to detect, analyze, and investigate potential trade practice violations on the SEF's trading systems or platforms; it does not obligate a SEF to establish a cross-market trade practice surveillance program.

Although the Commission acknowledges the merits of the recommendation by Better Markets to include time stamps at intervals consistent with the capabilities of high-frequency traders, the Commission does not believe that it is necessary to modify § 37.203(d) to address this concern. As discussed in § 37.401 below, there are efforts underway both within and outside of the Commission to define and develop approaches for better monitoring of high-frequency and algorithmic trading.[473] However, while the rule does not specify the granularity of time-stamped data, a SEF's automated trade surveillance system should have the ability to readily determine the sequence in which orders are entered. This reflects the Commission's belief that an automated trade surveillance system should time-stamp data with the granularity necessary to conduct effective surveillance of all trade-related activity, including high-frequency trading, while leaving the details of the system to the SEF.

The Commission notes that the accurate time-stamping of data is particularly important for SEFs that use an RFQ System, including an RFQ System with a voice component. For such SEFs, the accurate time-stamping of both their Order Book and RFQ System activity is critical for ensuring both that the SEF itself has a robust surveillance system and that the Commission is able to monitor the SEF's adherence to part 37's Order Book-RFQ System integration requirements.

(5) § 37.203(e)—Real-Time Market Monitoring

Proposed § 37.203(e) required a SEF to conduct real-time market monitoring of all trading activity on its electronic trading platform to ensure orderly trading and to identify market or system anomalies. The proposed rule further required a SEF to have the authority to adjust prices and cancel trades when needed to mitigate ''market disrupting events'' caused by platform malfunctions or errors in orders submitted by market participants. In addition, proposed § 37.203(e) required that any trade price adjustments or trade cancellations be transparent to the market and subject to standards that are clear, fair, and publicly available.

(i) Summary of Comments

CME stated that the proposed standards would be difficult for any SEF to reasonably meet because they require

[467] CME Comment Letter at 19–20 (Feb. 22, 2011); WMBAA Comment Letter at 21 (Mar. 8, 2011).

[468] CME Comment Letter at 19–20 (Feb. 22, 2011).

[469] *Id.* at 20.

[470] WMBAA Comment Letter at 21 (Mar. 8, 2011).

[471] Better Markets Comment Letter at 18 (Mar. 8, 2011).

[472] CEA section 5h(f)(2)(B); 7 U.S.C. 7b–3(f)(2)(B).

[473] *See* discussion below regarding high-frequency trading under § 37.401—General Requirements in the preamble.

monitoring of all trading activity on a platform to ensure orderly trading.[474] CME also reiterated its belief that the proposed rules are overly prescriptive and recommended that the Commission provide application guidance instead of a rule.[475] WMBAA requested clarification that a SEF's obligation to conduct real-time market monitoring does not include the requirement to conduct automated trade surveillance under § 37.203(d).[476]

Two commenters opined on the requirement for a SEF to modify or cancel a swap transaction.[477] SIFMA AMG argued that a SEF should not be able to modify or cancel a swap transaction under any circumstances without the express consent of the counterparties.[478] SIFMA AMG also stated that if counterparties consent to an adjustment, then clearing entities, executing brokers, DCMs, and middleware platforms should also make the appropriate adjustment.[479] ISDA/SIFMA recommended that the Commission adopt a uniform standard for ''market disrupting events.'' [480]

Better Markets stated that a SEF's obligation to conduct real-time market monitoring should include monitoring orders and cancellations that are time-stamped at intervals consistent with the capabilities of high-frequency traders to identify abusive high frequency trading strategies.[481]

(ii) Commission Determination

The Commission is adopting proposed § 37.203(e), subject to one modification. The Commission agrees with CME that real-time market monitoring cannot ''ensure'' orderly trading at all times, but the Commission believes that such monitoring must identify disorderly trading when it occurs. Accordingly, the Commission is modifying proposed § 37.203(e) to require a SEF to conduct real-time market monitoring ''to identify disorderly trading,'' instead of ''to ensure orderly trading.''

In response to CME's comment that the rule is overly prescriptive, the Commission believes that § 37.203(e) grants a SEF the flexibility to determine the best way to conduct real-time market monitoring so that it can effectively monitor its markets. The Commission also believes that the rule correctly mandates that a SEF conduct real-time market monitoring of all trading activity that occurs on its system or platform in order to detect disorderly trading and market or system anomalies, and take appropriate regulatory action. The Commission believes that this rule fulfills the statutory requirement of Core Principle 2, which requires a SEF to have the capacity to detect, investigate, and enforce trading rules that will deter abuses.[482]

In response to WMBAA's comment, the Commission clarifies that a SEF's obligation to conduct real-time market monitoring does not encompass the automated trade surveillance requirement in § 37.203(d). The Commission notes that while real-time market monitoring and trade practice surveillance are both self-regulatory functions assigned to all SEFs, these functions are generally independent and serve different purposes. As discussed in the SEF NPRM, market monitoring is conducted on a real-time basis so that a SEF can take mitigating action against any market or system anomalies on its trading system or platform.[483] Trade practice surveillance, on the other hand, involves reconstructing and analyzing order, trade, and other data post-execution to identify potential violations and anomalies found in trade data.[484] Further, as noted in the SEF NPRM, the automated trade surveillance system typically differs from the system used to conduct real-time market monitoring.[485]

The Commission disagrees with SIFMA AMG's comment that a SEF should not be able to modify or cancel a swap transaction under any circumstances without the express consent of the counterparties. The Commission believes that a SEF should have the authority to modify or cancel a swap transaction without the consent of the counterparties under certain limited circumstances. For example, a SEF should be able to cancel a trade when such trade was executed due to a technological error on the part of the SEF. Further, the Commission believes that the rule's requirement that any modifications or cancellations by the SEF be transparent to the market and subject to standards that are clear, fair, and publicly available will provide protection to counterparties. The Commission also acknowledges the validity of SIFMA AMG's concern that any adjustment to a swap transaction should also be reflected by entities involved in the clearing and processing of the swap. However, since imposing such a requirement on entities involved in the clearing and processing of swaps is outside the scope of this SEF rulemaking, the Commission declines to address this issue in these final rules.

The Commission also rejects ISDA/SIFMA's recommendation to define the term ''market disrupting events,'' as it does not believe that a rule definition could reasonably capture the universe of potentially market disrupting events. The Commission notes that industry definitions for terms such as ''market disrupting events'' generally only establish a process or framework for counterparties and other third parties to determine whether such an event has occurred and can be subject to challenge, resulting in delayed determinations with limited utility for effective trade monitoring. Although the Commission believes that coordination among SEFs regarding market disrupting events may be appropriate, and encourages SEFs to do so, the Commission is not defining ''market disrupting events'' at this time. The Commission may provide examples at a later time once it gains further knowledge regarding the types of market disrupting events that are likely to occur on a SEF.

In response to the comment by Better Markets about high-frequency trading, the Commission declines to modify proposed § 37.203(e) to include concepts related specifically to high-frequency trading at this time.[486] The Commission believes that a SEF's real-time market monitoring system should be structured to conduct effective market monitoring for all order and trade types, including, but not limited to, high frequency trading.

(6) § 37.203(f)—Investigations and Investigation Reports

Proposed § 37.203(f) required a SEF to establish procedures for conducting investigations, provided timelines for completing such investigations, detailed the requirements of an investigation report, and provided for warning letters.

(i) § 37.203(f)(1)—Procedures

Proposed § 37.203(f)(1) required a SEF to have procedures that require its compliance staff to conduct investigations of possible rule

[474] CME Comment Letter at 21 (Feb. 22, 2011).

[475] *Id.* at 20–21.

[476] WMBAA Comment Letter at 21 (Mar. 8, 2011).

[477] SIFMA AMG Comment Letter at 14 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 13 (Mar. 8, 2011).

[478] SIFMA AMG Comment Letter at 14 (Mar. 8, 2011).

[479] *Id.*

[480] ISDA/SIFMA Comment Letter at 13 (Mar. 8, 2011).

[481] Better Markets Comment Letter at 18 (Mar. 8, 2011).

[482] CEA section 5h(f)(2)(B); 7 U.S.C. 7b–3(f)(2)(B).

[483] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1224.

[484] *Id.* at 1223–24.

[485] *Id.* at 1224.

[486] *See* discussion below regarding high-frequency trading under § 37.401—General Requirements in the preamble.

violations. The proposed rule required that an investigation be commenced upon the Commission staff's request or upon discovery of information by the SEF indicating a possible basis for finding that a violation has occurred or will occur.

(A) Summary of Comments

CME argued that the proposed rule diminishes a SEF's discretion to determine the matters that warrant a formal investigation because at the time of discovery or upon receipt of information, and before any review has occurred, there will always be ''a possible basis'' that a violation has occurred or will occur.[487] CME agreed that formal written referrals from the Commission, law enforcement authorities, other regulatory agencies, or other SROs should result in a formal investigation in every instance.[488] However, CME contended that a SEF should have reasonable discretion to determine how it responds to complaints, leads, and other types of referrals, including the discretion to follow-up with a less formal inquiry in certain situations.[489]

MarketAxess expressed concern that the proposed rule is not clear as to whether a SEF can contract its investigations to its regulatory service provider.[490] MarketAxess recommended that the Commission modify the proposed rule by replacing ''compliance staff'' with ''swap execution facility'' to clarify that a regulatory service provider that is responsible for a SEF's rule enforcement program can conduct investigations on behalf of the SEF.[491]

(B) Commission Determination

The Commission is adopting § 37.203(f)(1) as proposed, subject to certain modifications described below. The Commission confirms that in certain circumstances a SEF should have reasonable discretion regarding whether or not to open an investigation, as noted by CME. Accordingly, the Commission is amending proposed § 37.203(f)(1) to provide that an investigation must be commenced by the SEF upon the receipt of a request from Commission staff or upon the discovery or receipt of information that indicates a ''reasonable basis'' for finding that a violation may have occurred or will occur.

In response to MarketAxess's comment that the proposed rule is unclear, the Commission confirms that a SEF may contract with a regulatory service provider, as provided for under § 37.204, whose staff may perform the functions assigned to a SEF's compliance staff under this rule. In this regard, the Commission also notes that the SEF must maintain sufficient internal compliance staff to oversee the quality and effectiveness of the regulatory services provided on its behalf, and to make certain regulatory decisions, as required by § 37.204.

(ii) § 37.203(f)(2)—Timeliness

Under proposed § 37.203(f)(2), the Commission required that investigations be completed in a timely manner, defined as 12 months after an investigation is opened, absent enumerated mitigating circumstances.

(A) Summary of Comments

CME generally supported the proposed rule, but recommended that the list of possible mitigating circumstances also include the domicile of the subjects and cooperative enforcement matters since the SEF may not have independent control over the pace of the investigation.[492] CME also requested that the Commission clarify that the twelve month period for completing an investigation referenced in proposed § 37.203(f)(2) is separate from the time period necessary to prosecute an investigation.[493]

(B) Commission Determination

The Commission is adopting § 37.203(f)(2) as proposed. The Commission believes that a 12-month period to complete an investigation is appropriate and timely. Although the Commission agrees with CME that additional mitigating factors could justifiably contribute to a delay in completing an investigation within a 12-month period, the Commission notes that the factors included in the proposed rule were not intended to be an exhaustive list of mitigating circumstances. In the Commission's view, the factors listed in the proposed rule represent some of the more common examples that could delay completion of an investigation within the 12-month period. The Commission also confirms that § 37.203(f)(2) only applies to the investigation phase of a matter, and is separate from the time period necessary to prosecute an investigation.

(iii) § 37.203(f)(3)—Investigation Reports When a Reasonable Basis Exists for Finding a Violation

Proposed § 37.203(f)(3) required a SEF's compliance staff to submit an investigation report for disciplinary action any time staff determined that a reasonable basis existed for finding a rule violation. The proposed rule also enumerated the items that must be included in the investigation report, including the market participant's disciplinary history.

(A) Summary of Comments

CME and ICE commented on the requirement that a respondent's disciplinary history be included in the investigation report that is submitted to a Review Panel.[494] CME asserted that a respondent's disciplinary history would only be relevant if a prior offense is an element of proof for the potential rule violation under review.[495] ICE commented that only substantive violations in the respondent's history would be relevant to the Review Panel's deliberations.[496]

CME commented that rule violations can range from very minor to egregious and not every rule violation merits formal disciplinary action.[497] CME argued that warning letters are sufficient to address minor rule violations, rather than the issuance of a formal investigatory report.[498]

MarketAxess stated that the proposed rule does not specify to whom the investigation reports must be submitted, and recommended that the reports be submitted to the SEF's Chief Compliance Officer, consistent with Core Principle 15.[499]

(B) Commission Determination

The Commission is adopting § 37.203(f)(3) as proposed, subject to one modification. The Commission agrees with CME and ICE that a respondent's disciplinary history is not always relevant to the determination of whether the respondent has committed a further violation of a SEF's rules. Accordingly, the Commission is removing this requirement from the final rule. The Commission notes, however, that all disciplinary sanctions, including sanctions imposed pursuant to an accepted settlement offer, must take into account the respondent's disciplinary history.

[487] CME Comment Letter at 21 (Feb. 22, 2011).

[488] *Id.*

[489] *Id.*

[490] MarketAxess Comment Letter at 35 (Mar. 8, 2011).

[491] *Id.* at 35–36.

[492] CME Comment Letter at 21 (Feb. 22, 2011).

[493] *Id.* at 21–22.

[494] ICE Comment Letter at 7 (Mar. 8, 2011); CME Comment Letter at 22, 35 (Feb. 22, 2011).

[495] CME Comment Letter at 35 (Feb. 22, 2011).

[496] ICE Comment Letter at 7 (Mar. 8, 2011).

[497] CME Comment Letter at 22 (Feb. 22, 2011).

[498] *Id.*

[499] MarketAxess Comment Letter at 36 (Mar. 8, 2011).

The Commission confirms, as recommended by CME, that ''minor transgressions'' can be addressed by a SEF's compliance staff with the issuance of warning letters as discussed below in § 37.203(f)(5). However, as further discussed below in § 37.203(f)(5), no more than one warning letter may be issued to the same person or entity found to have committed the same rule violation more than once within a rolling 12-month period.[500]

Finally, the Commission clarifies that a SEF's compliance staff should submit all completed investigation reports to the member or members of the SEF's compliance department responsible for reviewing such reports and determining the next steps in the process, such as whether to refer the matter to the SEF's disciplinary panel or authorized compliance staff under § 37.206(c).

(iv) § 37.203(f)(4)—Investigation Reports When No Reasonable Basis Exists for Finding a Violation

Proposed § 37.203(f)(4) required compliance staff to prepare an investigation report upon concluding an investigation and determining that no reasonable basis exists for finding a rule violation. If the investigation report recommended that a disciplinary panel should issue a warning letter, then the investigation report must also include a copy of the warning letter and the market participant's disciplinary history, including copies of warning letters.

(A) Summary of Comments

CME noted that its Market Regulation Department currently has the authority to administratively close a case and issue a warning letter without disciplinary committee approval.[501] Accordingly, CME recommended that the Commission amend the proposed rule to reflect that a SEF will also have such authority.[502]

(B) Commission Determination

The Commission is adopting § 37.203(f)(4) as proposed, subject to one modification.[503] The Commission is eliminating the provision that discussed the concept of warning letters because the Commission does not believe that a SEF would need to limit the number of warning letters that can be issued when a rule violation has not been found. The Commission notes, however, that this modification does not impact the limitation on the number of warning letters that may be issued by a disciplinary panel or by compliance staff to the same person or entity for the same violation committed more than once in a rolling 12-month period when a rule violation has been found. The Commission clarifies, in response to CME's comment, that a SEF may authorize its compliance staff to close a case administratively and issue a warning letter without disciplinary panel approval when a reasonable basis does not exist for finding a rule violation.

(v) § 37.203(f)(5)—Warning Letters

Proposed § 37.203(f)(5) provided that a SEF may authorize its compliance staff to issue a warning letter or to recommend that a disciplinary committee issue a warning letter. The proposed rule also prohibited a SEF from issuing more than one warning letter to the same person or entity for the same potential violation during a rolling 12-month period.

(A) Summary of Comments

Some commenters opposed the proposed limitation on the number of warning letters issued during a rolling 12-month period.[504] CME contended that the rule does not consider important factors that are relevant to a SEF when evaluating potential sanctions in a disciplinary matter.[505] CME believed that the SEF should have discretion to determine the appropriate actions in all cases based on the ''totality of the circumstances.'' [506] ICE stated that this limitation would discourage self-reporting of violations because of the lack of discretion in a resulting penalty assessment.[507] MarketAxess requested that the Commission adopt a more uniform approach with respect to warning letters, permitting them to be issued as a sanction or an indication of a finding of a violation in all SEF contexts.[508]

(B) Commission Determination

The Commission is adopting proposed § 37.203(f)(5), subject to certain modifications, including converting a portion of the rule to guidance in appendix B to part 37.

The Commission is maintaining in the final rule the limitation on the number of warning letters issued. The Commission acknowledges the comments from CME and ICE concerning the issuance of warning letters, but believes that to ensure that warning letters serve as effective deterrents and to preserve the value of disciplinary sanctions, no more than one warning letter may be issued to the same person or entity found to have committed the same rule violation more than once within a rolling 12-month period.[509] As discussed in the SEF NPRM, while a warning letter may be appropriate for a first-time violation, the Commission does not believe that more than one warning letter in a rolling 12-month period for the same violation is ever appropriate.[510] Further, a policy of issuing repeated warning letters, rather than issuing meaningful sanctions, to market participants who repeatedly violate the same rules reduces the effectiveness of a SEF's rule enforcement program.[511]

However, in response to commenters' concerns, the Commission is narrowing the application of this rule to warning letters that contain an affirmative finding that a rule violation has occurred. Therefore, the Commission is removing the provision in the proposed rule that a warning letter issued in accordance with this section is not a penalty or an indication that a finding of a violation has been made. To remain consistent with the modifications to proposed § 37.203(f)(3) and (f)(4), the Commission is also deleting the proposed requirement that investigation reports required by paragraphs (f)(3) and (f)(4) of this section must include a copy of the warning letter issued by compliance staff.

As noted above, the Commission agrees with CME's comment that minor transgressions can be addressed by a SEF's compliance staff issuing a warning letter. Accordingly, in order to provide a SEF with flexibility in this regard, the Commission is moving this provision of the rule to the guidance in appendix B to part 37. The text of the guidance provides that the rules of a SEF may authorize its compliance staff to issue a warning letter to a person or entity under investigation or to

[500] The Commission notes that a SEF's issuance of a warning letter for the violation of a SEF rule neither precludes the Commission from taking an enforcement action against the recipient of the warning letter based upon the same underlying conduct, nor does it provide a defense against any such Commission enforcement action.

[501] CME Comment Letter at 21 (Feb. 22, 2011).

[502] *Id.*

[503] Similar to § 37.203(f)(3), the Commission notes that a SEF's compliance staff should submit all completed investigation reports to the member or members of the SEF's compliance department responsible for reviewing such reports and determining the next steps to take.

[504] ICE Comment Letter at 7 (Mar. 8, 2011); CME Comment Letter at 22 (Feb. 22, 2011).

[505] CME Comment Letter at 22 (Feb. 22, 2011).

[506] *Id.*

[507] ICE Comment Letter at 7 (Mar. 8, 2011).

[508] MarketAxess Comment Letter at 36 (Mar. 8, 2011).

[509] For purposes of this rule, the Commission does not consider a ''reminder letter'' or such other similar letter to be any different than a warning letter.

[510] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1224.

[511] *Id.*

recommend that a disciplinary panel take such action.

(7) § 37.203(g)—Additional Rules Required

Proposed § 37.203(g) required a SEF to adopt and enforce any additional rules that it believes are necessary to comply with the requirements of § 37.203.

(i) Commission Determination

The Commission did not receive any comments on proposed § 37.203(g); however, the Commission is moving this rule to the guidance in appendix B to part 37. The Commission believes that this requirement is already implicit in Core Principle 2 and need not be addressed separately as a final rule. Additionally, moving proposed § 37.203(g) to guidance provides SEFs with added flexibility in adopting additional rules that it believes are necessary to comply with the rules related to Core Principle 2. Consistent with this determination, the Commission is replacing proposed § 37.203(g) with final § 37.203(g) (titled ''Additional sources for compliance'') that simply permits SEFs to rely upon the guidance in appendix B to part 37 to demonstrate to the Commission compliance with § 37.203.

(e) § 37.204—Regulatory Services Provided by a Third Party

(1) § 37.204(a)—Use of Third-Party Provider Permitted [512]

Proposed § 37.204(a) allowed a SEF to contract with a registered futures association or another registered entity to assist in complying with the SEF core principles, as approved by the Commission. The proposed rule also stated that a SEF that elects to use the services of a regulatory service provider must ensure that such provider has the capacity and resources to provide timely and effective regulatory services. The proposed rule further stated that a SEF will at all times remain responsible for the performance of any regulatory services received, for compliance with the SEF's obligations under the Act and Commission regulations, and for the regulatory service provider's performance on its behalf.

(i) Summary of Comments

Commenters generally supported the Commission's proposal to allow third parties to provide regulatory services.[513] However, MarketAxess argued that the Commission should permit an entity that is not a registered futures association or another registered entity with the Commission to perform regulatory services on behalf of a SEF, such as the Financial Industry Regulatory Authority (''FINRA'').[514] In the alternative, MarketAxess recommended that the Commission should permit SEFs, if desired, to form a joint venture to create a special regulatory service provider for SEFs that would not be a registered entity.[515] Similarly, several commenters supported a centralized, common regulatory organization (''CRO'') that would facilitate compliance with SEF core principles.[516] In this regard, WMBAA stated that a CRO would establish a uniform SEF standard of conduct, streamline the Commission's evaluation of each SEF registration application, and conduct effective surveillance of fungible swap products trading on multiple SEFs.[517]

MarketAxess and Tradeweb requested clarification on how the Commission will assess and approve regulatory service providers.[518] In this regard, Tradeweb commented that SEFs should have flexibility in contracting with third party service providers, so long as the SEF uses reasonable diligence and acts in a manner consistent with market practice.[519]

(ii) Commission Determination

The Commission is adopting § 37.204(a) as proposed, subject to two modifications. In response to MarketAxess's comment about non-registered entities performing regulatory services, the Commission is revising the proposed rule to allow FINRA to assist SEFs in complying with the core principles. The Commission notes that FINRA has provided similar regulatory services for the securities industry for many years and may serve as a self-regulatory organization for SB–SEFs. Therefore, the Commission believes that allowing FINRA to serve as a regulatory service provider for SEFs is appropriate because FINRA is likely to have the qualifications, capacity, and resources to provide timely and effective regulatory services for SEFs.

The Commission recognizes the concerns that WMBAA and others have with respect to SEFs conducting market-wide surveillance activities. As discussed elsewhere in this final rulemaking,[520] an individual SEF may have limited ability to monitor trading activities across markets since individual swaps may be listed on multiple SEFs (as well as any DCMs listing swaps). The Commission clarifies that a SEF (or a regulatory service provider on a SEF's behalf), under Core Principle 2 and the Commission's regulations thereunder, is only responsible for surveillance and rule enforcement of the SEF's systems and platforms, and Core Principle 2 does not impose a cross-market surveillance requirement on a SEF.[521] Therefore, the final rules do not require the use of a single industry-wide CRO to assist SEFs with cross-market surveillance. While not requiring it, the final rules also do not prohibit the use of a single industry-wide CRO.

In response to MarketAxess's and Tradeweb's comments regarding the Commission's assessment and approval of regulatory service providers, the Commission notes that it will assess and approve the use of such service providers during the full registration process. The Commission also notes that Exhibit N to Form SEF requests executed or executable copies of any agreements with regulatory service providers.

Finally, the Commission is modifying § 37.204(a) to make clear that a SEF may use the services of a regulatory service provider for the provision of services to assist the SEF in complying with ''the Act and Commission regulations thereunder'' rather than simply the SEF core principles as stated in proposed § 37.204(a). The modification aligns the rule text with what the Commission has always intended to be the range of a SEF's self-regulatory obligations.

(2) § 37.204(b)—Duty To Supervise Third Party [522]

Proposed § 37.204(b) required that a SEF maintain sufficient compliance staff to supervise any services performed by

[512] The Commission is renaming the title of this section from ''Use of Third-Party Provider Permitted'' to ''Use of Regulatory Service Provider Permitted'' to provide greater clarity.

[513] MarketAxess Comment Letter at 14–15 (Mar. 8, 2011); Reuters Comment Letter at 5 (Mar. 8, 2011); Bloomberg Comment Letter at 4–5 (Mar. 8, 2011); NFA Comment Letter at 1 (Mar. 8, 2011).

[514] MarketAxess Comment Letter at 15 (Mar. 8, 2011).

[515] *Id.*

[516] Parity Energy Comment Letter at 5 (Mar. 25, 2011); WMBAA Comment Letter at 22 (Mar. 8, 2011); FXall Comment Letter at 12 (Mar. 8, 2011).

[517] WMBAA Comment Letter at 22 (Mar. 8, 2011).

[518] MarketAxess Comment Letter at 15 (Mar. 8, 2011); Tradeweb Comment Letter at 10 (Mar. 8, 2011).

[519] Tradeweb Comment Letter at 10 (Mar. 8, 2011).

[520] *See, e.g.,* discussion under § 37.203(d)—Automated Trade Surveillance System and Core Principle 6—Position Limits or Accountability in the preamble.

[521] The Commission notes that other core principles, such as Core Principle 4, and the Commission's regulations thereunder may require SEFs to conduct certain cross-market monitoring.

[522] The Commission is renaming the title of this section from ''Duty to Supervise Third Party'' to ''Duty to Supervise Regulatory Service Provider'' to provide greater clarity.

a regulatory service provider. The proposed rule also required that the SEF hold regular meetings with its regulatory service provider to discuss current work and other matters of regulatory concern, as well as conduct periodic reviews of the adequacy and effectiveness of services provided on its behalf. In addition, proposed § 37.204(b) required a SEF to carefully document the reviews and make them available to the Commission upon request.

(i) Summary of Comments

Two commenters recommended that the Commission adopt a more flexible rule with respect to a SEF's duty to supervise its regulatory service provider.[523] In this regard, NFA recommended that the Commission provide flexibility to a SEF and its regulatory service provider to mutually determine the necessary process for a SEF to supervise its regulatory service provider.[524] CME recommended that the Commission move the rule to guidance or acceptable practices.[525] In particular, CME pointed to the requirements that a SEF conduct periodic reviews of the services provided and hold regular meetings with the regulatory service provider to discuss ongoing investigations, trading patterns, market participants, and any other matters of regulatory concern.[526] CME stated that ''[w]hile it may well be that it is constructive for the [SEF] to hold regular meetings with its service provider and 'discuss market participants,' the core principle should stand on its own and the [SEF] should have the flexibility to determine how best to demonstrate compliance with the core principle.'' [527]

(ii) Commission Determination

The Commission is adopting § 37.204(b) as proposed.[528] The Commission acknowledges the commenters' desire for a flexible approach, but notes that a SEF that elects to use a regulatory service provider remains responsible for the regulatory services received and for compliance with the Act and Commission regulations. The SEF therefore must properly supervise the quality and effectiveness of the regulatory services provided on its behalf. The Commission believes that proper supervision will require that a SEF have complete and timely knowledge of relevant work performed by the SEF's regulatory service provider on its behalf. The Commission also believes that this knowledge can only be acquired through periodic reviews and regular meetings required under § 37.204(b).

(3) § 37.204(c)—Regulatory Decisions Required From the SEF

Proposed § 37.204(c) required a SEF that utilizes a regulatory service provider to retain exclusive authority over all substantive decisions made by its regulatory service provider, including the cancellation of trades, issuance of disciplinary charges, denials of access to the trading platform for disciplinary reasons, and any decision to open an investigation into a possible rule violation. Further, the proposed rule required a SEF to document any instance where its actions differed from those recommended by its regulatory service provider.

(i) Summary of Comments

CME objected to the idea that all decisions concerning the cancellation of trades remain in the exclusive authority of the SEF.[529] CME contended that a SEF may be better served by granting such authority to a regulatory service provider because such decisions require prompt decision-making.[530]

(ii) Commission Determination

The Commission is adopting § 37.204(c) as proposed, subject to two modifications. First, the Commission is removing the requirement that a decision to open an investigation reside exclusively with the SEF. The final rule grants a SEF the latitude to determine whether investigations will be opened by the SEF, by its regulatory service provider, or some combination of the two. The Commission believes that opening investigations is an administrative task and does not necessarily imply the threat of formal disciplinary action or sanctions against a market participant. Second, the Commission is amending the rule to clarify that when a SEF documents instances when its actions differ from those recommended by its regulatory service provider, the SEF must include the reasons for the course of action recommended by the regulatory service provider and the reasons why the SEF chose a different course of action.

The Commission disagrees with CME's comment concerning the ''cancellation of trades'' and believes that a SEF must retain exclusive authority in this regard. Cancelling trades is an important exercise of a SEF's authority over its markets and market participants. Cancelled trades may have meaningful economic consequences to the swap counterparties involved in the transaction, and may be the subject of contention between the counterparties if they do not both agree to the cancellation. The Commission emphasizes that permanent, consequential decisions must remain with the SEF.

(f) § 37.205—Audit Trail

Proposed § 37.205 implements Core Principle 2's requirement that SEFs capture information that may be used in establishing whether rule violations have occurred.[531] Accordingly, proposed § 37.205 required a SEF to establish procedures to capture and retain information that may be used in establishing whether rule violations have occurred. The proposed rule, along with its subparts, established the requirements of an acceptable audit trail program and the enforcement of such program.

(1) § 37.205(a)—Audit Trail Required

Proposed § 37.205(a) required a SEF to capture and retain all audit trail data so that the SEF has the ability to detect, investigate, and prevent customer and market abuses. The proposed rule also provided that the audit trail data must be sufficient to reconstruct all transactions within a reasonable period of time and to provide evidence of any rule violations that may have occurred. Proposed § 37.205(a) further provided that the audit trail must permit the SEF to track a customer order from the time of receipt through fill, allocation, or other disposition, and must include both order and trade data.

(i) Summary of Comments

WMBAA requested that the Commission establish a common format for audit trail data to ensure consistency among all SEFs and to make the information easier for the Commission to use and review when investigating customer and market abuses.[532]

(ii) Commission Determination

The Commission is adopting § 37.205(a) as proposed, subject to the

[523] NFA Comment Letter at 2 (Mar. 8, 2011); CME Comment Letter at 18–19 (Feb. 22, 2011).

[524] NFA Comment Letter at 2 (Mar. 8, 2011).

[525] CME Comment Letter at 19 (Feb. 22, 2011).

[526] *Id.* at 18–19.

[527] *Id.* at 19.

[528] The Commission is making certain non-substantive clarifications to § 37.204(b).

[529] CME Comment Letter at 19 (Feb. 22, 2011).

[530] *Id.*

[531] CEA section 5h(f)(2)(B)(ii); 7 U.S.C. 7b–3(f)(2)(B)(ii).

[532] WMBAA Comment Letter at 22–23 (Mar. 8, 2011).

modifications described below.[533] The Commission believes that the requirement that SEFs capture and retain all audit trial data is essential to ensuring that SEFs can capture information to establish whether rule violations have occurred, as required by Core Principle 2.[534] Additionally, the creation and retention of a comprehensive audit trail will enable SEFs to properly reconstruct any and all market and trading events and to conduct a thorough forensic review of all market information. The Commission believes that the ability to reconstruct markets in such a manner is a fundamental element of a SEF's surveillance and rule enforcement programs. Consistent with these principles, the Commission is modifying § 37.205(a) to clarify that the audit trail data must be sufficient to reconstruct trades and sufficient to reconstruct indications of interest, requests for quotes, and orders within a reasonable period of time.

Both the proposed and final rules in § 37.205(a) require that a SEF ''capture and retain *all* audit trail data necessary to detect, investigate, and prevent customer and market abuses'' (emphasis added). The Commission notes that information required to detect abuses may in some cases include all communications between market participants and a SEF's trading system or platform. The Commission also notes that a SEF's obligation to capture in its audit trail all data necessary to detect, investigate, and prevent customer and market abuses is not altered by the nature of the trading system or platform that a SEF may choose to utilize, including a system or platform that, for example, utilizes the telephone. For example, an acceptable audit trail for a SEF with a telephone component should include communications between the SEF's employees and their customers, as well as any communications between employees as they work customer indications of interest, requests for quotes, orders, and trades. An acceptable audit trail must capture the totality of communications (including, but not limited to, telephone, instant messaging, email, written records, and electronic communications within a trading system or platform) that could be necessary to detect, investigate, and prevent customer and market abuses, as required by both proposed and final § 37.205(a).

The Commission believes that WMBAA's suggestion to establish a common format for audit trail data may provide some value for SEFs that wish to coordinate and establish such a standard. However, the intent of the final rules is to require that a SEF establish and maintain an effective audit trail program, not to dictate the method or form for maintaining such information. Importantly, the rule, by not being prescriptive, provides SEFs with flexibility to determine the manner and the technology necessary and appropriate to meet the requirements. The Commission notes, nevertheless, that staff from the Commission's Office of Data and Technology will coordinate with SEFs to establish standards for the submission of audit trail data to the Commission.

(2) § 37.205(b)—Elements of an Acceptable Audit Trail Program

Proposed § 37.205(b)(1) required a SEF's audit trail to include original source documents, on which trade execution information was originally recorded, as well as records for customer orders, whether or not they were filled. The proposed rule also required that a SEF that permits intermediation must require all executable orders or RFQs received over the telephone to be immediately entered into the trading system or platform. Proposed § 37.205(b)(2) required that a SEF's audit trail program include a transaction history database and specified the trade information required to be included in the database. Proposed § 37.205(b)(3) required the audit trail program to also have electronic analysis capability for the transaction history database. Proposed § 37.205(b)(4) required the audit trail program to include the ability to safely store all audit trail data and to retain it in accordance with the recordkeeping requirements of SEF Core Principle 10 and its associated regulations.

(i) Summary of Comments

WMBAA commented that the requirement for records to be retained for customer orders should not apply to indications of interest because it would extend beyond the Commission's statutory authority and the audit trail requirements currently in place in other financial markets, and would be unnecessarily costly and burdensome.[535] WMBAA also commented that the audit trail requirements must permit the retention of relevant information through various modes because SEFs may operate trade execution platforms ''through any means of interstate commerce.'' [536] Better Markets commented that audit trail records, such as records of customers' orders and their disposition, must be time-stamped at intervals that are consistent with the capabilities of high-frequency traders that use SEFs.[537]

(ii) Commission Determination

The Commission is adopting proposed § 37.205(b), subject to the modifications discussed below. The Commission is clarifying that ''time of trade execution'' must be included in the data points of an acceptable audit trail, and is noting this clarification in final § 37.205(b)(1). The Commission is also revising proposed § 37.205(b)(2) to specify that a transaction history database must include a history of ''all indications of interest, requests for quotes, orders, and trades entered into a [SEF's] trading system or platform, including all order modifications and cancellations.'' Further, the Commission is revising proposed § 37.205(b)(3) to specifically state that a SEF's electronic analysis capability must provide it with the ''ability to reconstruct indications of interest, requests for quotes, orders, and trades, and identify possible trading violations.'' The revisions to § 37.205(b)(2) and (b)(3), subject to the additions of the indications of interest and requests for quotes language, reflect regulatory requirements previously proposed as part of § 37.203(d), but, as noted above, the Commission is moving these requirements to final § 37.205(b). Additionally, the Commission is revising proposed § 37.205(b)(2) by replacing the customer type indicators listed in the proposed rule with the term ''customer type indicator code.''

In response to WMBAA's comment regarding indications of interest, the Commission believes that retaining information about indications of interest provides another important detail of an audit trail, just as information of filled, unfilled, or cancelled orders provides important information for the SEF. This information enables a SEF to fulfill its statutory duty under Core Principle 2, which requires a SEF to capture information that may be used in establishing whether rule violations have occurred.[538] Absent this information, SEFs would be limited in their ability to monitor their markets and to detect, investigate, and prevent customer and market abuses and trading

[533] The Commission is making certain non-substantive clarifications to § 37.205(a).

[534] CEA section 5h(f)(2)(B)(ii); 7 U.S.C. 7b–3(f)(2)(B)(ii).

[535] WMBAA Comment Letter at 23 (Mar. 8, 2011).

[536] *Id.*

[537] Better Markets Comment Letter at 18 (Mar. 8, 2011).

[538] CEA section 5h(f)(2)(B)(ii); 7 U.S.C. 7b–3(f)(2)(B)(ii).

rule violations. However, as discussed above, the Commission has removed the requirement for SEFs to offer indicative quote functionality, which should reduce the costs of complying with the audit trail requirements.[539]

In response to WMBAA's comment about the flexibility of audit trail requirements to accommodate various methods of execution, the Commission notes that proposed § 37.205(b) did not discriminate based on the method of execution. Given the Commission's clarification that a SEF may utilize any means of interstate commerce in providing the execution methods in § 37.9(a)(2)(i)(A) or (B), the Commission emphasizes that no matter how an indication of interest, request for quote, or order is communicated or a trade is executed, an audit trail that satisfies the requirements set forth in § 37.205 must be created.

The Commission is also making certain conforming changes to § 37.205(b)(1) to harmonize its provisions with the Commission's determination that a SEF may utilize any means of interstate commerce in providing the execution methods in § 37.9(a)(2)(i)(A) or (B). First, the Commission is adding ''indications of interest'' to the items that must be immediately captured in the audit trail pursuant to § 37.205(b)(1). Second, while proposed § 37.205(b)(1) required that all executable orders or requests for quotes ''be immediately entered into the trading system or platform,'' § 37.205(b)(1) as adopted requires that such information be immediately ''captured in the audit trail.'' This approach more accurately reflects the intent of § 37.205, whose purpose is to ensure an adequate audit trail, rather than to address the operation of a SEF's trading system or platform.

Accordingly, the final rules in § 37.205(b)(1) include conforming changes that remove the reference in proposed § 37.205(b)(1) to orders or requests for quotes ''that are executable,'' and also remove the qualification that a SEF's obligation to capture information in the audit trail is dependent on whether the SEF permits intermediation. Finally, the final rules remove the additional audit trail requirement in proposed § 37.205(b)(1) for orders and requests for quotes that cannot be immediately entered into the trading system or platform. These clarifications are consistent with the Commission's intention in § 37.205(a) that a SEF's audit trail ''capture and retain all audit trail data necessary to detect, investigate, and prevent customer and market abuses.'' It is the Commission's intent throughout § 37.205 to ensure that all SEFs' audit trails are equally comprehensive and effective regardless of the means of interstate commerce that a SEF may provide to meet the execution methods in § 37.9(a)(2)(i)(A) or (B).

Although § 37.205 sets forth a unified set of audit trail requirements for all methods of execution, the Commission notes that a SEF, for example, that utilizes the telephone as a means of interstate commerce in providing the execution methods in § 37.9(a)(2)(i)(A) or (B) may comply with the audit trail requirements by utilizing different technologies than a SEF that does not utilize the telephone. For example, the Commission believes that a SEF that utilizes the telephone may comply with the audit trail requirements in § 37.205(a) for oral communications by recording all such communications that relate to swap transactions, and all communications that may subsequently result in swap transactions. Such recordings must allow for reconstruction of communications between the SEF and its customers; reconstruction of internal and external communications involving SEF employees who are ascertaining or providing indications of interest, requests for quotes, or orders; reconstruction of executed transactions; provide evidence of any rule violations; track a customer's order; and capture order and trade data as required under § 37.205(a).

The Commission also believes that a SEF that utilizes the telephone may comply with the original source document requirement in § 37.205(b)(1) for oral communications by retaining each recording's original media. By storing the recordings in a digital database and supplementing it with additional data as necessary, the Commission believes that a SEF that utilizes the telephone may comply with the transaction history database requirement in § 37.205(b)(2) for oral communications. Additionally, the Commission believes that a SEF that utilizes the telephone may comply with the electronic analysis capability in § 37.205(b)(3) for oral communications by ensuring that its digital database of recordings is capable of being searched and analyzed. The Commission notes, however, that § 37.205(b) does not establish an affirmative requirement to create recordings of oral communications if the audit trail requirements are met through other methods. The discussion above regarding the applicability of audit trail requirements to SEFs that utilize the telephone in providing the execution methods in § 37.9(a)(2) applies equally to SEFs that use non-telephonic means of communication (*e.g.,* instant messaging or email). In all cases, the operative requirement is to capture in the audit trail and the transaction history database the totality of communications that could be necessary to detect, investigate, and prevent customer and market abuses.

The Commission acknowledges the comment by Better Markets regarding time-stamping audit trail records at intervals that are consistent with the capabilities of high-frequency traders. While the audit trail rules do not specify the granularity of time-stamped data, the Commission believes that the audit trail rules adopted herein, particularly the requirements that a SEF retain and maintain all data necessary to permit it to reconstruct trading, will help to ensure that audit trail records are time-stamped with the granularity necessary to reconstruct trades and investigate possible trading violations, including for high-frequency trading.[540]

(3) § 37.205(c)—Enforcement of Audit Trail Requirements

Proposed § 37.205(c)(1) required that a SEF conduct reviews, at least annually, of its members and market participants to verify their compliance with the SEF's audit trail and recordkeeping requirements. Proposed § 37.205(c)(1) also set forth minimum review criteria. Proposed § 37.205(c)(2) required that a SEF develop a program for effective enforcement of its audit trail and recordkeeping requirements, including a requirement that a SEF levy meaningful sanctions when deficiencies are found. Proposed § 37.205(c)(2) also stated that sanctions may not include more than one warning letter for the same violation within a rolling twelve-month period.

(i) Summary of Comments

Some commenters stated that annual audits are unnecessary and unduly

[539] *See* discussion above regarding Minimum Trading Functionality under § 37.3—Requirements for Registration in the preamble.

[540] The Commission notes, as stated above under § 37.203(d)—Automated Trade Surveillance System in the preamble, that the accurate time stamping of data is particularly important for SEFs that use an RFQ System, including an RFQ System with a voice component. For such SEFs, the accurate time stamping of both their Order Book and RFQ System activity is critical for ensuring both that the SEF itself has a robust audit trail system and that the Commission is able to monitor the SEF's adherence to part 37's Order Book-RFQ System integration requirements.

burdensome.[541] CME commented that annual audits of all SEF market participants would be costly and unproductive, and should instead apply at the clearing firm level.[542] MarketAxess recommended that the Commission require a single entity or self-regulatory organization, such as FINRA or NFA, to conduct the audit of each SEF market participant.[543] Tradeweb commented that the proposed annual audit review requirement is not required of DCMs and, as such, should not be required of SEFs.[544]

(ii) Commission Determination

The Commission is adopting § 37.205(c) as proposed, subject to certain modifications as discussed below. The Commission disagrees with commenters who assert that the annual audit review requirement is unnecessary, unduly burdensome, costly, and unproductive. Through its experience with DCMs and DCOs, the Commission has learned that sampling-based reviews of audit trail and recordkeeping requirements are inadequate to ensure compliance with audit trail rules. The Commission believes that the requirements under § 37.205(c) are necessary to ensure that SEFs have accurate and consistent access to all data needed to reconstruct all transactions in their markets and to provide evidence of customer and market abuses. Absent reliable audit trail data, a SEF's ability to detect or investigate customer or market abuses may be severely diminished.

However, in response to commenters' concerns that the rule is burdensome, the Commission is narrowing the scope of the proposed rule by removing the reference to ''market participants'' and instead stating that the annual audit review requirement only applies to members and those persons and firms that are subject to the SEF's recordkeeping rules. As a result of this revision, the Commission declines to adopt CME's recommendation to require annual audit trail reviews only at the clearing firm level.

The Commission is maintaining proposed § 37.205(c)(2) as a rule to ensure that SEFs impose meaningful sanctions for violations of audit trail and recordkeeping rules. However, the Commission is revising the rule to clarify that the limit on warning letters only applies where a SEF's compliance staff finds an actual rule violation, rather than just the suspicion of a violation. This change is consistent with the revisions in other sections discussing warning letters.[545]

In response to MarketAxess's recommendation that a single entity conduct the audit of each SEF market participant, the Commission believes that a SEF can monitor market participants on its own platform without relying upon a single cross-market self-regulatory organization. However, a SEF may use a regulatory service provider pursuant to § 37.204 to assist it in complying with the requirements under § 37.205(c).

In response to Tradeweb's comment that the annual audit review requirement is not required of DCMs, the Commission notes that it adopted a similar requirement for DCMs under § 38.553 of the Commission's regulations, to apply to all members and persons and firms subject to the DCM's recordkeeping rules.[546] The Commission believes that similar requirements are appropriate because, as noted above, SEFs, like DCMs, must have accurate and consistent access to all data needed to reconstruct all transactions in their markets, including indications of interest, requests for quotes, orders, and trades, and to detect, investigate, and prevent customer and market abuses.

(g) § 37.206—Disciplinary Procedures and Sanctions

(1) § 37.206—Disciplinary Procedures and Sanctions

Proposed § 37.206 addressed SEF Core Principle 2's requirement that SEFs establish and enforce trading, trade processing, and participation rules to deter abuse, and have the capacity to investigate and enforce such abuses.[547] Proposed § 37.206 provided that SEFs must establish trading, trade processing, and participation rules that will deter abuses and have the capacity to enforce such rules through prompt and effective disciplinary action.

(i) Summary of Comments

Some commenters generally stated that the proposed disciplinary procedures go beyond the statute and intent of Congress.[548] In this regard, FXall stated that, unlike DCMs, retail customers will not be participants on SEFs; therefore, the same level of protection afforded to DCM participants is not required for SEFs.[549] Some commenters recommended that the proposed disciplinary procedures should be streamlined through the use of a staff summary fine program.[550] Some commenters also requested that SEFs be granted greater flexibility to establish their own disciplinary procedures.[551] Tradeweb stated that the proposed disciplinary procedures would impose significant costs on SEFs and should be contracted to a central, third-party self-regulatory organization.[552]

(ii) Commission Determination

The Commission's evaluation of public comments with respect to proposed § 37.206 is based on its understanding that a SEF's obligation to establish adequate disciplinary rules is implicit in the statutory language of Core Principle 2, which requires, in part, that a SEF establish and enforce trading, trade processing, and participation rules to deter abuse and have the capacity to investigate and enforce such rules.[553] The Commission also takes note of public comments requesting greater flexibility in the application of SEF disciplinary rules. Accordingly, consistent with both its statutory mandate and its evaluation of the public comments received, the Commission is adopting elements of § 37.206 as proposed, while also moving to guidance or eliminating other parts of the proposed rules.[554]

The Commission believes that the specific disciplinary rules retained in the final rules are those that are essential to the promotion of market integrity by ensuring that SEF markets are free of fraud or abuse, and also helping to provide basic procedural fairness for SEF disciplinary

[541] Tradeweb Comment Letter at 6 (Jun. 3, 2011); MarketAxess Comment Letter at 22 (Mar. 8, 2011); CME Comment Letter at 33 (Feb. 22, 2011).

[542] CME Comment Letter at 33 (Feb. 22, 2011).

[543] MarketAxess Comment Letter at 22 (Mar. 8, 2011).

[544] Tradeweb Comment Letter at 6 (Jun. 3, 2011).

[545] *See, e.g.,* discussion above under § 37.203(f)(5)—Warning Letters in the preamble.

[546] Core Principles and Other Requirements for Designated Contract Markets, 77 FR at 36704.

[547] CEA section 5h(f)(2)(B); 7 U.S.C. 7b–3(f)(2)(B).

[548] MarketAxess Comment Letter at 23 (Mar. 8, 2011); ABC/CIEBA Comment Letter at 11 (Mar. 8, 2011); FXall Comment Letter at 12 (Mar. 8, 2011); ICAP Comment Letter at 5–6 (Mar. 8, 2011); State Street Comment Letter at 5 (Mar. 8, 2011).

[549] FXall Comment Letter at 12 (Mar. 8, 2011).

[550] MarketAxess Comment Letter at 23 (Mar. 8, 2011), WMBAA Comment Letter at 24 (Mar. 8, 2011); FXall Comment Letter at 12 (Mar. 8, 2011).

[551] FXall Comment Letter at 12 (Mar. 8, 2011); ICAP Comment Letter at 6 (Mar. 8, 2011); Reuters Comment Letter at 4 (Mar. 8, 2011); WMBAA Comment Letter at 23 (Mar. 8, 2011); State Street Comment Letter at 5 (Mar. 8, 2011).

[552] Tradeweb Comment Letter at 10 (Mar. 8, 2011). Parity Energy also commented that the proposed disciplinary rules will impose unnecessary costs and create unnecessary duplication and the possibility of conflicting rules. Parity Energy Comment Letter at 4 (Mar. 25, 2011).

[553] CEA section 5h(f)(2)(B); 7 U.S.C. 7b–3(f)(2)(B).

[554] The Commission is also revising § 37.206 to include the term ''member'' in addition to the term ''market participant'' in order to provide greater detail and clarity. The Commission notes, as described above in § 37.200, that the term ''market participant'' encompasses SEF ''members.''

respondents. While the SEF NPRM noted that the SEF disciplinary procedures parallel those for DCMs,[555] the Commission has determined that the level of protection offered by the proposed rules was more appropriate for markets that include retail participants, in contrast to SEFs, whose participants are limited to ECPs.[556] Consequently, the Commission is moving to guidance numerous procedural protections set forth in the proposed rules that are more tailored to retail participants, including the requirements relating to the issuance of a notice of charges, and a respondent's right to representation, right to answer charges, and right to request a hearing.

The remaining final rules provide an essential framework that the Commission believes adequately ensures the effectiveness of a SEF's disciplinary program. Accordingly, the Commission is maintaining the proposed disciplinary rules that represent the most critical components of a disciplinary program, including the requirements that a SEF: (1) Establish disciplinary panels that meet certain composition requirements; (2) levy meaningful disciplinary sanctions to deter recidivism; and (3) issue no more than one warning letter per rolling 12-month period for the same violation by the same respondent. The Commission believes that with these modifications, § 37.206 strikes the appropriate balance between providing the flexibility requested by the commenters and ensuring that SEFs comply with their statutory obligation under Core Principle 2.

Some commenters recommended that the proposed disciplinary procedures should be streamlined through the use of a summary fine program. The Commission believes that, while summary fines may be appropriate for some disciplinary matters, such as recordkeeping violations, many disciplinary matters are dynamic and require the balancing of multiple unique facts and circumstances, which cannot be addressed through a summary fine program. Therefore, the Commission declines to adopt a summary fine program in lieu of disciplinary procedures.

In response to Tradeweb's comment about contracting out certain aspects of a SEF's disciplinary functions to a central third-party, the Commission notes that it views SEFs as SROs,[557] with all the attendant self-regulatory responsibilities to establish and enforce rules necessary to promote market integrity and the protection of market participants. Such responsibilities include the adherence to, and maintenance of, disciplinary procedures. The Commission notes that a SEF may utilize the services of a third-party regulatory service provider for assistance in performing its self-regulatory functions, as provided for in § 37.204.

(2) § 37.206(a)—Enforcement Staff

Proposed § 37.206(a) required that a SEF establish and maintain sufficient enforcement staff and resources to effectively and promptly prosecute possible rule violations within the SEF's jurisdiction. Proposed § 37.206(a) also required a SEF to monitor the size and workload of its enforcement staff annually. In addition, proposed § 37.206(a) included provisions to ensure the independence of the enforcement staff and to help promote disciplinary procedures that are free of potential conflicts of interest.

(i) Commission Determination

In response to the general comments requesting greater flexibility regarding disciplinary procedures, the Commission is moving all of the requirements of proposed § 37.206(a) to guidance, except for the critical requirement that a SEF maintain sufficient enforcement staff and resources. The Commission believes that sufficient enforcement staff and resources are essential to the effective performance of a SEF's disciplinary program and are necessary to comply with Core Principle 2. Without a sufficient enforcement staff and resources, a SEF would be unable to promptly investigate and adjudicate potential rule violations and deter future violations. To maintain consistency with the revisions to proposed § 37.203(c)(2), the Commission is deleting from the rule the reference that a SEF monitor the size and workload of its enforcement staff annually to provide greater flexibility to SEFs in determining their approach to monitoring their enforcement resources. Nonetheless, the Commission believes that a SEF's obligation to monitor its enforcement staff and resources is implicit in the requirement to maintain adequate enforcement staff and resources.

(3) § 37.206(b)—Disciplinary Panels

Proposed § 37.206(b)(1) required a SEF to establish one or more Review Panels and one or more Hearing Panels. The composition of both panels was required to meet the composition requirements of proposed § 40.9(c)(3)(ii)[558] and could not include any members of the SEF's compliance staff or any person involved in adjudicating any other stage of the same proceeding. Proposed § 37.206(b)(2) provided that a Review Panel must be responsible for determining whether a reasonable basis exists for finding a violation of SEF rules and for authorizing the issuance of a notice of charges. If a notice of charges is issued, proposed § 37.206(b)(3) provided that a Hearing Panel must be responsible for adjudicating the matter and issuing sanctions.

(i) Summary of Comments

MetLife supported the proposed rule and agreed that SEFs should maintain a clear separation between disciplinary bodies that recommend the issuance of charges and those responsible for adjudicating matters.[559] CME stated that the Commission should not require a prescriptive approach to disciplinary panels, as SEFs may develop structures that clearly satisfy the objective of the core principle, but that may not precisely comply with the rule text.[560] CME illustrated two practices it believed may be precluded by the text of proposed § 37.206(b): (1) CME's Market Regulation staff determines whether certain non-egregious rule violations merit referral to a Review Panel and they issue warning letters on an administrative basis; and (2) CME's hearing panel adjudicates a disciplinary case prior to the issuance of charges

[555] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1225 n. 73.

[556] The Commission also believes that guidance is more appropriate for the SEF disciplinary procedures because the SEF core principles do not have a parallel to DCM Core Principle 13, which specifically discusses disciplinary procedures.

[557] *See* Adaptation of Regulations to Incorporate Swaps, 77 FR 66288 (Nov. 2, 2012). Section 1.3(ee) states that a self-regulatory organization ''means a contract market (as defined in § 1.3(h)), a swap execution facility (as defined in § 1.3(rrrr)), or a registered futures association under section 17 of the Act.'' *Id.* at 66318.

[558] Section 40.9(c)(3)(ii), as proposed, in the separate release titled Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, provided that ''Each Disciplinary Panel shall include at least one person who would not be disqualified from serving as a Public Director by § 1.3(ccc)(1)(i)–(vi) and (2) of this chapter (a ''Public Participant''). Such Public Participant shall chair each Disciplinary Panel. In addition, any registered entity specified in paragraph (c)(3)(i) of this section shall adopt rules that would, at a minimum: (A) Further preclude any group or class of participants from dominating or exercising disproportionate influence on a Disciplinary Panel and (B) Prohibit any member of a Disciplinary Panel from participating in deliberations or voting on any matter in which the member has a financial interest.'' 75 FR 63732, 63752 (proposed Oct. 18, 2010).

[559] MetLife Comment Letter at 6 (Mar. 8, 2011).

[560] CME Comment Letter at 35 (Feb. 22, 2011).

pursuant to a supported settlement agreement.[561]

(ii) Commission Determination

The Commission is adopting § 37.206(b) as proposed, subject to certain modifications described below. The Commission considered commenters' views and believes that the proposed rule can be modified to provide additional flexibility without diminishing its purpose. Accordingly, final § 37.206(b) will require SEFs to have one or more disciplinary panels, without imposing a specific requirement for SEFs to maintain a Review Panel and a Hearing Panel.[562] However, even under this single-panel approach, individuals who determine to issue charges in a particular disciplinary matter may not also adjudicate the matter. Therefore, final § 37.206(b) permits flexibility in the structure of SEFs' disciplinary bodies, but not in the basic prohibition, supported by MetLife, against vesting the same individuals with the authority to both issue and adjudicate charges in the same matter.

The modifications reflected in final § 37.206(b), together with the revisions made to the text of proposed § 37.206(d) that will now be included as guidance, as discussed below, provide additional flexibility by permitting SEFs to rely on their authorized compliance staff, rather than on a disciplinary panel, to issue disciplinary charges. However, the Commission notes that the adjudication of charges must still be performed by a disciplinary panel.

Finally, the Commission is adopting the composition and conflicts requirements for disciplinary panels with one modification, by replacing the reference to § 40.9(c)(3)(ii) with a reference to the more general ''part 40 of this chapter'' to accommodate any re-enumeration that may occur with respect to proposed § 40.9(c)(3)(ii).

(4) § 37.206(c)—Review of Investigation Report

Proposed § 37.206(c) required a Review Panel to promptly review an investigation report received pursuant to proposed § 37.203(f)(3), and to take one of the following actions within 30 days of receipt: (1) Promptly direct compliance staff to conduct further investigation if the Review Panel determined that additional investigation or evidence was needed, (2) direct that no further action be taken if the Review Panel determined that no reasonable basis existed for finding a violation or that prosecution was unwarranted, or (3) direct that the person or entity alleged to have committed a violation be served with a notice of charges if the Review Panel determined that a reasonable basis existed for finding a violation and adjudication was warranted.

(i) Summary of Comments

CME agreed that an investigation report should include the subject's disciplinary history; however, CME disagreed with the requirement in proposed § 37.203(f) that the disciplinary history be included in the version of the investigation report sent to the Review Panel.[563] CME believed that the disciplinary history should not be considered by the Review Panel at all when determining whether to issue formal charges, arguing that a participant's disciplinary history is not relevant to the consideration of whether it committed a further violation of SEF rules.[564]

(ii) Commission Determination

In response to the general comments requesting greater flexibility, the Commission is eliminating all of proposed § 37.206(c) except for paragraph (3) of the proposed rule. In addition, the Commission is adding language to paragraph (3) to provide SEFs with the flexibility to allow authorized compliance staff to review an investigation report and determine whether a notice of charges should be issued in a particular matter. The Commission is also revising the text of paragraph (3) to follow the single-panel approach provided for in § 37.206(b). Proposed § 37.206(c)(3), with the revisions described above, is being incorporated into proposed § 37.206(d). As described below, all of proposed § 37.206(d) is being moved to the guidance in appendix B to part 37.

(5) § 37.206(d)—Notice of Charges

Proposed § 37.206(d) described the minimally acceptable contents of a notice of charges issued by a Review Panel. Specifically, proposed § 37.206(d) provided that a notice of charges must adequately state the acts, conduct, or practices in which the respondent is alleged to have engaged; state the rule(s) alleged to have been violated; advise the respondent that he is entitled, upon request, to a hearing on the charges; and prescribe the period within which a hearing may be requested. Paragraphs (1) and (2) of the proposed rule permitted a SEF to adopt rules providing that: (1) The failure to request a hearing within the time prescribed in the notice, except for good cause, may be deemed a waiver of the right to a hearing; and (2) the failure to answer or expressly deny a charge may be deemed to be an admission of such charge.

(i) Commission Determination

Although no comments were received on proposed § 37.206(d), the Commission believes that it can provide SEFs with additional flexibility by moving the entire rule to the guidance in appendix B to part 37.[565] Moreover, since paragraphs (1) and (2) of proposed § 37.206(d) allowed, but did not require, a SEF to issue rules regarding failures to request a hearing and expressly answer or deny a charge, the Commission believes that the language in these paragraphs is better suited as guidance rather than a rule.

(6) § 37.206(e)—Right to Representation

Proposed § 37.206(e) provided for a respondent's right, upon receiving a notice of charges, to be represented by legal counsel or any other representative of its choosing in all succeeding stages of the disciplinary process.

(i) Summary of Comments

CME commented that this rule should be limited to avoid conflicts of interest in representation and, accordingly, requested that the rule be revised to clarify that a respondent may not be represented by: (1) A member of the SEF's disciplinary committees; (2) a member of the SEF's Board of Directors; (3) an employee of the SEF; or (4) a person substantially related to the underlying investigation, such as a material witness or other respondent.[566]

(ii) Commission Determination

The Commission is moving proposed § 37.206(e) in its entirety to the guidance in appendix B to part 37, subject to the following modification. The Commission is amending the language to incorporate CME's recommendation. The guidance states that upon being served with a notice of charges, a respondent should have the right to be represented by legal counsel or any other representative of its choosing in all succeeding stages of the disciplinary process, except by any

[561] *Id.*

[562] The Commission notes that it is replacing specific panel names (*i.e.,* Review Panel and Hearing Panel) with a generic reference to the ''disciplinary panel'' throughout part 37.

[563] CME Comment Letter at 35 (Feb. 22, 2011).

[564] *Id.* While the Commission largely agrees with CME's comment, the Commission directs interested parties to § 37.203(f) for a further discussion of the required components of investigation reports.

[565] As mentioned above, the Commission is moving paragraph (3) of proposed § 37.206(c) to the text of proposed § 37.206(d) that will now be included as guidance.

[566] CME Comment Letter at 35 (Feb. 22, 2011).

member of the SEF's board of directors or disciplinary panel, any employee of the SEF, or any person substantially related to the underlying investigations, such as a material witness or respondent. The Commission believes that this revision appropriately addresses the conflicts of interest noted by CME.

(7) § 37.206(f)—Answer to Charges

Proposed § 37.206(f) required that a respondent be given a reasonable period of time to file an answer to a notice of charges. The proposed rule also provided that the rules of a SEF may prescribe certain aspects of the answer, which were enumerated in paragraphs (1) through (3).[567]

(i) Commission Determination

Although no comments were received on proposed § 37.206(f), the Commission is moving the entire rule to the guidance in appendix B to part 37, with certain modifications, in order to provide SEFs with greater flexibility to adopt their own disciplinary procedures. The Commission is also condensing the guidance by replacing paragraphs (1) through (3) with language making clear that any rules adopted by a SEF governing the requirements and timeliness of a respondent's answer to a notice of charges should be ''fair, equitable, and publicly available.''

(8) § 37.206(g)—Admission or Failure To Deny Charges

Proposed § 37.206(g) provided that a SEF may adopt rules whereby a respondent who admits or fails to deny any of the charges alleged in the notice of charges may be found by the Hearing Panel to have committed the violations charged. If a SEF adopted such rules, paragraphs (1) through (3) of the proposed rule provided that: (1) The Hearing Panel must impose a sanction for each violation found to have been committed; (2) the Hearing Panel must promptly notify the respondent in writing of any sanction to be imposed and advise the respondent that it may request a hearing on such sanction within a specified period of time; and (3) the rules of the SEF may provide that if the respondent fails to request a hearing within the period of time specified in the notice, then the respondent will be deemed to have accepted the sanction.

(i) Commission Determination

Although the Commission did not receive comments on proposed § 37.206(g), the Commission is moving the entire rule, with certain modifications, to the guidance in appendix B to part 37.[568] Given that proposed § 37.206(g) allowed, but did not require, a SEF to issue rules regarding a respondent's admission or failure to deny charges, the Commission believes that the proposed rule is better suited as guidance rather than a rule. The Commission also believes that adopting the proposed rule as guidance, rather than a rule, will provide SEFs greater flexibility in administering their obligations, consistent with the general comments seeking the same. Furthermore, the Commission is modifying the text of proposed § 37.206(g)(2) that will now be included as guidance to clarify that a respondent may request a hearing ''within the period of time, which should be stated in the notice.''

(9) § 37.206(h)—Denial of Charges and Right to Hearing

Proposed § 37.206(h) required that in every instance where a respondent has requested a hearing on a charge that is denied, or on a sanction set by the Hearing Panel pursuant to proposed § 37.206(g), the respondent must be given the opportunity for a hearing in accordance with the requirements of proposed § 37.206(j). Proposed § 37.206(h) also gave SEFs the option to adopt rules that provided, except for good cause, the hearing must be concerned only with those charges denied and/or sanctions set by the Hearing Panel under proposed § 37.206(g) for which a hearing has been requested.

(i) Commission Determination

The Commission received no comments on proposed § 37.206(h), but is moving the entire rule, with certain modifications, to the guidance in appendix B to part 37.[569] In order to provide SEFs with further flexibility, even within the guidance, the Commission is also removing the proposed rule's reference to a SEF's ability to limit hearings to only those charges denied and/or sanctions set by the Hearing Panel under proposed § 37.206(g) for which a hearing has been requested.

(10) § 37.206(i)—Settlement Offers

Proposed § 37.206(i) provided the procedures that a SEF must follow if it permits the use of settlements to resolve disciplinary cases. Paragraph (1) of the proposed rule stated that the rules of a SEF may permit a respondent to submit a written offer of settlement any time after the investigation report is completed. The proposed rule also permitted the disciplinary panel presiding over the matter to accept the offer of settlement, but prohibited the panel from altering the terms of the offer unless the respondent agreed. In addition, paragraph (2) of the proposed rule provided that the rules of the SEF may allow a disciplinary panel to permit the respondent to accept a sanction without admitting or denying the rule violations upon which the sanction is based.

Paragraph (3) of the proposed rule stated that a disciplinary panel accepting a settlement offer must issue a written decision specifying the rule violations it has reason to believe were committed, and any sanction imposed, including any order of restitution where customer harm has been demonstrated. Paragraph (3) also provided that if an offer of settlement is accepted without the agreement of a SEF's enforcement staff, then the decision must adequately support the Hearing Panel's acceptance of the settlement. Finally, paragraph (4) of the proposed rule allowed a respondent to withdraw his or her offer of settlement at any time before final acceptance by a disciplinary panel. If an offer is withdrawn after submission, or is rejected by a disciplinary panel, the respondent must not be deemed to have made any admissions by reason of the offer of settlement and must not be otherwise prejudiced by having submitted the offer of settlement.

(i) Commission Determination

Although the Commission received no comments on proposed § 37.206(i), the Commission is moving the entire rule, with certain modifications, to the guidance in appendix B to part 37.[570]

[567] These aspects were that: (1) The answer must be in writing and include a statement that the respondent admits, denies, or does not have and is unable to obtain sufficient information to admit or deny each allegation; (2) failure to file an answer on a timely basis shall be deemed an admission of all allegations in the notice of charges; and (3) failure in an answer to deny expressly a charge shall be deemed to be an admission of such charge.

[568] The Commission notes that the text that will now be included as guidance is being modified to reflect the single-panel approach adopted in § 37.206(b), replacing specific panel names with a generic reference to the ''disciplinary panel.''

[569] The Commission is revising the proposed rule to reflect the single-panel approach adopted in § 37.206(b), replacing specific panel names with a generic reference to the ''disciplinary panel.'' The Commission is also removing the references to proposed §§ 37.206(g) and (j) given that the Commission is moving proposed § 37.206(g) to guidance, and either eliminating or moving certain provisions of proposed § 37.206(j) to guidance.

[570] The Commission notes that the text that will now be included as guidance is being modified to reflect the single-panel approach adopted in § 37.206(b), replacing specific panel names with a generic reference to the ''disciplinary panel.''

The Commission believes that adopting the proposed rule as guidance, rather than a rule, will provide SEFs greater flexibility in administering their obligations, consistent with the general comments seeking the same. Furthermore, the Commission is revising the guidance text to make it consistent with its modifications to the customer restitution provisions adopted below with respect to proposed § 37.206(n).

(11) § 37.206(j)—Hearings

Proposed § 37.206(j) required a SEF to adopt rules that provide certain minimum procedural safeguards for any hearing conducted pursuant to a notice of charges. In general, proposed §§ 37.206(j)(1)(i) through (j)(1)(vii) required the following: (i) A fair hearing; (ii) authority for a respondent to examine evidence relied on by enforcement staff in presenting the charges; (iii) the SEF's enforcement and compliance staffs to be parties to the hearing and the enforcement staff to present its case on the charges and sanctions; (iv) the respondent to be entitled to appear personally at the hearing, to cross-examine and call witnesses, and to present evidence; (v) the SEF to require persons within its jurisdiction who are called as witnesses to participate in the hearing and produce evidence; (vi) a copy of the hearing be made and be a part of the record of the proceeding if the respondent requested the hearing; and (vii) the rules of the SEF may provide that the cost of transcribing the record be borne by the respondent in certain circumstances. Additionally, proposed § 37.206(j)(2) specified that the rules of the SEF may provide that a sanction be summarily imposed upon any person within its jurisdiction whose actions impede the progress of a hearing.

(i) Summary of Comments

CME recommended that proposed § 37.206(j)(1)(ii) be revised so that a respondent may not access protected attorney work product, attorney-client communications, and investigative work product (*e.g.,* investigation and exception reports).[571]

(ii) Commission Determination

The Commission is partially adopting proposed § 37.206(j), and is either eliminating or moving to guidance the remaining portion of the rule. The Commission is maintaining as a rule the provisions requiring the following: (1) Hearings must be fair; and (2) if a respondent requested a hearing, a copy of the hearing be made and be a part of the record of the proceeding.[572] The Commission is eliminating proposed § 37.206(j)(1)(vii), a discretionary rule that in certain cases allowed for the cost of transcribing the record of the hearing to be borne by the respondent. The Commission is moving the remainder of proposed § 37.206(j) to the guidance in appendix B to part 37. The Commission believes that these revisions are appropriate given commenters' requests for greater flexibility to establish their own disciplinary procedures.

The Commission agrees with CME's comment that a SEF should be permitted to withhold certain documents from a respondent in certain circumstances. Therefore, the Commission is revising the text of proposed § 37.206(j)(1)(ii), which will now be included in guidance, to provide that a SEF may withhold documents that: (i) Are privileged or constitute attorney work product; (ii) were prepared by an employee of the SEF but will not be offered in evidence in the disciplinary proceedings; (iii) may disclose a technique or guideline used in examinations, investigations, or enforcement proceedings; or (iv) disclose the identity of a confidential source.

(12) § 37.206(k)—Decisions

Proposed § 37.206(k) required a Hearing Panel, promptly following a hearing conducted in accordance with proposed § 37.206(j), to render a written decision based upon the weight of the evidence and to provide a copy to the respondent. Paragraphs (1) through (6) detailed the items to be included in the decision.

(i) Commission Determination

The Commission received no comments on proposed § 37.206(k) and is adopting the rule as proposed with certain non-substantive clarifications.[573]

(13) § 37.206(l)—Right to Appeal

Proposed § 37.206(l) provided the procedures that a SEF must follow in the event that the SEF's rules permit an appeal. For SEFs that permit appeals, the language in paragraphs (1) through (4) of proposed § 37.206(l) generally required the SEF to: (1) Establish an appellate panel; (2) ensure that the appellate panel composition is consistent with § 40.9(c)(iv) and not include any members of the SEF's compliance staff or any person involved in adjudicating any other stage of the same proceeding; (3) conduct the appeal solely on the record before the Hearing Panel, except for good cause shown; and (4) issue a written decision of the board of appeals and provide a copy to the respondent.

(i) Commission Determination

Although the Commission received no comments on proposed § 37.206(l), the Commission is moving the entire rule to the guidance in appendix B to part 37.[574] Given that proposed § 37.206(l) allowed, but did not require, a SEF to issue rules regarding a respondent's right to appeal, the Commission believes that the proposed rule is better suited as guidance rather than a rule. The Commission also believes that adopting the proposed rule as guidance, rather than a rule, will provide SEFs greater flexibility in administering their obligations, consistent with the general comments seeking the same.

(14) § 37.206(m)—Final Decisions

Proposed § 37.206(m) required that each SEF establish rules setting forth when a decision rendered under § 37.206 will become the final decision of the SEF.

(i) Commission Determination

Although the Commission received no comments on proposed § 37.206(m), the Commission is moving the entire rule to

[571] CME Comment Letter at 36 (Feb. 22, 2011).

[572] The Commission is renumbering proposed § 37.206(j) to § 37.206(c). The Commission is also revising the proposed rule to reflect the single-panel approach adopted in § 37.206(b), replacing specific panel names with a generic reference to the ''disciplinary panel.'' The Commission is also revising the reference to § 37.206(l) in proposed § 37.206(j)(1)(vi) given that it is moving proposed § 37.206(l) to guidance.

[573] The Commission is renumbering proposed § 37.206(k) to § 37.206(d). The Commission is also revising the reference to § 37.206(j) in proposed § 37.206(k) given that the Commission has either eliminated or moved to guidance many of the provisions of proposed § 37.206(j). The Commission is also revising the proposed rule to reflect the single-panel approach adopted in § 37.206(b), replacing specific panel names with a generic reference to the ''disciplinary panel.''

[574] The Commission notes that the reference to § 40.9(c)(iv) in the proposed rule was a technical error. Instead, proposed § 37.206(l) should have referenced the composition requirements of an appellate panel outlined in proposed § 40.9(c)(3)(iii). However, to accommodate any re-enumeration that may occur with respect to proposed § 40.9(c)(3)(iii), the Commission is replacing the mistaken reference to § 40.9(c)(iv) with a more general reference to part 40 in the guidance text. *See* Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 FR 63732, 63752 (proposed Oct. 18, 2010). The Commission is also revising the reference to § 37.206(k) in proposed § 37.206(l)(4) to § 37.206(d) given the renumbering in § 37.206. Finally, the Commission is revising the proposed rule to reflect the single-panel approach adopted in § 37.206(b), replacing specific panel names with a generic reference to the ''disciplinary panel.''

the guidance in appendix B to part 37. The Commission believes that adopting the proposed rule as guidance rather than a rule provides a SEF with additional flexibility to establish disciplinary procedures to meet its obligations pursuant to Core Principle 2.

(15) § 37.206(n)—Disciplinary Sanctions

Proposed § 37.206(n) required that disciplinary sanctions imposed by a SEF must be commensurate with the violations committed and must be clearly sufficient to deter recidivism or similar violations by other market participants. In addition, the proposed rule required that a SEF take into account a respondent's disciplinary history when evaluating appropriate sanctions. The proposed rule further required that in the event of demonstrated customer harm, any disciplinary sanction must include full customer restitution.

(i) Summary of Comments

WMBAA recommended that any limitation of a market participant's access to a SEF imposed in response to a rule violation should be recognized and enforced consistently among all SEFs.[575] WMBAA also recommended that any disciplinary sanction imposed by a SEF should be published and made available to market participants.[576] Such requirements, WMBAA argued, are necessary in order to prevent market participants from gaming the system and maintaining access to markets after violations.[577]

(ii) Commission Determination

The Commission is adopting proposed § 37.206(n), subject to certain modifications.[578] The Commission is revising proposed § 37.206(n) to clarify that a respondent's disciplinary history should be taken into account in all sanction determinations, including sanctions imposed pursuant to an accepted settlement offer. Furthermore, the Commission is revising proposed § 37.206(n) so that it does not require customer restitution if the amount of restitution or the recipient cannot be reasonably determined.[579]

The Commission acknowledges WMBAA's comment that disciplinary sanctions may not be recognized and enforced consistently across SEFs. However, each SEF is a distinct entity with its own rulebook and set of disciplinary procedures. Therefore, each SEF must determine the sanctions that are appropriate for its own market and thus the same conduct may result in different sanctions at different SEFs. The Commission does not believe that such sanction variation supports the mandatory recognition of sanctions across SEFs. However, if a SEF believes that it is important to recognize and enforce sanctions against market participants imposed by other SEFs or DCMs, then the SEF may implement appropriate rules.

The Commission agrees with WMBAA that any disciplinary sanction imposed by a SEF should be published and made available to market participants. Commission Regulation 9.11(a) requires that ''[w]henever an exchange decision pursuant to which a disciplinary action or access denial action is to be imposed has become final, the exchange must, within thirty days thereafter, provide written notice of such action to . . . the Commission . . . .'' [580] The Commission has issued guidance that an exchange may comply with § 9.11(a) by transmitting or delivering the notice to NFA to be included in NFA's Background Affiliation Status Information Center database, which is available to the public online.[581] The Commission also notes that a SEF may adopt rules regarding the publishing of disciplinary sanctions imposed by the SEF.

(16) § 37.206(o)—Summary Fines for Violations of Rules Regarding Timely Submission of Records

Proposed § 37.206(o) permitted a SEF to adopt a summary fine schedule for violations of rules relating to the timely submission of accurate records required for clearing or verifying each day's transactions. Under the proposed rule, a SEF may permit its compliance staff to summarily impose minor sanctions against persons within the SEF's jurisdiction for violating such rules. The proposed rule made clear that a SEF's summary fine schedule must not permit more than one warning letter in a rolling 12-month period for the same violation before sanctions are imposed and must provide for progressively larger fines for recurring violations.

(i) Summary of Comments

CME objected to the restriction of one warning letter per rolling 12-month period.[582] MarketAxess also requested that the Commission adopt a uniform approach with respect to warning letters, either permitting warning letters as a sanction or an indication of a finding of a violation in all SEF contexts.[583]

(ii) Commission Determination

The Commission is partially adopting proposed § 37.206(o) and is converting the remaining portion of the rule to guidance in appendix B to part 37.[584] The Commission is maintaining as a rule the provision in the proposed rule that prohibits a SEF from issuing more than one warning letter per rolling 12-month period for the same violation. As discussed above, the Commission believes that in order to ensure that warning letters serve as effective deterrents, and to preserve the value of disciplinary sanctions, no more than one warning letter may be issued to the same person or entity found to have committed the same rule violation within a rolling 12-month period.[585] While a warning letter may be appropriate for a first-time violation, the Commission does not believe that more than one warning letter in a rolling 12-month period for the same violation is ever appropriate.[586]

However, in response to MarketAxess's comment, the Commission is narrowing the application of this rule to warning letters that contain an affirmative finding that a rule violation has occurred. Additionally, in order to provide flexibility, the compliance date of this rule will be one year from the effective date of the final SEF rules so that persons and entities may adapt to the new SEF regime. The Commission is converting the remainder of proposed § 37.206(o) to guidance in appendix B to part 37 because the proposed rule allowed, but did not require, a SEF to adopt a summary fine schedule.

(17) § 37.206(p)—Emergency Disciplinary Actions

Proposed § 37.206(p) provided that a SEF may impose a sanction, including

[575] WMBAA Comment Letter at 23 (Mar. 8, 2011).

[576] *Id.*

[577] *Id.* at 24.

[578] The Commission is renumbering proposed § 37.206(n) to § 37.206(e).

[579] The Commission notes that commenters to the DCM rulemaking requested this change and, after considering the comments, the Commission believes that this revision should also be applicable to SEFs. Core Principles and Other Requirements for Designated Contract Markets, 77 FR at 36654–55.

[580] Section 37.2 states that a SEF shall comply with part 9 of the Commission's regulations.

[581] NFA's Background Affiliation Status Information Center database is *available at http://www.nfa.futures.org/basicnet/*.

[582] CME Comment Letter at 36 (Feb. 22, 2011).

[583] MarketAxess Comment Letter at 36 (Mar. 8, 2011).

[584] The Commission is renumbering proposed § 37.206(o) to § 37.206(f). The Commission is also retitling this section as ''Warning letters.''

[585] For purposes of this rule, the Commission does not consider a ''reminder letter'' or such other similar letter to be any different than a warning letter.

[586] *See* Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1224.

a suspension, or take other summary action against a person or entity subject to its jurisdiction upon a reasonable belief that such immediate action is necessary to protect the best interest of the marketplace. The proposed rule also provided that any emergency action taken by the SEF must be in accordance with certain procedural safeguards as enumerated in the proposed rule.[587]

(i) Commission Determination

Although the Commission received no comments on proposed § 37.206(p), the Commission is moving the entire rule to the guidance in appendix B to part 37 because it is a discretionary rule.[588] The Commission also believes that adopting the proposed rule as guidance, rather than a rule, will provide SEFs greater flexibility in administering their obligations, consistent with the general comments seeking the same.

The Commission is also codifying new § 37.206(g)[589] (titled ''Additional sources for compliance'') that permits SEFs to refer to the guidance and/or acceptable practices in appendix B to part 37 to demonstrate to the Commission compliance with the requirements of § 37.206.

(h) § 37.207—Swaps Subject to Mandatory Clearing

Proposed § 37.207 required that a SEF provide rules that when a swap dealer or major swap participant enters into or facilitates a swap transaction subject to the mandatory clearing requirement under section 2(h) of the Act, the swap dealer or major swap participant shall be responsible for complying with the mandatory trading requirement under section 2(h)(8) of the Act.

(1) Summary of Comments

FXall stated that proposed § 37.207 could be read to require a SEF to be responsible for policing the conduct of swap dealers and major swap participants generally, and not only with respect to their trading on such SEF.[590] In this regard, MarketAxess stated that a SEF's obligation to require swap dealers and major swap participants to comply with the mandatory trading requirement should only extend to swaps that are executed pursuant to its own rules.[591] MarketAxess also noted that proposed § 37.207 is identical to proposed § 37.200(d) and therefore is unnecessary.[592] WMBAA commented that there is no statutory basis to impose the requirement in proposed § 37.207.[593]

(2) Commission Determination

The Commission agrees with MarketAxess that proposed § 37.207 is identical to § 37.200(d) and is therefore eliminating proposed § 37.207. In response to WMBAA's comment, the Commission notes that § 37.200(d) recites the statutory text of Core Principle 2 and thus provides the statutory basis for codification of the statutory text as a regulation.[594] To address FXall's and MarketAxess's concerns, the Commission clarifies that a SEF's rules pursuant to § 37.200(d) need only apply to swaps executed on or pursuant to the rules of that SEF.

3. Subpart D—Core Principle 3 (Swaps Not Readily Susceptible to Manipulation)

Core Principle 3 requires that a SEF permit trading only in swaps that are not readily susceptible to manipulation.[595] In the SEF NPRM, the Commission proposed to codify the statutory text of Core Principle 3 in proposed § 37.300, and adopts that rule as proposed.

To demonstrate to the Commission compliance with Core Principle 3, proposed § 37.301 required a SEF to submit new swap contracts in advance to the Commission pursuant to part 40 of the Commission's regulations, and provide to the Commission the information required under appendix C to part 38. The Commission also proposed guidance for compliance with Core Principle 3 under appendix B to part 37, which noted the importance of the reference price for a swap contract. The guidance also stated that Core Principle 3 requires that the reference price used by a swap not be readily susceptible to manipulation.

(a) Summary of Comments[596]

Reuters generally supported Core Principle 3, and the requirement that SEFs should have in place appropriate systems and controls to identify and manage situations where the market or individual swap contract may be susceptible to manipulation or fraud.[597] GFI commented that once the Commission has declared a swap subject to mandatory clearing, a SEF should not be required to ensure that the contract is not readily susceptible to manipulation since such activity would be redundant.[598] According to GFI, the Commission would not make a swap subject to mandatory clearing unless it believed that the swap is not subject to manipulation.[599]

(b) Commission Determination

The Commission is adopting § 37.301 as proposed, subject to certain modifications for clarity. The Commission is deleting from the rule the references to prior approval or self-certification for new product submissions under part 40 of the Commission's regulations because those details are covered under § 37.4 and part 40. The Commission is also adding to the rule a reference to the guidance and/or acceptable practices in appendix B to part 37. This reference was inadvertently omitted from the SEF NPRM.

In response to GFI's comments, the Commission notes that section 5h of the Act requires that a SEF permit trading only in swaps that are not readily susceptible to manipulation.[600] The Commission notes that this is a separate and distinct requirement for a SEF to comply with, as opposed to the Commission determination as to whether a swap is subject to mandatory clearing. The Commission does not have the authority under CEA section 4(c)(1) to exempt SEFs from complying with the core principles.

The Commission notes that the requirement that a SEF permit trading in swaps that are not readily susceptible to manipulation requires a SEF to be responsible for the terms and conditions of the swap contracts which trade on its facility. To meet this requirement, the

[587] The Commission notes that, pursuant to § 9.11 and § 37.2, SEFs must provide the Commission with notice of any disciplinary actions that they take, including emergency disciplinary actions.

[588] The Commission is also revising the reference to § 37.206(j) in proposed § 37.206(p)(ii) given that the Commission has either eliminated or moved to guidance many of the provisions of proposed § 37.206(j).

[589] The Commission notes that this paragraph's numbering is due to the renumbering of § 37.206.

[590] FXall Comment Letter at 11 (Mar. 8, 2011).

[591] MarketAxess Comment Letter at 34 (Mar. 8, 2011).

[592] *Id.*

[593] WMBAA Comment Letter at 24 (Mar. 8, 2011).

[594] CEA section 5h(f)(2)(D); 7 U.S.C. 7b–3(f)(2)(D).

[595] CEA section 5h(f)(3); 7 U.S.C. 7b–3(f)(3).

[596] The Commission notes that in Argus's joint DCM and SEF rulemaking comment letter dated Feb. 22, 2011, it commented on Core Principle 3 and specifically, the Commission's guidance in appendix C to part 38—Demonstration of Compliance That a Contract is Not Readily Susceptible to Manipulation. The Commission has addressed Argus's comments in the DCM final rulemaking, Core Principles and Other Requirements for Designated Contract Markets, 77 FR at 36633–34. The Commission also notes that in CME's SEF rulemaking comment letter dated Mar. 8, 2011 and DCM rulemaking comment letter dated Feb. 22, 2011, it commented on the Commission's guidance in appendix C to part 38. The Commission has also addressed CME's comments in the DCM final rulemaking, Core Principles and Other Requirements for Designated Contract Markets, 77 FR at 36632–34.

[597] Reuters Comment Letter at 5 (Mar. 8, 2011).

[598] GFI Comment Letter at 4–5 (Mar. 8, 2011).

[599] *Id.* at 5.

[600] CEA section 5h(f)(3); 7 U.S.C. 7b–3(f)(3).

guidance includes items that a SEF should consider in developing swap contract terms and conditions for both physical delivery and cash-settled contracts. The Commission recognizes that a SEF may permit trading in a wide range of swaps, some standardized and others customized and complex. The Commission staff is available to consult with SEFs should questions arise regarding the information that SEFs should submit to the Commission to satisfy the requirements of Core Principle 3, especially for the SEF's more customized and complex swap contracts. The Commission will take into account these considerations when determining whether a SEF satisfies the requirements of Core Principle 3.

4. Subpart E—Core Principle 4 (Monitoring of Trading and Trade Processing)

Under Core Principle 4, a SEF must establish and enforce rules or terms and conditions defining, or specifications detailing trading procedures to be used in entering and executing orders traded on or through the facilities of the SEF and procedures for trade processing of swaps on or through the facilities of the SEF.[601] Core Principle 4 also requires a SEF to monitor trading in swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.[602] In the SEF NPRM, the Commission proposed to codify the statutory text of Core Principle 4 in proposed § 37.400, and adopts that rule as proposed.

As discussed above under Core Principle 3, the Commission recognizes that a SEF may permit trading in a wide range of swaps, some standardized and others customized and complex. The Commission staff is available to consult with SEFs should questions arise regarding how to satisfy the requirements of Core Principle 4, especially for the SEF's more customized and complex swap contracts. The Commission will take into account these considerations when determining whether a SEF satisfies the requirements of Core Principle 4.

(a) § 37.401—General Requirements

Proposed § 37.401(a) required a SEF to collect and evaluate data on individual traders' market activity on an ongoing basis in order to detect and prevent manipulation, price distortions and, where possible, disruptions of the delivery or cash-settlement process. Proposed § 37.401(b) required a SEF to monitor and evaluate general market data in order to detect and prevent manipulative activity that would result in the failure of the market price to reflect the normal forces of supply and demand. Proposed § 37.401(c) required a SEF to have the capacity to conduct real-time monitoring of trading and comprehensive and accurate trade reconstruction. Further, the proposed rule required that intraday trade monitoring must include the capacity to detect abnormal price movements, unusual trading volumes, impairments to market liquidity, and position-limit violations. Finally, proposed § 37.401(d) required a SEF to have either manual processes or automated alerts that are effective in detecting and preventing trading abuses. The Commission noted in the SEF NPRM preamble that it would be difficult, if not impossible, for a SEF to monitor for market disruptions in markets with high transaction volume and a large number of trades unless the SEF installed automated trading alerts.[603]

(1) Summary of Comments

Several commenters sought clarification that proposed § 37.401 limits a SEF's oversight of market participant activity to its own SEF.[604] Tradeweb, for example, commented that a SEF cannot ensure that a marketplace other than its own has not been manipulated to affect the SEF's swaps because the SEF will not have enough information about the other marketplaces.[605]

WMBAA requested that the Commission clarify what it means by ''individual traders'' and ''market activity'' in proposed § 37.401(a).[606] WMBAA also sought clarification regarding what constitutes ''general market data'' in proposed § 37.401(b).[607]

CME commented that the Commission's requirements for real-time monitoring in proposed § 37.401(c) are overly broad, and stated that requiring real-time monitoring capabilities across every instrument for vague terms such as ''abnormal price movements,'' ''unusual trading volumes,'' and ''impairments to market liquidity'' does not provide a SEF with sufficient clarity with respect to what specific capabilities satisfy the standard.[608] Similarly, ICE requested that the Commission delete the phrase ''impairments to market liquidity'' from the rule, arguing that the wording is vague and has no foundation in the core principle.[609]

ICE and CME also expressed concern regarding the real-time monitoring of position limits.[610] ICE stated that real-time monitoring of position limits may be flawed given that option deltas change throughout the day, the destination of allocated and give-up transactions are not immediately known, and off-exchange transactions may not be reported in real-time.[611] CME stated that effective real-time monitoring of position limits is challenging given that the identical contract will frequently trade in multiple competitive venues.[612]

In response to the Commission's questions in the SEF NPRM regarding high frequency trading, CME raised concerns over the absence of a definition for high frequency trading, which CME claimed can include many different trading strategies.[613] CME questioned whether the Commission had unique concerns about high frequency traders, and further remarked that the Commission has not articulated what purpose would be served by singling out high frequency trading for special monitoring.[614] CME stated, however, that it has the capability to monitor the messaging frequency of participants in their markets and can quickly and easily identify which participants generate high messaging traffic.[615] With respect to the ability of automated trading systems to detect and flag high frequency trading anomalies, CME commented that it is unclear what specific types of anomalies would be uniquely of concern in the context of a high frequency trader as opposed to any other type of trader.[616] CME noted that its systems were designed to identify anomalies or transaction patterns that violate their rules or might otherwise be

[601] CEA section 5h(f)(4); 7 U.S.C. 7b–3(f)(4).

[602] *Id.*

[603] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1227.

[604] Bloomberg Comment Letter 3–4 (Jun. 3, 2011); Parity Energy Comment Letter at 4 (Mar. 25, 2011); Tradeweb Comment Letter at 11 (Mar. 8, 2011); MarketAxess Comment Letter at 22 (Mar. 8, 2011); WMBAA Comment Letter at 25 (Mar. 8, 2011).

[605] Tradeweb Comment Letter at 11 (Mar. 8, 2011).

[606] WMBAA Comment Letter at 25 (Mar. 8, 2011).

[607] *Id.*

[608] CME Comment Letter at 24 (Feb. 22, 2011).

[609] ICE Comment Letter at 4 (Mar. 8, 2011).

[610] ICE Comment Letter at 4 (Mar. 8, 2011); CME Comment Letter at 24 (Feb. 22, 2011).

[611] ICE Comment Letter at 4 (Mar. 8, 2011).

[612] CME Comment Letter at 24 (Feb. 22, 2011).

[613] *Id.* at 25.

[614] *Id.*

[615] *Id.*

[616] *Id.*

indicative of some other risk to the orderly functioning of the markets.[617]

(2) Commission Determination

The Commission is adopting § 37.401 as proposed, subject to certain modifications, including converting portions of the rule to guidance in appendix B to part 37.[618]

To address commenters' concerns whether § 37.401 requires a SEF to monitor market activity beyond its own market, the Commission notes that the Act requires a SEF to monitor trading in swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process.[619] Given this statutory requirement, there are certain instances where a SEF must monitor market activity beyond its own market.[620] As noted below, a SEF must assess whether trading in a third-party index or instrument used as a reference price or the underlying commodity for its listed swaps is being used to affect prices on its market.[621] The Commission, however, provides flexibility to SEFs by not prescribing in the regulations the specific methods for monitoring. To provide additional flexibility, in instances where a SEF can demonstrate to the Commission that trading activity off the SEF's facility is not relevant to threats of manipulation, distortion, or disruption for trading conducted on its own facility, then the SEF may limit monitoring to trading activity on its own facility.

In response to WMBAA's concerns regarding the clarification of certain terms in § 37.401(a), the Commission is revising the rule text to change the term ''individual traders'' to ''market participants'' as ''individual traders'' was meant to apply to a SEF's market participants. The Commission also clarifies that ''market activity'' means its market participants' ''trading'' activity. In § 37.401(b), ''general market data'' means that a SEF shall monitor and evaluate general market conditions related to its swaps. For example, a SEF must monitor the pricing of the underlying commodity or a third-party index or instrument used as a reference price for its swaps as compared to the prices on its markets.

The Commission is also revising the rule to clarify that: (a) Real-time monitoring is to detect and, when necessary, resolve abnormalities; and (b) reconstructing trading activity is to detect instances or threats of manipulation, price distortion, and disruptions.

In the guidance, the Commission is clarifying that monitoring of trading activity in listed swaps should be designed to prevent manipulation, price distortion, and disruptions. The Commission believes that SEFs should have rules in place that allow it to intervene to prevent or reduce market disruptions given such requirement in Core Principle 4. The Commission also notes that once a threatened or actual disruption is detected, the SEF should take steps to prevent the disruption or reduce its severity.

In the guidance, the Commission is also clarifying what activities should be included in real-time monitoring as compared to what activities may be done on a T+1 basis. The Commission believes that monitoring of price movements and trading volumes in order to detect, and when necessary, resolve abnormalities should be accomplished in real time in order to achieve, as much as possible, the statute's emphasis on preventive actions. It is acceptable, however, to have a program that detects instances or threats of manipulation, price distortion, and disruptions on at least a T+1 basis, incorporating any additional data that is available on such T+1 basis, including trade reconstruction data. The Commission notes that it dropped the requirements for a SEF to monitor for ''impairments to market liquidity'' and ''position limit violations'' given commenters' concerns about the difficulty of such monitoring.

The Commission is moving to guidance the requirement to have automated alerts in proposed § 37.401(d). The Commission believes that automated trading alerts, preferably in real time, are the most effective means of detecting market anomalies. However, a SEF may demonstrate that its manual processes are effective.

As for the Commission's inquiry in the SEF NPRM about requiring additional monitoring of high frequency trading, the Commission believes that a SEF should be capable of monitoring all types of trading that may occur on its facility, including trading that may be characterized as ''high frequency.'' The Commission has decided not to implement, at this time, further rules pertaining to the monitoring of high frequency trading. The Commission is encouraged that there are efforts underway both within and outside of the Commission, to define and develop approaches for better monitoring of high-frequency and algorithmic trading. This is particularly evident from recent work done at the request of the Commission's Technology Advisory Committee (''TAC'').[622] Further, the United Kingdom government's Foresight Project also commissioned a recently released report on the future of computer trading in financial markets, which aims to assess the risks and benefits of automated buying and selling.[623] These efforts may assist the Commission's further development of a regulatory framework for high frequency trading activities.

(b) § 37.402—Additional Requirements for Physical-Delivery Swaps

Proposed § 37.402 required, for physical-delivery swaps, that a SEF monitor each swap's terms and conditions, monitor the adequacy of deliverable supplies, assess whether supplies are available to those making physical delivery and saleable by those taking delivery, and monitor the ownership of deliverable supplies. Proposed § 37.402 also required that a SEF address any conditions that are causing price distortions or market disruptions.

(1) Summary of Comments

CME commented that proposed § 37.402 should be an acceptable practice instead of a prescriptive rule.[624] Parity Energy commented that in a market where numerous SEFs permit trading in identical swaps, requiring each SEF to monitor the adequacy, size, and ownership of deliverable supply as well as the delivery locations and commodity characteristics is duplicative, unmanageable, and creates the risk of conflicting conclusions.[625]

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[617] *Id.*

[618] The Commission is moving proposed § 37.401(d) to the guidance in appendix B to part 37 and moving the ''trade reconstruction'' language in proposed § 37.401(c) to final § 37.401(d).

[619] CEA section 5h(f)(4)(B); 7 U.S.C. 7b–3(f)(4)(B).

[620] Refer to the guidance under Core Principle 4 in appendix B to part 37 for examples of methods for monitoring market activity beyond a SEF's own market.

[621] *See* discussion below under § 37.403—Additional Requirements for Cash-Settled Swaps and § 37.404—Ability To Obtain Information in the preamble.

[622] *See, e.g.,* ''Recommendations on Pre-Trade Practices for Trading Firms, Clearing Firms and Exchanges involved in Direct Market Access,'' Pre-Trade Functionality Subcommittee of the CFTC's Technology Advisory Committee (Mar. 1, 2011) (''TAC Subcommittee Recommendations''), *available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/tacpresentation030111_ptfs2.pdf.* The Commission notes that the subcommittee report was submitted to the TAC and made available for public comment, but no final action has been taken by the full committee.

[623] *See* UK Government Office for Science, Foresight Project, The Future of Computer Trading in Financial Markets (working paper), *available at http://www.bis.gov.uk/foresight/our-work/projects/current-projects/computer-trading/working-paper.*

[624] CME Comment Letter at 25 (Feb. 22, 2011).

[625] Parity Energy Comment Letter at 4 (Mar. 25, 2011).

(2) Commission Determination

The Commission is adopting § 37.402 as proposed, subject to certain modifications, including converting portions of the rule to guidance in appendix B to part 37.[626] In response to comments and to provide SEFs with greater flexibility, the Commission is revising the requirement in proposed § 37.402(a)(2)[627] so that SEFs only have to monitor the ''availability'' of the commodity supply instead of monitoring whether the supply is ''adequate.'' The Commission is also removing from proposed § 37.402 the requirements that SEFs monitor specific details of the supply, marketing, and ownership of the commodity to be physically delivered. Instead, appendix B to part 37 lists guidance for monitoring conditions that may cause a physical-delivery swap to become susceptible to price manipulation or distortion, including monitoring the general availability of the commodity specified by the swap, the commodity's general characteristics, the delivery locations, and, if available, information on the size and ownership of deliverable supplies. Moving these specific details to guidance will provide SEFs with additional flexibility in meeting their monitoring obligations associated with physical-delivery swaps.

(c) § 37.403—Additional Requirements for Cash-Settled Swaps

Proposed § 37.403(a) required, for cash-settled swaps, that a SEF monitor: (a) The availability and pricing of the commodity making up the index to which the swap is settled and; (b) the continued appropriateness of the methodology for deriving the index for SEFs that compute their own indices. Where a swap is settled by reference to the price of an instrument traded in another venue, proposed § 37.403(b) required that the SEF either have an information sharing agreement with the other venue or be able to independently determine that positions or trading in the reference instrument are not being manipulated to affect positions or trading in its swap.

(1) Summary of Comments

Argus expressed concern regarding the requirement in proposed § 37.403(a)(1) for a SEF to monitor the availability and pricing of the commodity making up the index to which the swap will be settled, particularly where an index price is published based upon transactions that are executed off the SEF.[628] Argus noted that if a SEF is required to perform this monitoring function, a SEF may choose not to list the swap and market participants would not have a hedging instrument.[629] Argus also commented that the cost to monitor transactions that are executed off of the SEF could be prohibitive.[630]

Several commenters expressed concern about the requirement in proposed § 37.403(b) that a SEF have an information sharing agreement with, or monitor positions or trading in, another venue when a swap listed on the SEF is settled by reference to the price of an instrument traded on another venue.[631] ICE stated that the proposal places an undue burden on SEFs to monitor positions held at other trading venues, and that this requirement would be more efficiently facilitated by a central regulatory body such as the Commission.[632]

Similarly, CME stated that the Commission is uniquely situated to add regulatory value to the industry by reviewing for potential cross-venue rule violations because the Commission is the central repository for position information delivered to it on a daily basis in a common format across all venues.[633] CME asserted that the SEF NPRM's proposed alternative of requiring SEFs and their customers to report information that the Commission already receives or will be receiving is an onerous burden.[634] CME further asserted that the SEF NPRM's other proposed alternative, that the SEF enter into an information-sharing agreement with the other venue, will result in additional costs to both entities and that it may not be practical or prudent for a SEF to enter into such an agreement with the other venue.[635]

Finally, Nodal stated that a SEF that is a party to an industry agreement such as the International Information Sharing Memorandum of Understanding and Agreement should satisfy the information sharing requirement in the proposed rule by virtue of such agreement.[636]

(2) Commission Determination

The Commission is adopting § 37.403 as proposed, subject to certain modifications, including converting portions of the rule to guidance in appendix B to part 37.[637] The Act requires SEFs to monitor trading in swaps to prevent disruptions of the cash settlement process.[638] However, in response to Argus's comment about the costs of proposed § 37.403(a)(1), the Commission has removed from the rule the requirement that a SEF monitor the availability and pricing of the commodity making up the index to which the swap will be settled. Section 37.403(a)[639] now requires that a SEF monitor the pricing of the reference price used to determine cash flows or settlement. The Commission believes that SEFs must monitor the pricing of the reference price in order to comply with Core Principle 4's requirement to prevent manipulation, price distortion, and disruptions of the cash settlement process. As noted in the SEF NPRM, market participants may have incentives to disrupt or manipulate reference prices for cash-settled swaps.[640]

Although no comments were received on proposed § 37.403(a)(2),[641] the Commission is revising the rule so that the requirement for monitoring the continued appropriateness of the methodology for deriving the reference price only applies when the reference price is formulated and computed by the SEF. In order to reduce the burden on SEFs, the Commission is clarifying in new § 37.403(c) that when the reference price relies on a third-party index or instrument, including an index or instrument traded on another venue, the SEF must only monitor the ''continued appropriateness'' of the index or instrument as opposed to specifically monitoring the ''continued appropriateness of the methodology'' for deriving the index. To provide SEFs with greater flexibility, the Commission is moving the other requirements for monitoring in proposed § 37.403(a)(2) to the guidance in appendix B to part 37. Specifically, the guidance notes that if a SEF computes its own reference price, it should promptly amend any methodologies or impose new methodologies as necessary to resolve threats of disruption or distortions. For

[626] The Commission is renumbering proposed § 37.402(a)(1) and (a)(2) to § 37.402(a) and (b), respectively. The Commission is deleting or moving to guidance proposed § 37.402(a)(3), (a)(4), and (b).

[627] Proposed § 37.402(a)(2) is now final § 37.402(b).

[628] Argus Comment Letter at 6 (Feb. 22, 2011).

[629] *Id.*

[630] *Id.* at 7.

[631] Parity Energy Comment Letter at 5 (Mar. 25, 2011); ICE Comment Letter at 4–5 (Mar. 8, 2011); Nodal Comment Letter at 5 (Mar. 8, 2011); CME Comment Letter at 11 (Mar. 8, 2011).

[632] ICE Comment Letter at 4–5 (Mar. 8, 2011).

[633] CME Comment Letter at 11 (Mar. 8, 2011).

[634] *Id.*

[635] *Id.*

[636] Nodal Comment Letter at 5 (Mar. 8, 2011).

[637] The Commission is renumbering proposed § 37.403(a)(1) and (a)(2) to § 37.403(a), (b), and (c). The Commission is moving proposed § 37.403(b) to § 37.404(a).

[638] CEA section 5h(f)(4)(B); 7 U.S.C. 7b–3(f)(4)(B).

[639] Final § 37.403(a) was proposed § 37.403(a)(1).

[640] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1228.

[641] The Commission is renumbering proposed § 37.403(a)(2) to § 37.403(b).

reference prices that rely upon a third-party index or instrument, the Commission notes in the guidance that the SEF should conduct due diligence to ensure that the reference price is not susceptible to manipulation.

With respect to commenters' concerns about the requirement in proposed § 37.403(b) for a SEF to have an information-sharing agreement with, or monitor positions or trading in, another venue when a swap listed on the SEF is settled by reference to the price of an instrument traded on another venue, the Commission notes that the Act requires SEFs to monitor trading in swaps to prevent disruptions of the cash settlement process.[642] Given this statutory requirement, the Commission believes that a SEF must have access to sufficient information to determine whether trading in the instrument or index used as a reference price for its listed swaps is being used to affect prices on its market. The Commission is adopting this general requirement, but is moving it to § 37.404 where it more logically belongs.

Although, as CME noted, the Commission does obtain certain position information in the large-trader reporting systems for swaps, the Commission may not routinely obtain such position information, including where a SEF's swap settles to the price of a non-U.S. index or instrument. However, in response to ICE's and CME's concerns and to reduce the burden on SEFs, the Commission is removing from the rule text the requirement for SEFs to assess ''positions'' and is moving it to the guidance in appendix B to part 37. The Commission is also moving to the guidance the specific methods for a SEF to obtain information to assess whether trading in the reference market is being used to affect prices on its market. The guidance also allows SEFs to limit such information gathering to market participants that conduct substantial trading on its facility.

(d) § 37.404—Ability To Obtain Information

Proposed § 37.404(a) provided that a SEF must have rules that require traders in its swaps to keep and make available records of their activity in underlying commodities and related derivatives markets and swaps. Proposed § 37.404(b) required that a SEF with customers trading through intermediaries have a large-trader reporting system or other means to obtain position information.

(1) Summary of Comments

CME commented that the Commission should specify in acceptable practices the types of records that traders are required to keep under proposed § 37.404(a).[643] WMBAA commented that the requirement for a SEF to force traders to maintain trading and financial records is not required under the CEA.[644]

(2) Commission Determination

The Commission is adopting § 37.404 as proposed, subject to certain modifications, including providing guidance in appendix B to part 37.[645] As noted above in the discussion of § 37.403, the Commission is moving to § 37.404 the requirement for a SEF to assess whether trading in swaps listed on its market, in the index or instrument used as a reference price, or in the underlying commodity for its swaps is being used to affect prices in its market.[646]

With respect to CME's and WMBAA's comments on proposed § 37.404(a),[647] the Commission disagrees that this rule is unnecessary or that the requirements should instead be codified as acceptable practices. Core Principle 4 requires a SEF to monitor trading in swaps to prevent manipulation, price distortion, and disruptions.[648] In its experience regulating the futures market, the Commission has found market participants' records to be an invaluable tool in its surveillance efforts, and believes that a SEF should have direct access to such information in order to discharge its obligations under the SEF core principles, including Core Principle 4. However, the Commission notes that in the guidance for this rule, a SEF may limit the application of this requirement to those market participants who conduct substantial trading activity on its facility, which is consistent with the Commission's similar requirements that large traders keep records for futures trading under § 18.05 and for swaps trading under § 20.6 of the Commission's regulations. The Commission also notes that the requirement for market participants to keep such records is sound commercial practice, and that market participants are likely already maintaining such trading records. In response to CME's comment, the Commission notes that the nature of records covered varies with the type of market and a market participant's involvement, but would generally include purchases, sales, ownership, production, processing, and use of swaps, the underlying commodity, and other derivatives that have some relationship to, or effect on, the market participant's trading in the listed swap.

The Commission is also deleting the requirements under proposed § 37.404(b) and replacing it, in the guidance, with a more general requirement for a SEF to demonstrate that it can obtain position and trading information directly from market participants or, if not available from them, through information-sharing agreements. Moreover, the guidance for this rule allows a SEF to limit the acquisition of such information to those market participants who conduct substantial trading on its facility. The Commission is making this change in response to commenters' concerns, as noted in other sections, about obtaining position information because a SEF will not have the capability to monitor trading activities conducted on other trading venues.[649]

(e) § 37.405—Risk Controls for Trading

Proposed § 37.405 required that a SEF have risk controls to reduce the potential risk of market disruptions, including, but not limited to, market restrictions that pause or halt trading in market conditions prescribed by the SEF. Additionally, the rule provided that where a SEF's swap is linked to, or a substitute for, other swaps on the SEF or on other trading venues, including where a swap is based on the level of an equity index, such risk controls must be coordinated with those on the similar markets or trading venues, to the extent possible.

The preamble of the SEF NPRM recognized that pauses and halts are only one category of risk controls, and that additional controls may be necessary to further reduce the potential for market disruptions.[650] The SEF NPRM preamble specifically listed several risk controls that the Commission believed may be appropriate, including price collars or bands, maximum order size limits, stop loss order protections, kill buttons, and any others that may be suggested by commenters.[651]

[642] CEA section 5h(f)(4)(B); 7 U.S.C. 7b–3(f)(4)(B).

[643] CME Comment Letter at 26 (Feb. 22, 2011).

[644] WMBAA Comment Letter at 26 (Mar. 8, 2011).

[645] The Commission is changing the phrase ''traders in its swaps'' to ''its market participants'' to provide clarity.

[646] The Commission notes that this requirement is now in § 37.404(a).

[647] The Commission notes that this requirement is now in § 37.404(b).

[648] CEA section 5h(f)(4)(B); 7 U.S.C. 7b–3(f)(4)(B).

[649] *See, e.g.,* comments below under Core Principle 6—Position Limits or Accountability in the preamble.

[650] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1228.

[651] *Id.*

(1) Summary of Comments

Several commenters asserted that a SEF should have some discretion to determine the specific risk controls that are implemented within its markets.[652] CME commented that the marketplace would benefit from some standardization of the types of pre-trade risk controls employed by SEFs and other trading venues, and expressed support for an acceptable practices framework that includes pre-trade quantity limits, price banding, and messaging throttles, but argued that the specific parameters of such controls should be determined by each SEF.[653] ICE recommended that the Commission take a flexible approach to risk controls so as not to hinder innovation in developing new mechanisms to prevent market disruptions.[654] ICE did, however, recommend that the Commission expressly require a SEF to have pre-trade risk controls or checks, which are especially important in thinly traded markets where RFQs are more common.[655]

SDMA supported the requirement in proposed § 37.405, but noted that the rule should include pre-trade and post-trade risk control requirements that are uniform across the market.[656] SDMA noted that a uniform approach would create a much needed single regulatory approach to risk management across the derivatives market, enhance market integrity, and decrease systemic risk.[657] SDMA agreed with the best practices for pre-trade and post-trade risk controls as noted in the Pre-Trade Functionality Subcommittee of the CFTC TAC's Recommendations on Pre-Trade Practices for Trading Firms, Clearing Firms and Exchanges involved in Direct Market Access.[658]

Finally, CME objected to the requirement to coordinate risk controls.[659] CME stated that a SEF should retain the flexibility to determine and implement risk controls that it believes are necessary to protect the integrity of its markets.[660] CME recommended that the Commission work constructively with registered entities to facilitate coordination.[661]

(2) Commission Determination

The Commission is adopting proposed § 37.405, subject to certain modifications, including converting a portion of the rule to the guidance in appendix B to part 37. As stated in the SEF NPRM, the Commission believes that pauses and halts are effective risk management tools that must be implemented by a SEF to facilitate orderly markets.[662] Automated risk control mechanisms, including pauses and halts, have proven to be effective and necessary in preventing market disruptions in the futures market and, therefore, will remain as part of the rule.

As noted by SDMA, the Pre-Trade Functionality Subcommittee of the TAC issued a report that recommended the implementation of several trade risk controls at the exchange level.[663] The controls recommended in the Subcommittee report were consistent, in large part, with the trade controls referenced in the preamble to the SEF NPRM, and which are being adopted in the guidance in appendix B to part 37.[664] The TAC accepted the Subcommittee report, which specifically recommended that exchanges implement pre-trade limits on order size, price collars around the current price, intraday position limits (of a type that represent financial risk to the clearing member), message throttles, and clear error-trade and order-cancellation policies.[665] The Subcommittee report also noted that ''[s]ome measure of standardization of pre-trade risk controls at the exchange level is the cheapest, most effective and most robust path to addressing the Commission's concern [for preserving market integrity].'' [666]

The Commission believes that the implementation of specific types of other risk controls is generally desirable, but also recognizes that such risk controls should be adapted to the unique characteristics of the markets to which they apply. A SEF implementing any such additional risk controls should consider the balance between avoiding a market disruption while not impeding a market's price discovery function. Controls that unduly restrict a market's ability to respond to legitimate market events will interfere with price discovery. Accordingly, consistent with many of the comments on this subject, the Commission is enumerating specific types of risk controls, in addition to pauses and halts, that a SEF may implement in the guidance rather than in the rule, in order to provide a SEF with greater discretion to select among the enumerated risk controls, or to create new risk controls that meet the unique characteristics of its markets. A SEF will also have discretion in determining the parameters for the selected controls.

Additionally, in response to CME's concern about the requirement to coordinate risk controls, the Commission is moving this language from proposed § 37.405 to the guidance. Specifically, a SEF with a swap that is fungible with, linked to, or a substitute for other swaps on the SEF or on other trading venues, should, to the extent practicable, coordinate its risk controls with any similar controls placed on those other swaps. The guidance also states that if a SEF's swap is based on the level of an equity index, such risk controls should, to the extent practicable, be coordinated with any similar controls placed on national security exchanges.

(f) § 37.406—Trade Reconstruction

Under Core Principle 4, Congress required that a SEF have the ability to comprehensively and accurately reconstruct all trading on its facility.[667] Proposed § 37.406 set forth this requirement, including the requirement that audit-trail data and reconstructions be made available to the Commission in a form, manner, and time as determined by the Commission.

(1) Summary of Comments

CME commented that audit trail data is extremely detailed and voluminous and that SEFs should be given adequate time to prepare the trading data before it is supplied to the Commission.[668] In this regard, CME recommended that the wording ''in a form, manner, and time as determined by the Commission'' be

[652] ICE Comment Letter at 5 (Mar. 8, 2011); Tradeweb Comment Letter at 11 (Mar. 8, 2011); CME Comment Letter at 27 (Feb. 22, 2011).

[653] CME Comment Letter at 27 (Feb. 22, 2011).

[654] ICE Comment Letter at 5 (Mar. 8, 2011).

[655] *Id.*

[656] SDMA Comment Letter at 5 (Mar. 8, 2011).

[657] *Id.* at 6.

[658] *Id. See* TAC Subcommittee Recommendations (Mar. 1, 2011). The report recommended several pre-trade risk controls for implementation at the exchange level, which were largely consistent with the pre-trade controls listed in the preamble to the SEF NPRM.

[659] CME Comment Letter at 26 (Feb. 22, 2011).

[660] *Id.*

[661] *Id.*

[662] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1228.

[663] TAC Subcommittee Recommendations (Mar. 1, 2011).

[664] The preamble to the SEF NPRM specifically mentioned daily price limits, order size limits, trading pauses, stop logic functionality, among others. Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1228.

[665] TAC Subcommittee Recommendations at 4–5 (Mar. 1, 2011). The TAC discussed this report's findings at its meeting on March 1, 2011. *See* Transcript of Third Meeting of Technology Advisory Committee (Mar. 1, 2011) *available at http://www.cftc.gov/ucm/groups/public/@newsroom/documents/file/tac_030111_transcript.pdf.*

[666] TAC Subcommittee Recommendations at 4 (Mar. 1, 2011).

[667] CEA section 5h(f)(4)(B); 7 U.S.C. 7b–3(f)(4)(B).

[668] CME Comment Letter at 27 (Feb. 22, 2011).

replaced with ''such reasonable time as determined by the Commission.'' [669]

(2) Commission Determination

The Commission is revising the rule so that a SEF shall be required to make audit trail data and reconstructions available to the Commission ''in a form, manner, and time that is acceptable to the Commission.'' The Commission notes that it will work with SEFs to provide them with adequate time to supply such information to the Commission.

(g) § 37.407—Additional Rules Required

Proposed § 37.407 required a SEF to adopt and enforce any additional rules that it believes are necessary to comply with the requirements of subpart E of part 37.

(1) Commission Determination

Although the Commission did not receive any comments on the proposed rule, the Commission is revising the rule to state that applicants and SEFs may refer to the guidance and/or acceptable practices in appendix B to part 37 to demonstrate to the Commission compliance with the requirements of section 37.400. The Commission is also moving proposed § 37.407 to new § 37.408, titled ''Additional sources for compliance.''

In new § 37.407, titled ''Regulatory service provider,'' the Commission is clarifying that a SEF can comply with the regulations in subpart E through a dedicated regulatory department or by contracting with a regulatory service provider pursuant to § 37.204.

5. Subpart F—Core Principle 5 (Ability To Obtain Information)

Core Principle 5 requires a SEF to: (a) Establish and enforce rules that will allow the facility to obtain any necessary information to perform any of the functions described in section 5h of the Act, (b) provide the information to the Commission on request, and (c) have the capacity to carry out international information-sharing agreements as the Commission may require.[670] In the SEF NPRM, the Commission proposed to codify the statutory text of Core Principle 5 in proposed § 37.500, and adopts that rule as proposed.

(a) § 37.501—Establish and Enforce Rules

Proposed § 37.501 required a SEF to establish and enforce rules that will allow the SEF to have the ability and authority to obtain sufficient information to allow it to fully perform its operational, risk management, governance, and regulatory functions and any requirements under part 37, including the capacity to carry out international information-sharing agreements as the Commission may require.

(1) Commission Determination

The Commission received no comments on proposed § 37.501 and is adopting the rule as proposed. The Commission believes that § 37.501 appropriately implements the requirement in Core Principle 5 for a SEF to establish and enforce rules that will allow the SEF to obtain any necessary information to perform any of its functions described in section 5h of the Act.[671]

(b) § 37.502—Collection of Information

Proposed § 37.502 required a SEF to have rules that allow it to collect information on a routine basis, allow for the collection of non-routine data from its participants, and allow for its examination of books and records kept by the traders on its facility.

(1) Summary of Comments

WMBAA commented that aside from participants who contractually agree to provide information, a SEF does not possess the legal authority to obtain such information.[672] Additionally, WMBAA stated that the burden to collect information should be placed upon counterparties.[673] In the alternative, WMBAA stated that the Commission should require a SEF and its participants to enter into third party service provider agreements for the collection of the required information.[674] MarketAxess commented that it is not clear what is meant by ''non-routine data'' in proposed § 37.502 and that the rule should make clear that a SEF is only required to collect and maintain participant information that is directly related to such participants' activity conducted pursuant to the SEF's rules.[675]

(2) Commission Determination

The Commission is adopting § 37.502 as proposed.[676] In response to WMBAA's and MarketAxess's comments, the Commission notes that Core Principle 5 requires a SEF to establish and enforce rules that will allow it to obtain any necessary information to perform any of its functions described in section 5h of the Act. The Act and the Commission's regulations provide a SEF with the legal authority to collect such information. As mentioned in § 37.204 above, a SEF may contract with a regulatory service provider to perform regulatory services on behalf of a SEF. Thus, a SEF may enter into a third party regulatory service provider agreement for the collection of information under § 37.502. Additionally, as mentioned in § 37.404 above, the Act requires SEFs to monitor trading in swaps to prevent manipulation, price distortion, and disruptions through surveillance, compliance, and disciplinary practices and procedures.[677] The Commission believes that market participant records are a valuable tool in conducting an effective surveillance program; thus, a SEF should have direct access to such information in order to discharge its obligations under the core principles. The Commission notes that market participants are likely maintaining trading records as part of sound business practices so requiring SEFs to have rules that allow them to access such information should not present a burden. To address MarketAxess's comment about ''non-routine data,'' the Commission clarifies that ''non-routine data'' means the collection of data on an ad-hoc basis, such as data that may be collected during an investigation.

(c) § 37.503—Provide Information to the Commission

Proposed § 37.503 required a SEF to provide information in its possession to the Commission upon request, in a form and manner that the Commission approves.

(1) Commission Determination

The Commission received no comments on proposed § 37.503 and is adopting the rule as proposed. The Commission believes that § 37.503 appropriately implements the requirement in Core Principle 5 for a SEF to provide information to the Commission on request.[678]

(d) § 37.504—Information-Sharing Agreements

Proposed § 37.504 required a SEF to share information with other regulatory organizations, data repositories, and reporting services as required by the

[669] *Id.*

[670] CEA section 5h(f)(5); 7 U.S.C. 7b–3(f)(5).

[671] CEA section 5h(f)(5)(A); 7 U.S.C. 7b–3(f)(5)(A).

[672] WMBAA Comment Letter at 26 (Mar. 8, 2011).

[673] *Id.*

[674] *Id.*

[675] MarketAxess Comment Letter at 37 (Mar. 8, 2011).

[676] The Commission is changing the terms ''participants'' and ''traders'' to ''market participants'' to provide clarity.

[677] CEA section 5h(f)(4)(B); 7 U.S.C. 7b–3(f)(4)(B).

[678] CEA section 5h(f)(5)(B); 7 U.S.C. 7b–3(f)(5)(B).

Commission or as otherwise necessary and appropriate to fulfill its self-regulatory and reporting responsibilities. The proposed rule also stated that appropriate information-sharing agreements can be established with such entities or the Commission can act in conjunction with the SEF to carry out such information sharing.

(1) Summary of Comments

WMBAA commented that the proposed rule could be interpreted to require a SEF to share information with its competitors, unless the information is disseminated by a neutral third party pursuant to a services agreement.[679] WMBAA also requested clarification regarding the circumstances in which the Commission would determine to carry out information sharing itself, as opposed to a SEF entering into information-sharing agreements with the relevant entity.[680]

(2) Commission Determination

The Commission is adopting § 37.504 as proposed, subject to one modification. The Commission is revising the rule to change the term ''reporting services'' to ''third party data reporting services.'' The Commission clarifies that the term ''reporting services'' was meant to refer to independent third parties that would provide trading data on a public basis and was not meant to include competitor SEFs. To address WMBAA's comment about information sharing, the Commission clarifies that a SEF may work with the Commission to fulfill its information sharing requirements in the absence of agreements with SDRs, regulatory bodies, or third party data reporting services. Given that each SEF is unique, a particular SEF would need to contact the Commission to discuss how the information sharing requirements could be fulfilled.

6. Subpart G—Core Principle 6 (Position Limits or Accountability)

Core Principle 6 requires that a SEF adopt for each swap, as is necessary and appropriate, position limits or position accountability to reduce the potential threat of market manipulation or congestion.[681] In addition, Core Principle 6 requires that for any contract that is subject to a federal position limit under CEA section 4a(a), the SEF set its position limits at a level no higher than the position limitation established by the Commission and monitor positions established on or through the SEF for compliance with the limit set by the Commission and the limit, if any, set by the SEF.[682] In the SEF NPRM, the Commission proposed to codify the statutory text of Core Principle 6 in proposed § 37.600, and adopts that rule as proposed. Proposed § 37.601 repeated the requirements in § 37.600 and required that SEFs establish position limits in accordance with the requirements set forth in part 151 of the Commission's regulations.

(a) Summary of Comments

Several commenters stated that SEFs will have difficulty enforcing position limitations.[683] Many of these commenters noted that SEFs will lack knowledge of a market participant's activity on other venues, and that will prevent a SEF from being able to calculate the true position of a market participant.[684] In this regard, Phoenix stated that market participants will be allowed to trade on multiple SEFs so any one SEF's information concerning a market participant's position will be virtually meaningless, as the market participant may sell a large position on one SEF and simultaneously buy the same amount of the instrument on another SEF.[685] WMBAA recommended that a common regulatory organization or third party regulatory service provider monitor position limits because they will have the capability to ensure coordinated oversight of the trading activity on multiple SEFs and the ability to implement disciplinary action if needed.[686] Reuters and Phoenix recommended that the Commission or its designee monitor position limits.[687] Alice recommended that, for cleared swaps, DCOs maintain position limits, and when a swap is cleared by multiple DCOs, one DCO would be the primary for a given participant and the other DCOs would report positions to that DCO.[688]

Despite the concerns raised by other commenters, Phoenix noted that, if required, a SEF can monitor position limits of market participants based upon the trading activity that takes place only on the SEF's platform.[689] Tradeweb also requested confirmation from the Commission that a SEF must only monitor its market participants' position limits or positions in particular instruments with respect to positions entered into on its own platforms.[690]

(b) Commission Determination

In response to commenters concerns about monitoring position limits, the Commission is removing the requirements in § 37.601. Instead, final § 37.601 states that until such time that compliance is required under part 151 of this chapter,[691] a SEF may refer to the guidance and/or acceptable practices in appendix B to part 37 to demonstrate to the Commission compliance with the requirements of § 37.600.

The guidance provides a SEF with reasonable discretion to comply with § 37.600, including considering part 150 of the Commission's regulations.[692] The guidance also states that for Required Transactions as defined in § 37.9, a SEF may demonstrate compliance with § 37.600 by setting and enforcing position limitations or position accountability levels only with respect to trading on the SEF's own market. For example, a SEF could satisfy the position accountability requirement by setting up a compliance program that continuously monitors the trading activity of its market participants and has procedures in place for remedying any violations of position levels. For Permitted Transactions as defined in § 37.9, a SEF may demonstrate compliance with § 37.600 by setting and enforcing position accountability levels or sending the Commission a list of Permitted Transactions traded on the SEF. Therefore, a SEF is not required to monitor its market participants' activity on other venues with respect to monitoring position limits.

In response to comments that a common regulatory organization or the Commission should monitor position limits, the Commission notes that Core Principle 6 places the responsibility on a SEF to adopt and monitor position limits. The Dodd-Frank Act does not mandate that a common regulatory organization or the Commission monitor position limits. The Dodd-Frank Act also does not provide the Commission with the authority to exempt a SEF from

[679] WMBAA Comment Letter at 27 (Mar. 8, 2011).

[680] *Id.*

[681] CEA section 5h(f)(6); 7 U.S.C. 7b–3(f)(6).

[682] *Id.*

[683] Bloomberg Comment Letter at 3–4 (Jun. 3, 2011); Alice Comment Letter at 5 (May 31, 2011); Rosen et al. Comment Letter at 22 (Apr. 5, 2011); WMBAA Comment Letter at 27 (Mar. 8, 2011); Tradeweb Comment Letter at 11 (Mar. 8, 2011); Reuters Comment Letter at 6 (Mar. 8, 2011); Phoenix Comment Letter at 3 (Mar. 7, 2011).

[684] WMBAA Comment Letter at 2 (Apr. 11, 2013); Bloomberg Comment Letter at 3–4 (Jun. 3, 2011); Rosen et al. Comment Letter at 22 (Apr. 5, 2011); WMBAA Comment Letter at 27 (Mar. 8, 2011); Tradeweb Comment Letter at 11 (Mar. 8, 2011); Phoenix Comment Letter at 3 (Mar. 7, 2011).

[685] Phoenix Comment Letter at 3–4 (Mar. 7, 2011).

[686] WMBAA Comment Letter at 27 (Mar. 8, 2011).

[687] Reuters Comment Letter at 6 (Mar. 8, 2011); Phoenix Comment Letter at 4 (Mar. 7, 2011).

[688] Alice Comment Letter at 5 (May 31, 2011).

[689] Phoenix Comment Letter at 4 (Mar. 7, 2011).

[690] Tradeweb Comment Letter at 11 (Mar. 8, 2011).

[691] *See* Position Limits for Derivatives, 76 FR 4752 (proposed Jan. 26, 2011).

[692] Part 150 of the Commission's regulations contains the current position limits regime.

certain core principles. Therefore, the Commission is providing a SEF with flexibility to adopt and monitor position limits as described above.

7. Subpart H—Core Principle 7 (Financial Integrity of Transactions)

Core Principle 7 requires a SEF to establish and enforce rules and procedures for ensuring the financial integrity of swaps entered on or through the facilities of the SEF, including the clearance and settlement of the swaps pursuant to section 2(h)(1) of the Act.[693] In the SEF NPRM, the Commission proposed to codify the statutory text of Core Principle 7 in proposed § 37.700, and adopts that rule as proposed.

(a) § 37.701—Mandatory Clearing[694]

Proposed § 37.701 required transactions executed on or through a SEF to be cleared through a Commission registered DCO unless the transaction is excepted from clearing under section 2(h)(7) of the Act or the swap is not subject to the clearing requirement under section 2(h)(1) of the Act.

(1) Summary of Comments

ISDA/SIFMA commented that section 2(h)(1) of the CEA provides that swaps subject to the clearing requirement must be submitted for clearing to a registered DCO or a DCO that is exempt from registration; however, proposed § 37.701 requires that transactions executed through a SEF be cleared only through a Commission-registered DCO.[695] ISDA/SIFMA recommended that the rule be amended to permit the use of exempt DCOs.[696] MarketAxess recommended that proposed § 37.701 be revised to permit a SEF to rely on a representation from an end-user that it qualifies for the section 2(h)(7) exemption.[697]

(2) Commission Determination

The Commission is adopting § 37.701 as proposed, subject to certain revisions. The Commission is modifying § 37.701 to state that ''[t]ransactions executed on or through the swap execution facility that are required to be cleared under section 2(h)(1)(A) of the Act or are voluntarily cleared by the counterparties shall be cleared through a Commission-registered derivatives clearing organization, or a derivatives clearing organization that the Commission has determined is exempt from registration.'' The Commission is deleting proposed § 37.701(a), which referred to the end-user exception under CEA section 2(h)(7) because, as modified, the final rule text clarifies that any swaps that are required to be cleared or that are voluntarily cleared must be cleared through a registered DCO, or a DCO that the Commission has determined is exempt from registration. The Commission notes that swaps that are subject to the clearing requirement must be submitted for clearing, except where the swap may be eligible for an exception or exemption from the clearing requirement pursuant to either the exception provided under section 2(h)(7) of the Act and § 50.50 of the Commission's regulations, or an exemption provided under part 50 of the Commission's regulations. The rule also provides that counterparties that elect to clear a swap that is not required to be cleared may do so voluntarily through a Commission-registered DCO, or a DCO that the Commission has determined is exempt from registration.

In response to ISDA/SIFMA's recommendation that the rule be amended to permit the use of exempt DCOs, the Commission is mindful that CEA section 2(h)(1) provides that swaps subject to the clearing requirement must be submitted for clearing to a registered DCO or a DCO that is exempt from registration under the Act. The Commission further notes that under CEA section 5b(h), the Commission has discretionary authority to exempt DCOs, conditionally or unconditionally, from the applicable DCO registration requirements.[698] Specifically, section 5b(h) of the Act provides that ''[t]he Commission may exempt, conditionally or unconditionally, a derivatives clearing organization from registration under this section for the clearing of swaps if the Commission determines that the [DCO] is subject to comparable, comprehensive supervision and regulation by the Securities and Exchange Commission or the appropriate government authorities in the home country of the organization.''[699] Thus, the Commission has discretion to exempt from registration DCOs that, at a minimum, are subject to comparable and comprehensive supervision by another regulator.

The Commission notes that it has not yet exercised its discretionary authority to exempt DCOs from registration. Notwithstanding that there are no exempt DCOs at this time, the Commission has determined to revise the rule text as suggested by ISDA/SIFMA. If the Commission determines to exercise its authority to exempt DCOs from applicable registration requirements, the Commission would likely address, among other things, the conditions and limitations applicable to clearing swaps for customers subject to section 4d(f) of the Act.[700]

Until such time as the Commission determines to exercise its authority to exempt DCOs from the applicable registration requirement, SEFs must route all swaps through registered DCOs, which are the appropriate entities to perform the clearing functions under CEA section 2(h)(1) at this time. Registered DCOs are subject to the CEA, the Commission's regulations, and its regulatory programs. Among other things, registered DCOs are supervised for compliance with the Commission's regulations, and subjected to ongoing risk surveillance and regular examinations.

In consideration of MarketAxess's comment that a SEF should be able to rely on a representation from an end-user that it qualifies for the CEA section 2(h)(7) exception, the Commission clarifies that a SEF is not obligated to make any determinations with respect to applicability of the exceptions to the clearing requirement.

(b) § 37.702—General Financial Integrity

Proposed § 37.702(a) required a SEF to provide for the financial integrity of its transactions by establishing minimum financial standards for its members. At a minimum, a SEF would have to ensure that its members meet the definition of ''eligible contract participant'' under CEA section 1(a)(18). Proposed § 37.702(b) required a SEF, for transactions cleared by a DCO, to have the capacity to route transactions to the DCO in a manner acceptable to the DCO for purposes of ongoing risk management. In proposed § 37.702(c), for transactions that are not cleared by a DCO, a SEF must require members to demonstrate that they: (1) Have entered into credit arrangement documentation for the transaction, (2) have the ability to exchange collateral, and (3) meet any credit filters that the SEF may adopt. Proposed § 37.702(d) required a SEF to implement any additional safeguards

[693] CEA section 5h(f)(7); 7 U.S.C. 7b–3(f)(7).

[694] The Commission is renaming the title of this section from ''Mandatory Clearing'' to ''Required Clearing'' to be consistent with terminology used in the CEA and the Commission's regulations.

[695] ISDA/SIFMA Comment Letter at 13 (Mar. 8, 2011).

[696] *Id.*

[697] MarketAxess Comment Letter at 38 (Mar. 8, 2011).

[698] CEA section 5b(h); 7 U.S.C. 7a–1(h).

[699] *Id.*

[700] The Commission will address any necessary revisions to part 37 at such time as it determines to exercise its discretionary authority to exempt DCOs from certain DCO registration requirements. For example, if exempt DCOs are limited to clearing for only certain types of market participants, then the Commission will take action to ensure that SEF market participants have impartial access to swap clearing through registered DCOs.

that may be required by Commission regulations.

(1) Summary of Comments

Bloomberg commented, with respect to proposed § 37.702(a), that a SEF should be able to determine a market participant's ability to meet any minimum financial standards by virtue of confirming that the participant has access to a DCO either as a member or through an intermediary.[701] According to Bloomberg, it is not necessary to set separate, duplicative financial requirements at the SEF level that are redundant to the exhaustive financial requirements that will be associated with access to a DCO.[702]

With respect to proposed § 37.702(b), Reuters agreed that SEFs should assure the secure and prompt routing to a DCO for swap transactions subject to the clearing requirement.[703] MarketAxess commented that SEFs should be able to send a trade to the DCO via an affirmation hub.[704] Use of affirmation hubs, according to MarketAxess, would allow SEFs to enjoy lower costs and is preferred by its clients.[705]

The Commission received several comments with regard to proposed § 37.702(c). The Energy Working Group noted that proposed § 37.702(c) should be narrower in scope and that a SEF should be able to fulfill its obligation by ensuring that the counterparties have entered into bilateral credit support arrangements.[706] MarketAxess wrote that a SEF is not in a position to determine whether members' credit filters or exchanges of collateral are sufficient.[707] Reuters noted that the existence of credit and/or collateral arrangements should be primarily a matter between the counterparties.[708] ISDA/SIFMA commented that the Commission should not create new collateral requirements for end-users transacting through a SEF.[709] ABC/CIEBA commented that proposed § 37.702(c) would impose costly burdens on SEFs.[710]

Goldman noted that there are circumstances where a swap that is subject to the clearing requirement may not be accepted for clearing for credit or other reasons.[711] In such cases and depending on the SEF's rules under Core Principle 7, parties that execute through the SEF either would face one another in an uncleared, bilateral transaction or would potentially owe amounts arising from the trade not being accepted for clearing.[712] Therefore, Goldman recommended that parties should be able to learn the identities of their counterparty when transacting in cleared and uncleared swaps.[713]

(2) Commission Determination

The Commission has considered the comments received and is adopting § 37.702(a) as proposed. In response to Bloomberg's comment about setting financial requirements at the SEF level, the Commission disagrees that a SEF should be able to determine a member's ability to meet any minimum financial standards by virtue of confirming that the member has access to a DCO. The Commission notes that a DCO only screens clearing members, and not customers, according to financial standards. Therefore, unless a SEF member is also a clearing member, the SEF will not be able to determine the member's ability to meet any minimum financial standards by virtue of confirming that the member has access to a DCO. The Commission also notes that there is no affirmative obligation for a DCO to ensure that its members, customers, or counterparties are ECPs. Therefore, a SEF must ensure that its members qualify as ECPs and may rely on representations from its members to fulfill this requirement.[714]

Last year, the Commission adopted rules regarding the processing of cleared trades.[715] In that rulemaking, the Commission proposed a new § 37.702(b)[716] and adopted a revised § 37.702(b)[717] regarding cleared swaps traded through a SEF. That final rule required a SEF to provide for the financial integrity of its transactions that are cleared by a DCO: (a) By ensuring that it has the capacity to route transactions to the DCO in a manner acceptable to the DCO for purposes of clearing; and (b) by coordinating with each DCO to which it submits transactions for clearing, in the development of rules and procedures to facilitate prompt and efficient transaction processing in accordance with the requirements of § 39.12(b)(7) of the Commission's regulations.[718]

In response to MarketAxess's comment about affirmation hubs, the Commission notes that § 37.702(b), as adopted in April 2012, requires a SEF to route a swap to a DCO in a manner acceptable to the DCO.[719] If the DCO views the use of an affirmation hub as an acceptable means for routing the swap, the routing otherwise complies with § 37.702(b), and the trade is processed in accordance with the standards set forth in §§ 1.74, 39.12, 23.506, and 23.610 of the Commission's regulations, then the use of an affirmation hub for routing a swap to a DCO for clearing would be permissible.

In consideration of the comments with respect to uncleared swaps, the Commission is eliminating proposed § 37.702(c). The Commission agrees with commenters that requiring SEFs to monitor the credit and collateral arrangements of parties transacting uncleared swaps goes beyond the scope of what should be expected of a SEF. To address Goldman's comments requesting that the Commission mandate that a SEF's rules require identification of the counterparties prior to a swap transaction, the Commission believes that a SEF should retain discretion in this regard. Finally, the Commission is deleting proposed § 37.702(d) as it is unnecessary because a SEF must already implement safeguards as required by Commission regulations.

(c) § 37.703—Monitoring for Financial Soundness

Proposed § 37.703 required a SEF to monitor its members' compliance with the SEF's minimum financial standards and routinely receive and promptly review financial and related information from its members.

(1) Summary of Comments

ABC/CIEBA commented that this requirement would create significant barriers to entry, stifle competition, and lead to higher transaction costs.[720] FXall commented that like DCMs, SEFs should be permitted to delegate their financial surveillance functions to the

[701] Bloomberg Comment Letter at 5 (Mar. 8, 2011).

[702] *Id.*

[703] Reuters Comment Letter at 6 (Mar. 8, 2011).

[704] MarketAxess Comment Letter at 35 (Mar. 8, 2011).

[705] *Id.*

[706] Energy Working Group Comment Letter at 5 (Mar. 8, 2011).

[707] MarketAxess Comment Letter at 37 (Mar. 8, 2011).

[708] Reuters Comment Letter at 6 (Mar. 8, 2011).

[709] ISDA/SIFMA Comment Letter at 13 (Mar. 8, 2011).

[710] ABC/CEIBA Comment Letter at 11 (Mar. 8, 2011).

[711] Goldman Comment Letter at 5 (Mar. 8, 2011).

[712] *Id.*

[713] *Id.*

[714] The Commission notes that under § 37.202(a)(2), a SEF that permits intermediation must also obtain signed representations from intermediaries that their customers are ECPs.

[715] Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management, 77 FR 21278 (Apr. 9, 2012).

[716] Requirements for Processing, Clearing, and Transfer of Customer Positions, 76 FR 13101, 13109–10 (proposed Mar. 10, 2011).

[717] Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management, 77 FR at 21309.

[718] *Id.*

[719] *Id.*

[720] ABC/CEIBA Comment Letter at 11 (Mar. 8, 2011).

Joint Audit Committee to the extent that its members are registered with NFA.[721] For non-NFA members, FXall recommended that SEFs be permitted to delegate financial surveillance obligations to the members' primary financial regulator or otherwise outsource such duties to a third party service provider.[722]

(2) Commission Determination

The Commission agrees with the commenters that burdensome financial surveillance obligations may lead to higher transaction costs. Therefore, in consideration of the comments, the Commission is revising § 37.703 to state that a SEF must monitor its members to ensure that they continue to qualify as ECPs. With regard to the comment requesting delegation of the proposed § 37.703 responsibilities to the Joint Audit Committee, the Commission notes that final § 37.703, as revised, obviates the need for any such delegation. Under final § 37.703, a SEF need only ensure that its members remain ECPs and may rely on representations from its members.

8. Subpart I—Core Principle 8 (Emergency Authority)

Core Principle 8 requires a SEF to adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority to liquidate or transfer open positions in any swap or to suspend or curtail trading in a swap.[723] In the SEF NPRM, the Commission proposed to codify the statutory text of Core Principle 8 in proposed § 37.800, and adopts that rule as proposed.[724]

(a) § 37.801—Additional Sources for Compliance

Proposed § 37.801 referred applicants and SEFs to the guidance and/or acceptable practices in appendix B to part 37 to demonstrate compliance with Core Principle 8. The guidance reflected the Commission's belief that the need for emergency action may also arise from related markets traded on other platforms and that there should be an increased emphasis on cross-market coordination of emergency actions. In that regard, the proposed guidance provided that, in consultation and cooperation with the Commission, a SEF should have the authority to intervene as necessary to maintain markets with fair and orderly trading and to prevent or address manipulation or disruptive trading practices, whether the need for intervention arises exclusively from the SEF's market or as part of a coordinated, cross-market intervention. The proposed guidance also provided that in situations where a swap is traded on more than one platform, emergency action to liquidate or transfer open interest must be as directed, or agreed to, by the Commission or the Commission's staff. The proposed guidance also clarified that the SEF should have rules that allow it to take market actions as may be directed by the Commission.

In addition to providing for rules, procedures, and guidelines for emergency intervention, the guidance noted that SEFs should provide prompt notification and explanation to the Commission of the exercise of emergency authority, and that information on all regulatory actions carried out pursuant to a SEF's emergency authority should be included in a timely submission of a certified rule.

(1) Summary of Comments

Several commenters expressed concern about a SEFs ability to liquidate or transfer open positions.[725] Bloomberg stated that, because a SEF will not hold a participant's swap positions, the Commission should only require that a SEF adopt rules requiring it to coordinate with a DCO to facilitate the liquidation or transfer of positions during an emergency.[726] Similarly, WMBAA noted that a SEF will not maintain counterparty positions and thus it may not possess the ability to liquidate or transfer those positions.[727] Reuters stated that liquidating open positions does not fall within a trading platform's traditional role in the market.[728]

CME stated that SEFs must have the flexibility and independence necessary to address market emergencies.[729] Alternatively, ISDA/SIFMA commented that the Core Principle 8 rules should adopt uniform standards and that those standards must consider the interaction between SEFs, DCMs, clearing organizations, swap data repositories, and other market-wide institutions.[730]

(2) Commission Determination

The Commission is adopting § 37.801 as proposed, with certain modifications to the guidance in appendix B to part 37. The Commission acknowledges commenters concerns regarding a SEF's ability to liquidate or transfer open positions; however, the statute requires a SEF to have the authority to liquidate or transfer open positions.[731] The Commission expects that SEFs would establish such authority over open positions through their rules and/or participant agreements and that the exercise of any such authority would, consistent with the statute, be done in coordination with the Commission and relevant DCOs.

The Commission is making slight revisions to the guidance to clarify that SEFs retain the authority to independently respond to emergencies in an effective and timely manner consistent with the nature of the emergency, as long as all such actions taken by the SEF are made in good faith to protect the integrity of the markets. The Commission believes that market emergencies can vary with the type of market and any number of unusual circumstances so SEFs need flexibility to carry out emergency actions. The Commission believes that the guidance strikes a reasonable balance between the need for flexibility and the need for standards in the case of coordinated cross-market intervention.

9. Subpart J—Core Principle 9 (Timely Publication of Trading Information)

Core Principle 9 requires a SEF to make public timely information on price, trading volume, and other trading data on swaps to the extent prescribed by the Commission.[732] It also requires a SEF to have the capacity to electronically capture and transmit trade information for those transactions that occur on its facility.[733] In the SEF NPRM, the Commission proposed to codify the statutory text of Core Principle 9 in proposed § 37.900. Proposed § 37.901 required that, for swaps traded on or through a SEF, the SEF report specified swap data as

[721] FXall Comment Letter at 13 (Mar. 8, 2011).

[722] *Id.*

[723] CEA section 5h(f)(8); 7 U.S.C. 7b–3(f)(8).

[724] The Commission notes that Commission regulation 40.6(a)(6)(i) provides that any SEF rule that establishes general standards or guidelines for taking emergency actions must be submitted to the Commission pursuant to regulation 40.6(a). Relatedly, Commission regulation 40.6(a)(6)(ii) provides particular emergency actions shall be filed with the Commission ''prior to [its] implementation, or, if not practicable, . . . at the earlier possible time after implementation, but in no event more than twenty-four hours after implementation.''

[725] Bloomberg Comment Letter at 4 (Jun. 3, 2011); Bloomberg Comment Letter at 5–6 (Mar. 8, 2011); WMBAA Comment Letter at 28 (Mar. 8, 2011); Reuters Comment Letter at 7 (Mar.8, 2011).

[726] Bloomberg Comment Letter at 4 (Jun. 3, 2011); Bloomberg Comment Letter at 5–6 (Mar. 8, 2011).

[727] WMBAA Comment Letter at 28 (Mar. 8, 2011).

[728] Reuters Comment Letter at 7 (Mar. 8, 2011).

[729] CME Comment Letter at 28 (Feb. 22, 2011).

[730] ISDA/SIFMA Comment Letter at 13 (Mar. 8, 2011).

[731] CEA section 5h(f)(8); 7 U.S.C. 7b–3(f)(8).

[732] CEA section 5h(f)(9); 7 U.S.C. 7b–3(f)(9).

[733] *Id.*

provided under part 43 [734] and part 45 [735] of the Commission's regulations and meet the requirements of part 16 of the Commission's regulations. Proposed § 37.902 required a SEF to have the capacity to electronically capture trade information with respect to transactions executed on the facility.

(a) Summary of Comments

In response to the Commission's questions in the SEF NPRM about end-of-day price reporting for interest rate swaps and the Commission's proposed revisions to § 16.01,[736] Eris stated the following: (1) It is reasonable to require a market to report publicly each trade (including instrument, price, and volume) intra-day, as soon as the trade occurs; (2) daily open interest should be published publicly in a summary fashion and should be grouped in maturity buckets based on the remaining tenor of each instrument; (3) as to end-of-day pricing, a clearing house will settle contracts based upon a market-driven curve, and the methodology, as well as the inputs and components, of the curve should be made transparent to the full trading community; and (4) the clearing house should publish the specific settlement value applied to each cleared swap in the daily mark-to-market process.[737] Eris also stated that SEFs and DCMs should be held to the same reporting standard in this respect.[738]

MarketAxess commented that proposed § 37.900(b) and § 37.902 are duplicative and that proposed § 37.902 should be withdrawn.[739]

(b) Commission Determination

The Commission is adopting § 37.900 and § 37.901 as proposed. The Commission acknowledges MarketAxess's comment that § 37.902 is duplicative to § 37.900(b) and thus is withdrawing § 37.902. In response to Eris's comment about the same reporting standards for SEFs and DCMs that list swaps, the Commission notes that a SEF, similar to a DCM, must meet the same requirements under part 16 of the Commission's regulations for swaps reporting.[740] The Commission also notes that it codified § 16.01 in the final DCM rulemaking, and in that rulemaking, the Commission states that it considered the proposed reporting standard put forth by Eris, but the Commission believes that the more detailed reporting obligations under § 16.01 are warranted at this time in light of the novelty of swaps trading on regulated exchanges.[741]

10. Subpart K—Core Principle 10 (Recordkeeping and Reporting)

Core Principle 10 establishes recordkeeping and reporting requirements for SEFs.[742] In the SEF NPRM, the Commission proposed to codify the statutory text of Core Principle 10 in proposed § 37.1000, and adopts that rule as proposed.

Proposed § 37.1001 required a SEF to maintain records of all business activities, including a complete audit trail, investigatory files, and disciplinary files, in a form and manner acceptable to the Commission for at least five years in accordance with the requirements of section 1.31 and part 45 of this chapter. Proposed § 37.1002 required a SEF to report to the Commission such information that the Commission determines to be necessary or appropriate for it to perform its duties. Proposed § 37.1003 required a SEF to keep records relating to swaps defined in section 1a(47)(A)(v) of the CEA open to inspection and examination by the SEC.

(a) Summary of Comments

MarketAxess stated that a SEF should be permitted to use a regulatory service provider with respect to its recordkeeping and reporting requirements.[743] CME commented that proposed § 37.1003 does not provide any guidance as to what records will need to be retained and for how long they must be retained.[744]

(b) Commission Determination

The Commission is adopting § 37.1001 as proposed. The Commission is also withdrawing proposed § 37.1002 and § 37.1003 because they are repetitive of paragraphs (a)(2) and (a)(3) of § 37.1000. In response to MarketAxess's comment, the Commission notes that a SEF may utilize the services of a regulatory service provider pursuant to § 37.204 to assist the SEF in complying with its responsibilities under Core Principle 10. In response to CME's comment, the Commission notes that in accordance with Core Principle 10 and § 1.31 of the Commission's regulations, a SEF should retain ''any'' records relevant to swaps defined in section 1a(47)(A)(v) of the Act and that the SEF should leave such records open to inspection and examination for a period of five years. The Commission staff also consulted with representatives from the SEC, who confirmed that the SEC's relevant recordkeeping requirements typically extend for a period of five years.[745]

11. Subpart L—Core Principle 11 (Antitrust Considerations)

Core Principle 11 governs the antitrust obligations of SEFs.[746] In the SEF NPRM, the Commission proposed to codify the statutory text of Core Principle 11 in proposed § 37.1100, and adopts that rule as proposed. Additionally, proposed § 37.1101 referred applicants and SEFs to the guidance in appendix B to part 37 for purposes of demonstrating compliance with proposed § 37.1100.

(a) Summary of Comments

NGSA commented that if SEFs are allowed to select the SDR to which SEF-executed swaps are reported, there is a threat of anticompetitive tying of swap data reporting services from a particular SDR to the SEF's services, which may harm competition among SDRs.[747] Accordingly, NGSA recommended that the Commission amend the proposed rules to explicitly prohibit a SEF from tying the swap data reporting services of a particular SDR to the swap execution services provided by such SEF and from entering into an exclusive agreement

[734] 17 CFR part 43; Real-Time Reporting of Swap Transaction Data, 77 FR 1182 (Jan. 9, 2012).

[735] 17 CFR part 45; Swap Data Recordkeeping and Reporting Requirements, 77 FR 2136 (Jan. 13, 2012).

[736] The Commission proposed certain revisions to § 16.01 in the DCM NPRM. *See* Core Principles and Other Requirements for Designated Contract Markets, 75 FR 80572 (proposed Dec. 22, 2010) for further details.

[737] Eris Comment Letter at 5 (Mar. 8, 2011).

[738] *Id.*

[739] MarketAxess Comment Letter at 39 (Mar. 8, 2011).

[740] The Commission notes that § 16.00 is applicable to a SEF only to the extent that such SEF has clearing members and lists options on physicals for trading. Section 16.01 is applicable to a SEF for all swaps and options traded thereon. Section 16.02 is applicable to a SEF only to the extent that such SEF lists options for trading.

[741] Core Principles and Other Requirements for Designated Contract Markets, 77 FR 36612, 36642 (Jun. 19, 2012).

[742] CEA section 5h(f)(10); 7 U.S.C. 7b–3(f)(10).

[743] MarketAxess Comment Letter at 39 (Mar. 8, 2011).

[744] CME Comment Letter at 38 (Feb. 22, 2011).

[745] *See* Registration and Regulation of Security-Based Swap Execution Facilities, 76 FR at 10982, 11063 (Proposed Rule 818(b) requires SB–SEFs to keep books and records ''for a period of not less than five years, the first two years in an easily accessible place). Rule 17a–1(b) (240.17a–1(b) requires national securities exchanges, among others, to keep books and records for a period of not less than five years, the first two years in an easily accessible place, subject to a destruction and disposition provisions, which allows exchanges to destroy physical documents pursuant to an effective and approved plan regarding such destruction and transferring/indexing of such documents onto some recording medium.). 17 CFR 240.17a–1(b).

[746] CEA section 5h(f)(11); 7 U.S.C. 7b–3(f)(11).

[747] NGSA Comment Letter at 2 (Jun. 8, 2012). DTCC also raised this concern in its comment letter. DTCC Comment Letter at 3 (Jun. 10, 2011).

with any SDR to report all swaps to such SDR.[748]

(b) Commission Determination

The Commission is adopting § 37.1101 and the corresponding guidance in appendix B to part 37 as proposed and declines to revise the proposed rules as NGSA recommends. The Commission notes that under Core Principle 11, SEFs may not adopt any rule or take any action that results in any unreasonable restraint of trade or impose any material anticompetitive burden on trading or clearing. The Commission believes that Core Principle 11 adequately addresses NGSA's concern. The Commission also notes that it has not limited a SEF's choice of DCOs. The Commission believes that SDRs and DCOs should be able to compete for a SEF's business subject to the anticompetitive considerations under Core Principle 11. Additionally, the Commission notes that multiple SEFs are likely to trade the same swap contracts so market participants will be able to choose the appropriate SEF to trade swaps based on SDR and other considerations.

12. Subpart M—Core Principle 12 (Conflicts of Interest)

Core Principle 12 governs conflicts of interest.[749] In the SEF NPRM, the Commission proposed to codify the statutory text of Core Principle 12 in proposed § 37.1200, and adopts that rule as proposed. As noted in the SEF NPRM, the substantive regulations implementing Core Principle 12 were proposed in a separate release titled ''Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest.'' [750] Until such time as the Commission may adopt the substantive rules implementing Core Principle 12, SEFs have reasonable discretion to comply with this core principle as stated in § 37.100.

13. Subpart N—Core Principle 13 (Financial Resources)

Core Principle 13 requires a SEF to have adequate financial, operational, and managerial resources to discharge each of its responsibilities.[751] In particular, Core Principle 13 states that a SEF's financial resources are considered to be adequate if the value of such resources exceeds the total amount that would enable the SEF to cover its operating costs for a period of at least one year, calculated on a rolling basis.[752] In the SEF NPRM, the Commission proposed to codify the statutory text of Core Principle 13 in proposed § 37.1300, and adopts that rule as proposed.

(a) § 37.1301—General Requirements

Proposed § 37.1301 set forth the financial resources requirements for SEFs in order to implement Core Principle 13. Proposed § 37.1301(a) required a SEF to maintain financial resources sufficient to enable it to perform its functions in compliance with the SEF core principles. Proposed § 37.1301(b) required an entity operating as both a SEF and a DCO to comply with both the SEF financial resources requirements and the DCO financial resources requirements in § 39.11.[753] Proposed § 37.1301(c) stated that financial resources would be considered sufficient if their value is at least equal to a total amount that would enable the SEF, or applicant for designation as such, to cover its operating costs for a period of at least one year, calculated on a rolling basis.

(1) Summary of Comments

Several commenters raised concerns about the financial resources requirement to cover one year of operating costs. Parity Energy recommended that the Commission interpret ''operating costs of a swap execution facility for a 1-year period'' to be the cost to the SEF of an orderly wind-down of operations, where the SEF is one of many execution avenues for standardized, cleared swaps and its failure would have minimal impact on market risk or stability.[754] Phoenix recommended that because a SEF does not take or hold positions in any of the products traded on it, an orderly wind-down of a SEF should take six months so SEFs should be required to maintain financial resources to cover six months of its operating costs.[755] Similarly, TruMarx contended that SEFs should not have such stringent financial resources standards because a SEF is a trading platform and, therefore, will not carry on its books the risks of positions and trades executed on it.[756] Rather, TruMarx stated that risk will be borne by the principals entering into the transactions, their clearing brokers, and clearing houses.[757]

Alternatively, SDMA noted that it would be disruptive to the market if a SEF went into bankruptcy.[758] Therefore, it contended that 12 months of working capital is the absolute minimum amount of financial resources that SEFs should have, and recommend that the Commission require that SEFs have 18 months of working capital.[759]

(2) Commission Determination

The Commission is adopting § 37.1301 as proposed.[760] To address the concerns about the financial resources requirement, the Commission notes that Core Principle 13 requires each SEF to maintain adequate financial resources to discharge its responsibilities.[761] In order to fulfill this responsibility, the core principle states that the financial resources of a SEF shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the SEF to cover its operating costs for a period of one year, calculated on a rolling basis.[762]

In response to comments that Core Principle 13 should be interpreted to mean the cost to wind-down a SEF's operations, the Commission notes that such an interpretation would require SEFs to have significantly less financial resources. The Commission believes that a SEF's financial strength is vital to ensure that the SEF can discharge its

[748] NGSA Comment Letter at 5 (Jun. 8, 2012).

[749] CEA section 5h(f)(12); 7 U.S.C. 7b–3(f)(12).

[750] Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 FR 63732 (proposed Oct. 18, 2010).

[751] CEA section 5h(f)(13); 7 U.S.C. 7b–3(f)(13).

[752] *Id.*

[753] *See* Derivatives Clearing Organization General Provisions and Core Principles, 76 FR 69334 (Nov. 8, 2011). Commission regulation § 39.11 establishes requirements that a DCO will have to meet in order to comply with DCO Core Principle B (Financial Resources), as amended by the Dodd-Frank Act. Amended Core Principle B requires a DCO to possess financial resources that, at a minimum, exceed the total amount that would enable the DCO to meet its financial obligations to its clearing members notwithstanding a default by the clearing member creating the largest financial exposure for the DCO in extreme but plausible conditions; and enable the DCO to cover its operating costs for a period of one year, as calculated on a rolling basis.

[754] Parity Energy Comment Letter at 6 (Mar. 25, 2011).

[755] Phoenix Comment Letter at 4 (Mar. 7, 2011).

[756] TruMarx Comment Letter at 7 (Mar. 8, 2011).

[757] *Id.*

[758] SDMA Comment Letter at 12 (Mar. 8, 2011).

[759] *Id.*

[760] The Commission is making a technical change due to the fact that the cross reference in § 37.1301(b) should include ''of this chapter'' at the end of the reference in order to comply with federal regulatory guidelines. Accordingly, the Commission is revising § 37.1301(b) to read: ''An entity that operates as both a swap execution facility and a derivatives clearing organization shall also comply with the financial resources requirements of section 39.11 of this chapter.'' The Commission is also removing the phrase ''or applicant for designation as such'' from § 37.1301(c) because it is unnecessary. Section 37.3 and Form SEF read together make clear that an applicant must comply with the financial resources requirement.

[761] CEA section 5h(f)(13)(A); 7 U.S.C. 7b–3(f)(13)(A).

[762] CEA section 5h(f)(13)(B); 7 U.S.C. 7b–3(f)(13)(B).

core principle responsibilities in accordance with the CEA and that those costs are greater than the cost to wind-down operations. Based on its experience regulating DCMs and DCOs, the Commission has learned that financial strength is vital to market continuity and the ability of an entity to withstand unpredictable market events, and believes that one year of operating expenses on a rolling basis is appropriate. For these reasons, the Commission also disagrees with TruMarx's argument that SEFs should not have such stringent financial resources standards because they will not hold the risks of positions and trades.

(b) § 37.1302—Types of Financial Resources

Proposed § 37.1302 set forth the type of financial resources available to satisfy the requirements of proposed § 37.1301. The proposed rule stated that financial resources may include: (a) The SEF's own capital; and (b) Any other financial resource deemed acceptable by the Commission. The Commission invited comment regarding particular financial resources to be included in the final regulation.[763]

(1) Summary of Comments

Several commenters recommended that the Commission include specific examples of financial resources that might satisfy the requirement. Phoenix recommended that the Commission include in final § 37.1302 the following financial resources: assets of a parent company that wholly owns the SEF, and, subject to § 37.1304 (Valuation of financial resources), the SEF's accounts receivable from SEF members.[764] Phoenix contended that as long as the parent company has committed to guarantee the financial resource obligations of the SEF, those assets should be available to the SEF, and that amounts owed to a SEF by its customers are easily obtainable by a SEF.[765] CME believed that Congress intended the term ''financial resources'' to be construed broadly and include anything of value at the SEF's disposal, including operating revenues.[766] Reuters recommended that assets of affiliated entities within a corporate group should be acceptable types of financial resources.[767]

(2) Commission Determination

The Commission is revising proposed § 37.1302(a) to state that a SEF's own capital means its assets minus its liabilities calculated in accordance with U.S. Generally Accepted Accounting Principles (''GAAP''). The Commission believes that if a particular financial resource is an asset under GAAP, then it is appropriate for inclusion in the calculation for this rule. If a particular financial resource is not an asset under GAAP, but based upon the facts and circumstances a SEF believes that the particular financial resource should be acceptable, the Commission staff will work with the SEF to determine whether such resource is acceptable. In this regard, the Commission is clarifying that the language in final § 37.1302(b) is intended to provide flexibility to both SEFs and the Commission in determining other acceptable types of financial resources on a case-by-case basis.

Finally, the Commission notes that it may not have jurisdiction over a SEF's parent company or its affiliates; therefore, the Commission cannot consider the parent company's or affiliates' financial resources in determining whether the SEF possesses adequate financial resources.

(c) § 37.1303—Computation of Financial Resource Requirement[768]

Proposed § 37.1303 required a SEF, each fiscal quarter, to make a reasonable calculation of its projected operating costs over a twelve-month period to determine the amount needed to meet the requirements of proposed § 37.1301. Proposed § 37.1303 provided SEFs with reasonable discretion to determine the methodology used to compute such projected operating costs. The proposed rule authorized the Commission to review the methodology and require changes as appropriate.

(1) Summary of Comments

MarketAxess noted that the proposed regulations do not prescribe specific methodologies for computing projected operating costs and recommended that the Commission provide a safe harbor for specific methodologies.[769]

(2) Commission Determination

The Commission is adopting § 37.1303 as proposed because it provides flexibility to both SEFs and the Commission regarding the calculation of projected operating costs.[770] This flexibility would be limited if the Commission prescribed specific methodologies for computing projected operating costs in the rule text. In response to MarketAxess's comment, the Commission notes that SEFs may work with the Commission staff to create an appropriate methodology for computing such operating costs.

(d) § 37.1304—Valuation of Financial Resources

Proposed § 37.1304 required a SEF, not less than quarterly, to compute the current market value of each financial resource used to meet its obligations under proposed § 37.1301. The proposed rule required SEFs to perform the valuation at other times as appropriate. As stated in the SEF NPRM, the rule is designed to address the need to update valuations in circumstances where there may have been material fluctuations in market value that could impact a SEF's ability to meet its obligations under proposed § 37.1301.[771] The proposed rule required that, when valuing a financial resource, the SEF reduce the value, as appropriate, to reflect any market or credit risk specific to that particular resource (*i.e.,* apply a haircut).[772] The SEF NPRM stated that the Commission would permit SEFs to exercise discretion to determine applicable haircuts, which would be subject to Commission review and acceptance.[773]

(1) Summary of Comments

MarketAxess commented that proposed § 37.1304 did not prescribe specific methodologies for valuing financial resources and recommended that the Commission provide a safe harbor for specific methodologies.[774]

(2) Commission Determination

The Commission is adopting § 37.1304 as proposed.[775] As with

[763] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1230.

[764] Phoenix Comment Letter at 5 (Mar. 7, 2011).

[765] *Id.*

[766] CME Comment Letter at 37 (Feb. 22, 2011).

[767] Reuters Comment Letter at 8 (Mar. 8, 2011).

[768] The Commission is renaming the title of this section from ''Computation of Financial Resource Requirement'' to ''Computation of Projected Operating Costs to Meet Financial Resource Requirement'' to provide greater clarity.

[769] MarketAxess Comment Letter at 39 (Mar. 8, 2011).

[770] The Commission is revising the language of § 37.1303 for clarity.

[771] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1231.

[772] A ''haircut'' is a deduction taken from the value of an asset to reserve for potential future adverse price movements in such asset.

[773] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1231 n. 102.

[774] MarketAxess Comment Letter at 39 (Mar. 8, 2011).

[775] MarketAxess noted that § 37.1304 contains a typographical error as it mistakenly cross-references proposed § 37.701, which relates to the mandatory clearing requirement, instead of proposed § 37.1301. The Commission has made this technical change in the final rule. Additionally, the Commission is revising the language of § 37.1304 for clarity.

§ 37.1303, § 37.1304 provides flexibility to both SEFs and the Commission regarding the valuation of financial resources. This flexibility would be limited if the Commission prescribed specific methodologies for valuing financial resources in the rule text. In response to MarketAxess's comment, the Commission notes that SEFs may work with the Commission staff to create an appropriate methodology for valuing such financial resources.

(e) § 37.1305—Liquidity of Financial Resources

Proposed § 37.1305 required a SEF's financial resources to include unencumbered, liquid financial assets (*i.e.,* cash and/or highly liquid securities) equal to at least six months' operating costs. As noted in the SEF NPRM, the Commission believes that the requirement to have six months' worth of unencumbered, liquid financial assets would provide a SEF time to liquidate the remaining financial assets it would need to continue operating for the last six months of the required one-year period.[776] The proposed rule stated that if any portion of such financial resources is not sufficiently liquid, the SEF may take into account a committed line of credit or similar facility to satisfy this requirement. As stated in the SEF NPRM, a SEF may only use a committed line of credit or similar facility to meet the liquidity requirements set forth in § 37.1305.[777] Accordingly, the SEF NPRM stated that a committed line of credit or similar facility is not available to a SEF to satisfy the financial resources requirements of § 37.1301.[778]

(1) Summary of Comments

Several commenters recommended alternate liquidity requirements to the six months of operating costs. CME commented that the liquidity measurement is only relevant in the context of winding-down operations, and claimed that a three-month period, rather than a six-month period, is a more accurate assessment of how long it would take for a SEF to wind down.[779] Similarly, Phoenix recommended that a SEF be required to maintain liquid assets equal to three months of operating expenses.[780] Parity Energy commented that the Commission should tailor financial requirements to a SEF's size and market impact and recommended limiting the six month liquid asset requirement to only those SEFs whose failure could impact market stability.[781] SDMA, however, recommended that the Commission require SEFs to have at least 12 months of unencumbered capital.[782]

(2) Commission Determination

The Commission is adopting § 37.1305 as proposed. The Commission views a six month period as appropriate for a wind down period and notes that commenters did not provide any support for alternative time frames. In response to Parity Energy's comment, the Commission notes that the purpose of the liquidity requirement is so that all SEFs have liquid financial assets to allow them to continue to operate and to wind down in an orderly fashion. Therefore, the Commission is not limiting the liquidity requirement to only those SEFs whose failure could impact market stability. In this regard, the Commission notes that the statutory financial resources requirements apply to all SEFs and are necessary to ensure core principle compliance. The statute does not distinguish SEFs' financial resources based on their market impact.

The Commission also notes that it is using the term ''unencumbered'' in § 37.1305 in the normal commercial sense to refer to assets that are not subject to a security interest or other adverse claims. By ''committed line of credit or similar facility,'' the Commission means a committed, irrevocable contractual obligation to provide funds on demand with preconditions limited to the execution of appropriate agreements. For example, a facility with a material adverse financial condition restriction would not be acceptable. The purpose of this requirement is for a SEF to have no impediments to accessing its line of credit at the time it needs liquidity. Further, SEFs are encouraged to periodically check their line of credit arrangements to confirm that no operational difficulties are present.

(f) § 37.1306—Reporting Requirements[783]

Proposed § 37.1306(a)(1) required that, at the end of each fiscal quarter, or at any time upon Commission request, a SEF report to the Commission: (i) The amount of financial resources necessary to meet the requirements of § 37.1301; and (ii) the value of each financial resource available to meet those requirements. Proposed § 37.1306(a)(2) required a SEF to provide the Commission with a financial statement, including balance sheet, income statement, and statement of cash flows of the SEF or of its parent company. Proposed § 37.1306(b) required calculations to be made on the last business day of the SEF's fiscal quarter.

Proposed § 37.1306(c) required a SEF to provide the Commission with sufficient documentation explaining the methodology it used to calculate its financial requirements and the basis for its valuation and liquidity determinations. The proposed rule also required the SEF to provide copies of any agreements establishing or amending a credit facility, insurance coverage, or any similar arrangement that evidences or otherwise supports its conclusions.

Finally, proposed § 37.1306(d) required SEFs to file the report no later than 17 business days[784] from the end of its fiscal quarter but allowed SEFs to request an extension of time from the Commission.

(1) Summary of Comments

CME wrote that it would not be feasible for SEFs to comply with the proposed filing deadline of 17 business days from the end of a SEF's fiscal quarter.[785] CME recommended a reporting deadline of 40 calendar days after the end of each fiscal quarter and 60 calendar days after the end of the fiscal year, which it noted is consistent with the SEC's reporting requirements.[786] CME also sought clarification that consolidated financial statements covering multiple registered entities satisfy the reporting requirements.[787]

MarketAxess stated that the proposed reporting requirements are unnecessary and burdensome, and recommended that the Commission allow a senior officer of the SEF to represent to the Commission that the SEF satisfies the financial resources requirements.[788]

Two commenters discussed disclosure of the reports. CME recommended that the Commission clarify that filings made in compliance with the proposed financial resources regulations are confidential.[789]

[776] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1231.

[777] *Id.*

[778] *Id.*

[779] CME Comment Letter at 37 (Feb. 22, 2011).

[780] Phoenix Comment Letter at 4 (Mar. 7, 2011).

[781] Parity Energy Comment Letter at 6 (Mar. 25, 2011).

[782] SDMA Comment Letter at 12 (Mar. 8, 2011).

[783] The Commission is renaming the title of this section from ''Reporting Requirements'' to ''Reporting to the Commission'' to provide greater clarity.

[784] This filing deadline is consistent with the deadline imposed on FCMs for the filing of monthly financial reports. *See* 17 CFR 1.10(b) for further details.

[785] CME Comment Letter at 38 (Feb. 22, 2011).

[786] *Id.*

[787] *Id.*

[788] MarketAxess Comment Letter at 40 (Mar. 8, 2011).

[789] CME Comment Letter at 38 (Feb. 22, 2011).

However, SIFMA AMG commented that SEFs should submit to the Commission and make available for public comment evidence demonstrating sufficient resources.[790]

(2) Commission Determination

The Commission is adopting § 37.1306 as proposed, subject to certain amendments to the filing deadlines.[791] The Commission agrees with CME that the proposed 17 business day filing deadline may be burdensome. In the final rule, the Commission is extending the 17 business day proposed filing deadline to 40 calendar days for the fiscal quarter reports and to 60 calendar days for the fiscal year-end report, which will also harmonize the filing deadlines with the SEC's requirements for its Form 10–Q and Form 10–K. The Commission also clarifies that consolidated financial statements must disclose all relevant and appropriate figures such that a determination of the sufficiency of financial resources of a SEF can be made without additional requests for information from the entity. In such case, consolidated financial statements would comply with the reporting requirements.

In response to MarketAxess's comment that the reporting requirements are unnecessary and burdensome, the Commission believes that prudent financial management requires SEFs to prepare and review financial reports on a regular basis and expects that SEFs would regularly review their finances. In this regard, the Commission notes that because of the importance of this requirement, a mere representation by a senior officer is insufficient for verification that the SEF meets its financial obligations. The quarterly reporting required by § 37.1306 will adequately provide the Commission with assurance that a SEF satisfies its financial resources requirements. The Commission notes that DCMs and DCOs have similar financial resources reporting obligations and does not believe that SEFs should be treated differently. The Commission also believes that much of the information required by the reports should be readily available to a sophisticated organization, which the Commission expects would regularly account for its financial resources. As such, the Commission notes that the cost of submitting these reports to the Commission would be de minimis.

The Commission further clarifies that it does not intend to make financial resources reports public. However, where such information is, in fact, confidential, the Commission encourages SEFs to submit a written request for confidential treatment of such filings under the Freedom of Information Act (''FOIA''), pursuant to the procedures established in section 145.9 of the Commission's regulations.[792] The determination of whether to disclose or exempt such information in the context of a FOIA proceeding would be governed by the provisions of part 145 and any other relevant provision.

Finally, the Commission is adding new § 37.1307 titled ''Delegation of Authority'' to the final SEF rules to delegate authority to the Director of DMO to perform certain functions that are reserved to the Commission under subpart N.

14. Subpart O—Core Principle 14 (System Safeguards)

Core Principle 14 pertains to the establishment of system safeguards and requires SEFs to: (1) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk through the development of appropriate controls and procedures and the development of automated systems that are reliable, secure, and have adequate scalable capacity; (2) establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for the timely recovery and resumption of operations and the fulfillment of the responsibilities and obligations of the SEF; and (3) periodically conduct tests to verify that backup resources are sufficient to ensure continued order processing and trade matching, price reporting, market surveillance, and maintenance of a comprehensive and accurate audit trail.[793] In the SEF NPRM, the Commission proposed to codify the statutory text of Core Principle 14 in proposed § 37.1400, and adopts that rule as proposed.

(a) § 37.1401—Requirements

Proposed § 37.1401(a) required a SEF to: Establish and maintain a program of risk analysis and oversight; establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery; and periodically conduct tests to verify that backup resources are sufficient. Proposed § 37.1401(b) required that a SEF's program of risk analysis and oversight address six categories of risk analysis and oversight, including: Information security; business continuity-disaster recovery (''BC–DR'') planning and resources; capacity and performance planning; systems operations; systems development and quality assurance; and physical security and environmental controls. Proposed § 37.1401(c) suggested that a SEF follow generally accepted standards and best practices when addressing the categories of risk analysis and oversight.

Proposed § 37.1401(d) and (e) also required each SEF to maintain a BC–DR plan, BC–DR resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and ongoing fulfillment of its responsibilities and obligations as a SEF following any disruption, either through sufficient infrastructure and personnel resources of its own or through sufficient contractual arrangements with other SEFs or disaster recovery service providers. If the Commission determines that a SEF is a critical financial market, then that SEF would be subject to more stringent requirements, set forth in § 40.9 of the Commission's regulations.

The proposed rule also required each SEF to notify the Commission staff of various system security-related events, including prompt notice of all electronic trading halts and systems malfunctions (proposed § 37.1401(f)(1)), cyber-security incidents (proposed § 37.1401(f)(2)), and any activation of the SEF's BC–DR plan (proposed § 37.1401(f)(3)). In addition, the proposed rule required each SEF to provide the Commission staff with timely advance notice of all planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems (proposed § 37.1401(g)(1)) and planned changes to programs of risk analysis and oversight (proposed § 37.1401(g)(2)).

The proposed rule also required each SEF to provide relevant documents to the Commission (proposed § 37.1401(h)) and to conduct regular, periodic, objective testing and review of its automated systems (proposed § 37.1401(i)). Moreover, proposed § 37.1401(j) required each SEF, to the extent practicable, to coordinate its BC–DR plan with those of the market participants upon whom it depends to provide liquidity, to initiate coordinated testing of such plans, and to ensure that its BC–DR plan takes into account the BC–DR plans of relevant telecommunications, power, water, and

[790] SIMFA AMG Comment Letter at 13 (Mar. 8, 2011).

[791] The Commission is also making certain non-substantive clarifications to § 37.1306.

[792] 17 CFR 145.9.

[793] CEA section 5h(f)(14); 7 U.S.C. 7b–3(f)(14).

other essential service providers. Finally, proposed § 37.1401(k) stated that part 46 of the Commission's regulations governs the obligations of entities determined to be critical financial markets, with respect to maintenance and geographical dispersal of disaster recovery resources.

(1) Summary of Comments

CME objected to what it considers to be an overly broad requirement in proposed § 37.1401(f)(1) to notify the Commission staff promptly of all electronic trading halts and systems malfunctions.[794] CME stated that the required reporting should be limited only to material system failures.[795] CME also objected to proposed § 37.1401(g)(1), stating that the requirement that SEFs provide the Commission with timely advance notice of all planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems is overly burdensome, and not cost effective.[796] Additionally, CME stated that the proposed § 37.1401(g)(2) requirement that SEFs provide timely advance notice of all planned changes to their program of risk analysis and oversight is too broad and generally unnecessary.[797] Finally, CME noted that it does not control, or generally have access to, the details of the disaster recovery plans of its major vendors.[798]

MarketAxess and WMBAA sought clarification of the criteria used to determine which SEFs are ''critical financial markets,'' as referenced in proposed § 37.1401(d).[799]

(2) Commission Determination

As noted in the SEF NPRM, automated systems play a central and critical role in today's electronic financial market environment, and the oversight of core principle compliance by SEFs with respect to automated systems is an essential part of effective oversight of swaps market.[800] Advanced computer systems are fundamental to a SEF's ability to meet its obligations and responsibilities under the core principles.[801] Accordingly, the Commission is adopting § 37.1401 as proposed, subject to the modifications described below.

Although the Commission did not receive related comments, the Commission is eliminating proposed § 37.1401(a) because this paragraph is repetitious of proposed rule § 37.1400. The Commission is also moving the following portions of proposed § 37.1401 to the guidance in appendix B to part 37 because the rules as proposed provided SEFs with a degree of discretion: (1) Proposed § 37.1401(c) suggesting that a SEF follow generally accepted standards and best practices in addressing the categories of its risk analysis and oversight program; (2) the portion of proposed § 37.1401(i) suggesting that a SEF's testing of its automated systems and BC–DR capabilities be conducted by qualified, independent professionals; and (3) proposed § 37.1401(j) suggesting that a SEF coordinate its BC–DR plan with those of others.[802] Given that these proposed provisions provided SEFs with a degree of discretion, the Commission believes that they are better suited as guidance rather than rules, and as guidance, SEFs will have greater flexibility in administering their obligations.

In response to CME's comments, the Commission is revising proposed § 37.1401(f)(1) to provide that SEFs only need to promptly notify the Commission staff of all material system malfunctions. With respect to planned changes to automated systems or programs of risk analysis and oversight, the Commission is revising proposed § 37.1401(g) to require timely advance notification of all material changes to automated systems and to programs of risk analysis and oversight. The Commission believes that these revisions are appropriate because the scope of the proposed rules may have been too broad as CME noted. The Commission notes that proposed § 37.1401(j) does not require SEFs to control or have access to the details of the disaster recovery plans of its major vendors. Rather, the requirement in the proposed rule, which is being adopted as guidance, suggests coordination to the extent possible.

In response to comments from WMBAA and MarketAxess, the Commission is revising proposed § 37.1401(d) to include a reference to appendix E to part 40 of the Commission's regulations, which describes the Commission's criteria for determining whether a SEF is a critical financial market.[803] Appendix E to part 40 describes the evaluation and notification process for SEFs once designated as a critical financial market.[804]

With respect to the references to § 40.9 regarding critical financial markets in proposed § 37.1401(d) and 37.1401(k), the Commission notes that § 40.9, which was proposed in a separate rulemaking,[805] is not yet final. However, SEFs deemed critical financial markets will be subject to the requirements set forth in § 40.9 upon its effective date. The Commission further notes that the reference to part 46 in proposed § 37.1401(k) was a technical error. Instead, the proposed rule should have referenced part 40. Accordingly, the Commission is replacing the mistaken reference to part 46 with a reference to part 40.

15. Subpart P—Core Principle 15 (Designation of Chief Compliance Officer)

Core Principle 15 establishes the position and duties of chief compliance officer (''CCO'').[806] Core Principle 15 also requires the CCO to design procedures to establish the handling, management response, remediation, retesting, and closing of noncompliance issues.[807] The statute also requires a CCO to prepare and sign an annual compliance report that is filed with the Commission.[808] In addition, Core Principle 15 requires the CCO to include in the report a certification that, under penalty of law, the report is accurate and complete.[809] In the SEF NPRM, the Commission proposed to codify the statutory text of Core Principle 15 in proposed § 37.1500, and adopts that rule as proposed.

(a) § 37.1501—Chief Compliance Officer

Proposed § 37.1501 implemented the statutory provisions of Core Principle 15 and granted CCOs the authority necessary to fulfill their responsibilities.

(1) § 37.1501(a)—Definition of Board of Directors

Proposed § 37.1501(a) defined ''board of directors'' as the board of directors of

[794] CME Comment Letter at 36 (Feb. 22, 2011).

[795] *Id.*

[796] *Id.* at 37.

[797] *Id.*

[798] *Id.*

[799] MarketAxess Comment Letter at 40 (Mar. 8, 2011); WMBAA Comment Letter at 28 (Mar. 8, 2011).

[800] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1231.

[801] *Id.*

[802] As a result of these changes, proposed section (b) is adopted as section (a), proposed section (d) is adopted as section (b), proposed section (e) is adopted as section (c), proposed section (f) is adopted as section (d), proposed section (g) is adopted as section (e), proposed section (h) is adopted as section (f), proposed section (i) is adopted as section (g), and proposed section (k) is adopted as section (h).

[803] Business Continuity and Disaster Recovery, 75 FR 42633 (proposed Jul. 22, 2010). The Commission notes that this rulemaking is not yet final.

[804] *Id.* at 42639.

[805] Id. at 42638–39.

[806] CEA section 5h(f)(15); 7 U.S.C. 7b–3(f)(15).

[807] *Id.*

[808] *Id.*

[809] *Id.*

a swap execution facility or for those swap execution facilities whose organizational structure does not include a board of directors, a body performing a function similar to a board of directors.

(i) Commission Determination

The Commission received no comments on § 37.1501(a) and is adopting the rule as proposed.

(2) § 37.1501(b)—Designation and Qualifications of Chief Compliance Officer

Proposed § 37.1501(b)(1) required a SEF to establish a CCO position and to designate an individual to serve in that capacity. Proposed § 37.1501(b)(1)(i) required that a SEF provide its CCO with the authority and resources to develop and enforce policies and procedures necessary to fulfill its statutory and regulatory duties. In addition, proposed § 37.1501(b)(1)(ii) provided that CCOs must have supervisory authority over all staff acting in furtherance of the CCO's statutory, regulatory, and self-regulatory obligations.

Proposed § 37.1501(b)(2) required that a CCO have the appropriate background and skills to fulfill the responsibilities of the position. Proposed § 37.1501(b)(2)(i) prohibited anyone who would be disqualified from registration under CEA sections 8a(2) or 8a(3) from serving as a CCO.[810] Proposed § 37.1501(b)(2)(ii) prohibited a CCO from being a member of the SEF's legal department or its general counsel.[811]

(i) Summary of Comments

Some commenters stated that by mandating that the CCO have the authority and resources to ''enforce'' a SEF's policies and procedures, the proposed rules change the traditional role of a CCO and give the CCO authority that should be reserved for senior management.[812] These commenters stated that the traditional and proper role of a CCO is to advise management on compliance issues and that management has the authority to enforce compliance policies and procedures.[813] The commenters recommended that the Commission revise the proposed rules to give effect to the well-established and critical distinction between a CCO and management.[814]

Some commenters stated that the proposed rules should not prohibit a CCO from serving as the SEF's general counsel or as a member of the SEF's legal department.[815] WMBAA noted that it is not uncommon for a company's CCO to be its general counsel.[816] Similarly, CME noted that many CCOs have certain other job responsibilities, most typically in related ''control areas'' such as the Legal Department or Internal Audit.[817] Additionally, MarketAxess stated that this prohibition could prevent a smaller SEF from structuring its internal management in the most efficient manner.[818] Parity Energy recommended that this requirement only apply to SEFs that could have a substantial impact on market risk and stability if they were to fail.[819] However, Tradeweb and Better Markets expressed support for a dedicated CCO position independent of a SEF's legal department.[820] Better Markets also commented that in situations where there are a number of affiliated organizations, a single senior CCO should have overall responsibility for each affiliated and controlled entity, even if the individual entities have CCOs.[821]

(ii) Commission Determination

The Commission is adopting § 37.1501(b) as proposed, subject to two modifications described below. In general, the Commission disagrees with the commenters who believe that a CCO's function is solely to monitor and advise on compliance issues. These commenters do not provide any statutory support for this view and their position appears to conflict with the statutory responsibilities of a CCO as set forth in the Act. In particular, CEA section 5h(f)(15)(B) requires a CCO to ''resolve any conflicts of interest that may arise'' and to ''ensure compliance with this Act.'' [822] These duties suggest that a CCO is intended to be more than just an advisor, and must have the appropriate authority to enforce policies and procedures related to his or her areas of responsibility. The Commission believes that such authority is particularly important for a SEF CCO, given the CCO's responsibility in overseeing a SEF's self-regulatory programs.

However, to clarify the CCO's supervisory authority, the Commission is amending proposed § 37.1501(b)(1)(ii) to state that ''[t]he chief compliance officer shall have supervisory authority over all staff acting *at the direction of* the chief compliance officer'' (emphasis added). This modification provides greater clarity as to the SEF staff that must be under the managerial oversight of a CCO by emphasizing that such staff includes persons necessary for SEFs to fulfill their self-regulatory obligations, including compliance staff (*e.g.,* trade practice and market surveillance staff and enforcement staff). The Commission notes that other SEF staff are not captured by the requirements of § 37.1501(b)(1).

The Commission is withdrawing proposed § 37.1501(b)(2)(ii), which prohibits the CCO from serving as a SEF's general counsel or as a member of its legal department. In the SEF NPRM, the Commission noted that there is potentially a conflict of interest present if a CCO serves as a SEF's general counsel or as a member of its legal department.[823] However, the Commission has determined that the potential costs of hiring additional staff to satisfy the requirement in proposed § 37.1501(b)(2)(ii) may impose an excessive burden on SEFs, particularly smaller SEFs.

Although the Commission is eliminating proposed § 37.1501(b)(2)(ii) from the final SEF rules, the Commission notes that a conflict of interest may compromise a CCO's

[810] *See* Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1232 (discussing the reasons for this requirement).

[811] *Id.*

[812] WMBAA Comment Letter II at 2–6 (Mar. 8, 2011); FXall Comment Letter at 14–15 (Mar. 8, 2011); CME Comment Letter at 5–6 (Feb. 7, 2011). WMBAA submitted two comment letters to the SEF rulemaking comment file on Mar. 8, 2011. The second comment letter referred to herein as ''WMBAA Comment Letter II'' only pertains to the SEF NPRM's proposed CCO provisions. Additionally, rather than repeat its comments regarding the CCO provisions that pertain to both the DCO and SEF NPRMs, CME incorporated its entire DCO rulemaking comment letter regarding CCOs dated Feb. 7, 2011 as Exhibit B to its SEF comment letter dated Mar. 8, 2011. The Commission notes these comments by referencing the Feb. 7, 2011 date of CME's DCO comment letter regarding CCOs. The Commission is also changing CME's reference to ''DCO'' to ''SEF'' for these comments.

[813] WMBAA Comment Letter II at 2–6 (Mar. 8, 2011); FXall Comment Letter at 14–15 (Mar. 8, 2011); CME Comment Letter at 5–6 (Feb. 7, 2011).

[814] WMBAA Comment Letter II at 6 (Mar. 8, 2011); FXall Comment Letter at 14–15 (Mar. 8, 2011); CME Comment Letter at 6 (Feb. 7, 2011).

[815] WMBAA Comment Letter II at 6–7 (Mar. 8, 2011); MarketAxess Comment Letter at 27 (Mar. 8, 2011); ICE Comment Letter at 6–7 (Mar. 8, 2011); CME Comment Letter at 3 (Feb. 7, 2011).

[816] WMBAA Comment Letter II at 6 (Mar. 8, 2011).

[817] CME Comment Letter at 3 (Feb. 7, 2011).

[818] MarketAxess Comment Letter at 27 n. 31 (Mar. 8, 2011).

[819] Parity Energy Comment Letter at 6 (Mar. 25, 2011).

[820] Tradeweb Comment Letter at 12 (Mar. 8, 2011); Better Markets Comment Letter at 19 (Mar. 8, 2011).

[821] Better Markets Comment Letter at 19 (Mar. 8, 2011).

[822] CEA sections 5h(f)(15)(B)(iii) and (v); 7 U.S.C. 7b–3(f)(15)(B)(iii) and (v).

[823] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1232, n. 103.

ability to effectively fulfill his or her responsibilities as a CCO, and that such conflicts may be more likely to arise when a CCO is also employed as the SEF's general counsel or within its legal department. Therefore, the Commission expects that as soon as any conflict of interest becomes apparent, a SEF will immediately implement contingency measures. For example, a SEF may reassign the conflicted matter to an alternate employee who does not report to the CCO and who does not possess a conflict of interest. The Commission believes that a SEF's Regulatory Oversight Committee (''ROC'') [824] should regularly monitor for potential conflicts of interest in its oversight of the CCO, and should be particularly involved in the oversight of any matter in which a CCO was recused.

The Commission disagrees with the recommendation by Better Markets to require a single senior CCO to have responsibility over multiple affiliated registered entities, some of which would be required by the CEA and Commission regulations to have their own CCOs. Such a situation might cause unnecessary confusion and dilute CCO accountability at the individual entity level. Additionally, the Commission believes that the proposed rule is sufficient to manage instances where there are a number of affiliated organizations within a corporate family. In these instances, each SEF would be required to appoint its own CCO.

(3) § 37.1501(c)—Appointment, Supervision, and Removal of Chief Compliance Officer

Proposed § 37.1501(c)(1) required that a CCO's appointment and compensation be approved by a majority of the SEF's board of directors or its senior officer. Proposed § 37.1501(c)(1) also required a CCO to meet with the SEF's board of directors at least annually and the ROC at least quarterly, and to provide any information requested regarding the SEF's regulatory program. In addition, proposed § 37.1501(c)(1) required a SEF to notify the Commission of the appointment of a new CCO within two business days of such appointment. Proposed § 37.1501(c)(2) required a CCO to report directly to the board of directors or to the senior officer of the SEF, at the SEF's discretion. Proposed § 37.1501(c)(3) required approval of a majority of a SEF's board of directors to remove a CCO. If a SEF does not have a board of directors, the proposed rule provided that the CCO may be removed by its senior officer. Proposed § 37.1501(c)(3) also required a SEF to notify the Commission of, and explain the reasons for, the departure of the CCO within two business days. In addition, proposed § 37.1501(c)(3) required a SEF to immediately appoint an interim CCO, to appoint a permanent CCO as soon as reasonably practicable, and to notify the Commission within two business days of appointing any new interim or permanent CCO.

(i) Summary of Comments

Some commenters requested that the Commission define the term ''senior officer'' and provided recommendations.[825] FXall recommended that the Commission define the term ''senior officer'' to include the SEF's president, chief executive officer, chief legal officer, or other officer with ultimate supervisory authority for the SEF entity.[826] CME recommended that the term ''senior officer'' be defined to include the senior officer of a division that is engaged in SEF activities rather than the senior officer of a larger corporation.[827]

Commenters also requested that the Commission grant a SEF greater flexibility in determining how a CCO is appointed, compensated, supervised, and removed.[828] In this regard, WMBAA stated that a CCO should be permitted to satisfy the statutory requirement of reporting to the board of directors or a senior officer by reporting to a ROC.[829] MarketAxess commented that the proposed requirements for a majority of the board of directors to approve the appointment, compensation, and removal of the CCO go beyond the statutory mandate and would effectively place the CCO at the same level as the SEF's senior officer.[830] CME argued that each SEF should be given the flexibility to take additional steps beyond those required in the proposed rule, based on the SEF's particular corporate structure, size, and complexity, to ensure an appropriate level of independence for its CCO.[831]

AFR and Better Markets recommended, however, that the rules for CCO's appointment, compensation, supervision, and removal be strengthened.[832] AFR recommended that CCOs be responsible only to a SEF's ROC.[833] It argued that CCO independence may only be ensured by vesting oversight of the position exclusively in public directors.[834] Similarly, Better Markets recommended that decisions relating to a CCO's designation, compensation, and termination should be the sole responsibility of the independent members of the board of directors.[835]

(ii) Commission Determination

The Commission is adopting § 37.1501(c) as proposed, subject to several modifications described below.[836] In response to commenters' requests to define the term ''senior officer,'' the Commission believes, based on the statutory language that requires a CCO to report directly to the ''board or to the senior officer,'' that ''senior officer'' would only include the most senior executive officer of the legal entity that is registered as a SEF.

In response to the commenters' requests for greater flexibility, the Commission believes that proposed § 37.1501(c) generally strikes the appropriate balance between flexibility and ensuring that a SEF's CCO is insulated from day-to-day commercial pressures. The proposed rules provide a degree of flexibility by allowing a SEF's board of directors or senior officer to appoint, set the compensation of, and supervise the CCO. The proposed rules also protect the CCO from undue influence by requiring that the board of directors or the senior officer (if the SEF does not have a board of directors) be responsible for removing the CCO and that the CCO meet with the board of directors at least annually and with the ROC at least quarterly. In response to CME's comment about additional flexibility beyond the rules, the Commission notes that § 37.1501(c) sets forth minimum standards so a SEF may implement additional measures if it deems doing so necessary to insulate the CCO from undue influence. The Commission encourages SEFs to review and enact conflict mitigation procedures as appropriate for their specific

[824] *See* Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding the Mitigation of Conflicts of Interest, 75 FR 63732, 63747–48 (proposed Oct. 18, 2010). Proposed § 37.19(b) describes the role of the ROC. The Commission notes that this rule is not yet final.

[825] FXall Comment Letter at 14 (Mar. 8, 2011); Tradeweb Comment Letter at 12 n.8 (Mar. 8, 2011); CME Comment Letter at 2–3 (Feb. 7, 2011).

[826] FXall Comment Letter at 14 (Mar. 8, 2011).

[827] CME Comment Letter at 2–3 (Feb. 7, 2011).

[828] Tradeweb Comment Letter at 6 (Jun. 3, 2011); MarketAxess Comment Letter at 26 (Mar. 8, 2011); WMBAA Comment Letter II at 7 (Mar. 8, 2011); Tradeweb Comment Letter at 12 (Mar. 8, 2011).

[829] WMBAA Comment Letter II at 7 (Mar. 8, 2011).

[830] MarketAxess Comment Letter at 26 (Mar. 8, 2011).

[831] CME Comment Letter at 9 (Feb. 7, 2011).

[832] AFR Comment Letter at 6 (Mar. 8, 2011); Better Markets Comment Letter at 19–20 (Mar. 8, 2011).

[833] AFR Comment Letter at 6 (Mar. 8, 2011).

[834] *Id.*

[835] Better Markets Comment Letter at 19–20 (Mar. 8, 2011).

[836] The Commission is making certain non-substantive revisions to § 37.1501(c) for clarity.

corporate and/or organizational structure.

However, the Commission is revising proposed § 37.1501(c) in six respects. First, the Commission is modifying proposed § 37.1501(c)(1) to more clearly state that the CCO is obligated to meet with the board of directors at least annually and with the ROC at least quarterly, even if the CCO was appointed by, or is supervised by, the senior officer of the facility. Second, to clarify a CCO's duty to provide information to a SEF's board of directors or ROC, the Commission is modifying proposed § 37.1501(c)(1) to state that ''[t]he chief compliance officer shall provide any information regarding the swap execution facility's *self*-regulatory program that is requested by the board of directors or the regulatory oversight committee'' (emphasis added). Third, the Commission is eliminating the requirement in proposed § 37.1501(c)(1) that a CCO's appointment and compensation require the approval of a majority of a SEF's board of directors. The Commission believes that board of director approval is a sufficient requirement for appointment, and that a SEF should have appropriate discretion to determine the voting percentage necessary to appoint a CCO or determine salary. Fourth, the Commission is eliminating the requirement in proposed § 37.1501(c)(3) that a SEF explain the reason for the departure of a CCO within two business days. The Commission believes that the specific reason for the departure may be unnecessary in most instances. However, the Commission will have the opportunity to investigate the reason for the departure if it so desires because a SEF must notify the Commission of a CCO's departure within two business days. Fifth, the Commission is eliminating the requirement in proposed § 37.1501(c)(3) that a SEF immediately appoint an interim CCO, and appoint a new permanent CCO as soon as reasonably practicable, upon the removal of a CCO. The Commission believes that the requirement to appoint a new CCO is implicit in § 37.1501(b)(1), which requires that a SEF designate an individual to serve as CCO. Finally, the Commission is eliminating the requirement in proposed § 37.1501(c)(3) that a SEF notify the Commission within two business days of appointing a new CCO because this requirement is already included in § 37.1501(c)(1).

(4) § 37.1501(d)—Duties of Chief Compliance Officer

Proposed § 37.1501(d) generally listed the following CCO duties: (1) Overseeing and reviewing compliance with section 5h of the CEA and related Commission regulations; (2) in consultation with the board of directors or the senior officer, resolving any conflicts of interest that may arise; (3) establishing and administering written policies and procedures reasonably designed to prevent violations of the CEA and Commission regulations; (4) ensuring compliance with the CEA and Commission regulations relating to agreements, contracts, or transactions, and with Commission regulations issued under section 5h of the CEA; (5) establishing procedures for the remediation of noncompliance issues identified by the CCO; (6) establishing and following appropriate procedures for noncompliance issues; (7) establishing a compliance manual and administering a code of ethics; (8) supervising a SEF's self-regulatory program; and (9) supervising the effectiveness and sufficiency of any regulatory services provided to the SEF.

(i) Summary of Comments

Better Markets and CME commented on proposed § 37.1501(d)(2) regarding conflicts of interest.[837] Better Markets recommended that the Commission revise proposed § 37.1501(d)(2) to require a CCO to consult with both the independent members of the board of directors and the senior officer when resolving conflicts of interest, which are particularly contentious.[838] CME requested that the Commission revise proposed § 37.1501(d)(2) to require a CCO to establish policies and procedures reasonably designed to resolve any conflicts of interest that may arise.[839] Although CME conceded that the language in proposed § 37.1501(d)(2) mirrors the language in the Act, it believes that Congress did not intend for the CCO to resolve conflicts in the executive or managerial sense.[840]

Several commenters argued that proposed § 37.1501(d)(4), requiring a CCO to ''ensure'' compliance with the Act and Commission regulations, is an impracticable standard.[841] Instead, many of these commenters recommended alternative language, which generally stated that the CCO put in place policies and procedures that reasonably ensure compliance with the Act and Commission regulations.[842]

CME also took issue with the requirement in proposed § 37.1501(d)(6), which requires a CCO to ''follow'' appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues.[843] CME requested that the Commission eliminate this requirement, which it believes is a function of senior management.[844] Additionally, WMBAA recommended that the Commission delete proposed § 37.1501(d)(8) and (d)(9), regarding the supervision of a SEF's self-regulatory program and any regulatory service provider, because these functions should be the responsibility of management.[845]

(ii) Commission Determination

The Commission is adopting § 37.1501(d) as proposed, subject to certain modifications described below. The Commission is revising proposed § 37.1501(d)(2) to clarify that the list of enumerated conflicts of interest is not exhaustive.[846] The Commission is not adopting the recommendation by Better Markets to require the CCO to consult with both the independent members of the board of directors and the senior officer when resolving conflicts of interest. Considering the statutory provisions of CEA section 5h, the Commission believes that it is unnecessary to require the CCO to do so. However, the Commission notes that § 37.1501(d)(2) sets forth minimum standards so a SEF may institute higher standards, such as requiring its CCO to consult with both the independent members of the board of directors and the senior officer when resolving conflicts of interest. The Commission also declines to adopt CME's recommendation regarding conflicts of interest. As CME acknowledged, the Commission is following the statutory language in its implementation of § 37.1501(d)(2).

In response to commenters' concerns about the requirement to ''ensure'' compliance in proposed § 37.1501(d)(4),

[837] Better Markets Comment Letter at 20 (Mar. 8, 2011); CME Comment Letter at 6 (Feb. 7, 2011).

[838] Better Markets Comment Letter at 19, 20 (Mar. 8, 2011).

[839] CME Comment Letter at 6 (Feb. 7, 2011).

[840] *Id.*

[841] Tradeweb Comment Letter at 6–7 (Jun. 3, 2011); WMBAA Comment Letter II at 5–6 (Mar. 8, 2011); MarketAxess Comment Letter at 26 (Mar. 8, 2011); Tradeweb Comment Letter at 12 (Mar. 8, 2011); CME Comment Letter at 4 (Feb. 7, 2011).

[842] Tradeweb Comment Letter at 6–7 (Jun. 3, 2011); Tradeweb Comment Letter at 12 (Mar. 8, 2011); CME Comment Letter at 4 (Feb. 7, 2011).

[843] CME Comment Letter at 6 (Feb. 7, 2011).

[844] *Id.*

[845] WMBAA Comment Letter II at 6 (Mar. 8, 2011).

[846] The Commission notes that the preamble to the SEF NPRM already clarified this point. To provide additional clarity, the Commission is clarifying this point in the final rule by adding the word ''including'' before the list of enumerated conflicts of interest. *See* Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1233.

the Commission is modifying the rule to state that the CCO shall take ''reasonable steps to ensure compliance with the Act and the rules of the Commission.'' The Commission understands that a single individual cannot guarantee compliance with the CEA and Commission regulations. The Commission believes that this modification is responsive to commenters' concerns and is consistent with the final rules for other registered entities.[847] The Commission is also removing the reference to ''agreements, contracts, or transactions'' in proposed § 37.1501(d)(4) to more closely follow the language in the Act. In making this modification, the Commission does not intend to modify any substantive obligations of the CCO with regard to agreements, contracts, or transactions to the extent that these documents implicate the Act or Commission regulations under the Act.

In order to clarify differences between the SEF NPRM's preamble and rule text regarding proposed § 37.1501(d)(7), the Commission is revising the rule to state that the CCO's duties include ''[e]stablishing *and administering* a compliance manual designed to promote compliance with the applicable laws, rules, and regulations . . .'' (emphasis added). The Commission also disagrees with CME and WMBAA that the requirements in proposed § 37.1501(d)(6), (d)(8), and (d)(9) are functions of management. These provisions, as discussed above, require a CCO to establish and follow appropriate procedures regarding noncompliance issues, supervise the SEF's self-regulatory program, and supervise the effectiveness and sufficiency of any regulatory service provider. As noted above, the Commission disagrees with the commenters who believe that a CCO's function is solely to monitor and advise on compliance issues. Finally, the Commission is revising proposed § 37.1501(d)(9) to remove the references to ''registered futures association'' and ''other registered entity'' and, instead, adding a reference to ''regulatory service provider'' given the inclusion of FINRA as a regulatory service provider under § 37.204.

(5) § 37.1501(e)—Annual Compliance Report Prepared by Chief Compliance Officer[848]

Proposed § 37.1501(e) generally enumerated the following information that must be included in the annual compliance report: (1) A description of the SEF's written policies and procedures, including the code of ethics and conflicts of interest policies; (2) a detailed review of the SEF's compliance with CEA section 5h and Commission regulations, which, among other requirements, identifies the policies and procedures that ensure compliance with the core principles; (3) a list of any material changes to the compliance policies and procedures since the last annual compliance report; (4) a description of staffing and resources set aside for the SEF's compliance program; (5) a description of any material compliance matters, including instances of noncompliance; (6) any objections to the annual compliance report by those persons who have oversight responsibility for the CCO; and (7) a certification by the CCO that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the annual compliance report is accurate and complete.

(i) Summary of Comments

FXall and CME asserted that the information required to be included in the annual compliance report is too detailed.[849] FXall, for example, commented that the requirements for the annual compliance report go beyond those set forth in the Dodd-Frank Act and that producing the report will consume considerable resources.[850] FXall proposed alternative requirements, which it believes would be more in-line with the requirements in the Dodd-Frank Act.[851]

With respect to the requirement in proposed § 37.1501(e)(2)(i) to identify policies and procedures that ''ensure'' compliance with the core principles, FXall and CME stated that policies and procedures cannot ''ensure'' or guaranty compliance, but can only be reasonably designed to result in compliance.[852] CME also recommended that the requirement in proposed § 37.1501(e)(5) to describe any material compliance matters be revised to require the report to identify ''any material non-compliance issues that were not properly addressed.'' [853] MarketAxess recommended that the Commission remove proposed § 37.1501(e)(6) because in its opinion other persons should be able to correct the CCO's annual report.[854]

MarketAxess and FSR expressed their concern that the CCO's certification of the annual compliance report in proposed § 37.1501(e)(7) may impose strict liability on a CCO where the report contains even a minor and insignificant error.[855] These commenters recommended adding a materiality qualifier to the certification.[856] Additionally, both FXall and CME recommended that the SEF's senior officer, not the CCO, certify the accuracy of the annual compliance report.[857]

(ii) Commission Determination

The Commission is adopting § 37.1501(e) as proposed, subject to certain modifications described below. The Commission disagrees with the comments from FXall and CME regarding the complexity and the burden of the annual compliance report. The annual compliance report is meant to provide the Commission with a detailed account of a SEF's compliance with the CEA and Commission regulations, as well as a detailed account of a SEF's self-regulatory program. The Commission believes that the level of detail the proposed rules require, including the requirement that the annual report include a description of all noncompliance issues identified, is necessary to ensure that the Commission can determine the effectiveness of a SEF's compliance and self-regulatory programs.[858]

However, in response to comments, the Commission is revising proposed § 37.1501(e)(2)(i) to require that the annual compliance report identify ''the policies and procedures that *are designed to* ensure compliance with each subsection and core principle, including each duty specified in section 5h(f)(15)(B) of the Act . . .'' (emphasis added). The Commission is also removing proposed § 37.1501(e)(6), which requires the annual compliance report to include any objections by

[847] *See, e.g.,* Swap Data Repositories: Registration Standards, Duties and Core Principles, 76 FR 54538, 54584 (Sept. 1, 2011) (stating that the duties of an SDR's CCO include ''[t]aking reasonable steps to ensure compliance with the Act and Commission regulations . . .''); Derivatives Clearing Organization General Provisions and Core Principles, 76 FR 69334, 69434 (Nov. 8, 2011) (stating that the duties of a DCO's CCO include ''[t]aking reasonable steps to ensure compliance with the Act and Commission regulations . . .'').

[848] The Commission is renaming the title of this section from ''Annual Compliance Report Prepared by Chief Compliance Officer'' to ''Preparation of Annual Compliance Report.''

[849] FXall Comment Letter at 16–17 (Mar. 8, 2011); CME Comment Letter at 7–8 (Feb. 7, 2011).

[850] FXall Comment Letter at 16 (Mar. 8, 2011).

[851] *See id.* for details regarding FXall's proposed alternatives.

[852] FXall Comment Letter at 17 (Mar. 8, 2011); CME Comment Letter at 7 (Feb. 7, 2011).

[853] CME Comment Letter at 7–8 (Feb. 7, 2011).

[854] MarketAxess Comment Letter at 26 (Mar. 8, 2011).

[855] MarketAxess Comment Letter at 26 (Mar. 8, 2011); FSR Comment Letter at 10 (Mar. 8, 2011).

[856] *Id.*

[857] FXall Comment Letter at 15 (Mar. 8, 2011); CME Comment Letter at 8 (Feb. 7, 2011).

[858] In this regard, the Commission disagrees with CME's recommendation regarding proposed § 37.1501(e)(5).

those persons who oversee the CCO.[859] The Commission believes that the board of directors [860] may append its own comments if desired, but the statutory text and the Commission's implementing regulations do not require it.

The Commission disagrees with the comments from MarketAxess and FSR regarding the inclusion of a materiality qualifier to the certification requirement. The Commission believes that the current certification sufficiently protects the CCO from being held strictly liable for any minor inaccuracies because it includes a ''knowledge'' and ''reasonable belief'' qualifier. The Commission also disagrees with CME's and FXall's comments to have the SEF's CEO, instead of the CCO, certify the accuracy of the annual compliance report. While the CEA does not explicitly require that the CCO certify the report, it does require that the CCO ''annually prepare and sign'' the report, and that the report ''include a certification that, under penalty of law, the compliance report is accurate and complete.'' [861] The Commission believes that these two requirements read together provide sufficient basis for the CCO to certify that the report is accurate and complete. However, the Commission is modifying § 37.1501(e) to explicitly state that the CCO ''sign'' the annual compliance report in order to follow the statutory text more closely.

(6) § 37.1501(f)—Submission of Annual Compliance Report by Chief Compliance Officer to the Commission [862]

Proposed § 37.1501(f)(1) required, among other items, that the CCO provide the annual compliance report to the board of directors or the senior officer for review, prior to submission to the Commission. The proposed rule also stated that the board of directors or the senior officer may not require the CCO to make any changes to the report. Proposed § 37.1501(f)(2) required that the annual compliance report be electronically provided to the Commission not more than 60 days after the end of the SEF's fiscal year. Proposed § 37.1501(f)(3) required the CCO to promptly file an amendment to an annual compliance report upon discovery of any material error or omission. Proposed § 37.1501(f)(4) allowed a SEF to request an extension of time to file its compliance report based on substantial, undue hardship. Finally, proposed § 37.1501(f)(5) stated that annual compliance reports will be treated as exempt from mandatory public disclosure for purposes of FOIA [863] and the Sunshine Act [864] and parts 145 and 147 of the Commission's regulations.

(i) Summary of Comments

Some commenters stated that proposed § 37.1501(f)(1) should be modified to allow the board of directors or the senior officer to make changes to the annual compliance report.[865] These commenters generally argued that the CCO should be accountable to management and, by not permitting the board of directors or the senior officer to revise the report, the proposed rule undermines the authority of the board of directors.[866] Better Markets recommended that the CCO should be required to present his or her finalized report to the board of directors and executive management prior to its submission.[867] Better Markets further recommended that the independent directors and/or the Audit Committee, as well as the entire board of directors, review and approve the report or detail where and why it disagrees with any provision before submission to the Commission.[868]

With respect to proposed § 37.1501(f)(5), CME recommended that the Commission expressly state that annual compliance reports are confidential documents that are not subject to public disclosure by listing such reports as a specifically exempt item in Commission regulation 145.5.[869]

(ii) Commission Determination

The Commission is adopting § 37.1501(f) as proposed, subject to two modifications described below. The Commission has determined not to adopt the commenters' recommendation to allow the board of directors or the senior officer to make changes to the annual compliance report. The Commission believes that allowing the board of directors or the senior officer to make changes to the report would prevent the CCO from making a complete and accurate assessment of a SEF's compliance program. The Commission has determined not to adopt the recommendation by Better Markets that the board of directors approve the annual compliance report or detail any disagreement. The Commission believes that requiring the board of directors to approve the report increases the risk that the CCO would be subject to undue influence by the board or by management. The Commission notes that the board of directors may include its own opinion of the annual compliance report if it disagrees with the CCO's assessment. The Commission believes that the rule strikes the appropriate balance between ensuring that the board of directors cannot adversely influence the content of the annual compliance report and granting the board the opportunity to express its opinion of the report to the Commission.

The Commission is revising proposed § 37.1501(f)(2) to clarify that a SEF shall submit its annual compliance report to the Commission concurrently with the SEF's filing of its fourth fiscal quarter financial report pursuant to § 37.1306. The Commission is making this technical correction because CEA section 5h(f)(15)(D)(ii) sets forth such a requirement, which was inadvertently omitted from the proposed rules.[870]

Additionally, the Commission is withdrawing proposed § 37.1501(f)(5). The Commission acknowledges CME's concern regarding the public release of annual compliance reports and clarifies that the Commission does not intend to make annual compliance reports public. However, where such information is, in fact, confidential, the Commission encourages SEFs to submit a written request for confidential treatment of such filings under FOIA, pursuant to the procedures established in section 145.9 of the Commission's regulations.[871] The determination of whether to disclose or exempt such information in the context of a FOIA proceeding would be governed by the provisions of part 145 and any other relevant provision.

(7) § 37.1501(g)—Recordkeeping

Proposed § 37.1501(g)(1) generally stated that a SEF must maintain the following records: (i) A copy of written policies and procedures adopted in furtherance of compliance with the Act and Commission regulations; (ii) copies

[859] As a result of this deletion, the Commission is adopting proposed § 37.1501(e)(7) as § 37.1501(e)(6).

[860] If a SEF does not have a board of directors, then the senior officer of the SEF may append his or her own comments if desired.

[861] CEA section 5h(f)(15)(D); 7 U.S.C. 7b–3(f)15)(D).

[862] The Commission is renaming the title of this section from ''Submission of Annual Compliance Report by Chief Compliance Officer to the Commission'' to ''Submission of Annual Compliance Report.''

[863] 5 U.S.C. 552.

[864] 5 U.S.C. 552b(b).

[865] FXall Comment Letter at 17–18 (Mar. 8, 2011); WMBAA Comment Letter II at 7 (Mar. 8, 2011); MarketAxess Comment Letter at 26 (Mar. 8, 2011).

[866] *Id.*

[867] Better Markets Comment Letter at 20 (Mar. 8, 2011).

[868] *Id.*

[869] CME Comment Letter at 9 (Feb. 7, 2011).

[870] CEA section 5h(f)(15)(D)(ii); 7 U.S.C. 7b–3(f)(15)(D)(ii).

[871] 17 CFR 145.9.

of all materials created in furtherance of the CCO's duties listed in paragraphs (d)(6) and (d)(7) of proposed § 37.1501; (iii) copies of all materials in connection with the review and submission of the annual compliance report; and (iv) any records relevant to a SEF's annual report. Proposed § 37.1501(g)(2) required a SEF to maintain these records in accordance with § 1.31 and part 45 of the Commission's regulations.

(i) Summary of Comments

MarketAxess commented that the final rule should provide an exception for legally privileged materials.[872] MarketAxess argued that it is unreasonable for the Commission to take the position that a CCO should not be able to receive privileged advice from counsel in an effort to comply with these new, complex, and uncertain rules.[873]

(ii) Commission Determination

The Commission is adopting § 37.1501(g) as proposed.[874] The Commission does not believe that § 37.1501(g) changes existing Commission policies regarding the assertion of attorney-client privilege by registrants. As stated in the SEF NPRM, the Commission designed § 37.1501(g) to ensure that the Commission staff would be able to obtain the necessary information to determine whether a SEF has complied with the CEA and applicable regulations.[875] The Commission believes that proposed § 37.1501(g) properly accomplishes this goal.

Finally, the Commission is adding new § 37.1501(h) titled ''Delegation of authority'' to the final SEF rules to delegate authority to the Director of DMO to grant or deny a swap execution facility's request for an extension of time to file its annual compliance report under paragraph (f)(4) of § 37.1501.

III. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'')[876] requires federal agencies, in promulgating regulations, to consider the impact of those regulations on small entities. The regulations adopted herein will affect SEFs. The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.[877] In addition, the Commission has previously determined that DCMs, derivatives transaction execution facilities (''DTEFs''), exempt commercial markets (''ECMs''), exempt boards of trade (''EBOTs''), and DCOs are not small entities for the purpose of the RFA.[878]

While SEFs are new entities to be regulated by the Commission pursuant to the Dodd-Frank Act,[879] in the SEF NPRM the Commission proposed that SEFs should not be considered as small entities for the purpose of the RFA for essentially the same reasons that DCMs and DCOs have previously been determined not to be small entities.[880] The Commission received no comments on the impact of the rules contained herein on small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies, pursuant to 5 U.S.C. 605(b), that the regulations will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA'')[881] imposes certain requirements on federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number issued by the Office of Management and Budget (''OMB''). This final rulemaking contains new collection of information requirements within the meaning of the PRA. Accordingly, in connection with the SEF NPRM, the Commission submitted an information collection request, titled ''Core Principles and Other Requirements for Swap Execution Facilities,'' to OMB for its review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. Additionally, pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission, in the SEF NPRM, requested comments from the public on the proposed information collection requirements in order to, among other items, evaluate the necessity of the proposed collections of information and minimize the burden of the information collection requirements on respondents.[882]

On April 28, 2011, OMB assigned control number 3038–0074 to this collection of information, but withheld final approval pending the Commission's resubmission of the information collection, which includes a description of the comments received on the collection and the Commission's responses thereto. The Commission has revised some of its proposed estimates of the number of mandatory responses in order to clarify the Commission's original intent; otherwise, the proposed burden hour estimates are being adopted as discussed herein. The Commission has submitted the revised information collection request to OMB for its review, which will be made available by OMB at *http://www.reginfo.gov/public/do/PRAMain.*

As noted in the SEF NPRM, the Commission will protect proprietary information according to the Freedom of Information Act and 17 CFR part 145, ''Commission Records and Information.'' In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.''[883] The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974.[884]

1. Proposed Collection of Information

In the SEF NPRM, the Commission estimated that each SEF respondent would have an average annual reporting burden of 308 hours.[885] In deriving this estimate, the Commission compared the reporting requirements for other entities that fall under the Commission's regulatory oversight, such as an Exempt Commercial Market with a significant price discovery contract (''SPDC ECM''), a DTEF, and a DCM.[886] Specifically, the Commission estimated that a SEF will have more reporting requirements than a SPDC ECM and a DTEF, but fewer

[872] MarketAxess Comment Letter at 27 (Mar. 8, 2011).

[873] *Id.*

[874] The Commission is making certain non-substantive clarifications to § 37.1501(g). In addition, the Commission is revising the citation to paragraphs ''(d)(6) and (d)(7)'' in proposed § 37.1501(g)(1)(ii) to cite to paragraphs ''(d)(8) and (d)(9).'' The Commission notes that this was a drafting error.

[875] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1235.

[876] 5 U.S.C. 601 *et seq.*

[877] *See* 47 FR 18618–21 (Apr. 30, 1982).

[878] *See* 47 FR 18618, 18619 (Apr. 30, 1982) discussing DCMs; 66 FR 42256, 42268 (Aug. 10, 2001) discussing DTEFs, ECMs, and EBOTs; and 66 FR 45604, 45609 (Aug. 29, 2001) discussing DCOs.

[879] Dodd Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, 124 Stat. 1376 (2010).

[880] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1235.

[881] 44 U.S.C. 3501 *et seq.*

[882] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1236.

[883] 7 U.S.C. 12(a)(1).

[884] 5 U.S.C. 552a.

[885] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1236.

[886] *Id.*

reporting requirements than a DCM (as most recently calculated).[887] The Commission employed an average of its most recent hourly burdens for DCMs, DTEFs, and SPDC ECMs.[888] Those hourly burdens provided in the SEF NPRM are noted below:

Current estimate of DCM's annual burden: 440 hours per DCM[889]
Initial estimate of DTEF's annual burden: 200 hours per DTEF[890]
Initial estimate of SPDC ECM's annual burden: 233 hours per ECM[891]

In the SEF NPRM, the Commission estimated that 30 to 40 SEFs will register with the Commission as a result of the Dodd-Frank Act.[892] Therefore, the Commission estimated the annual aggregate hour burden for all respondents to be 10,780 hours.[893] Based on an hourly rate of $52,[894] the Commission estimated that respondents may expend up to $16,016 annually to comply with the proposed regulations.[895] This would result in an aggregate cost across all SEF respondents of $560,560 per annum (35 respondents × $16,016).[896] The SEF NPRM also provided the following summary of estimates:

Estimated number of respondents: 35
Annual responses by each respondent: 1
Total annual responses: 35
Quarterly responses by each respondent: 4
Total quarterly responses: 140
Estimated average hours per response: 308
Aggregate annual reporting hours burden: 10,780[897]

2. Summary of Comments and Commission Response

While no commenter directly addressed the proposed aggregate burden hour estimate, the Commission did receive comments related to the costs of various recordkeeping and reporting requirements in the proposed rules.

(a) § 37.3—Requirements and Procedures for Registration

WMBAA commented that the Commission could reduce the regulatory burden of the registration procedures by reconciling its Form SEF with the SEC's registration form such that a potential SEF will have to fill out only one form.[898] Similarly, MarketAxess stated that it is costly and inefficient for a SEF that is required to be registered by both the Commission and SEC to go through two full registration processes, and that the Commission instead should permit ''notice'' or ''passport'' registration of an SB–SEF already registered with the SEC.[899] While the Commission acknowledges notice registration under section 5h(g) of the Act, it notes that the registration requirements for SEFs may differ from the registration requirements for SB–SEFs and thus the Commission must conduct an independent review of a SEF applicant's registration application to ensure that the potential SEF's proposed trading models and operations comply with the Commission's requirements. Given such differing requirements, the Commission also notes that Form SEF may differ from the SEC's registration form.

With respect to temporary registration, the Commission has eliminated the requirement from the SEF NPRM that an applicant provide transaction data that substantiates that the execution or trading of swaps has occurred and continues to occur on the applicant's trading system or platform at the time the applicant submits its temporary registration request. The Commission has also eliminated the certification requirement that an applicant believes that when it operates under temporary registration it will meet the requirements of part 37 of the Commission's regulations. Instead, the Commission has revised the temporary registration provisions to require a SEF applicant that is already operating a swaps-trading platform, in reliance upon either an exemption granted by the Commission or some form of no-action relief granted by the Commission staff, to include in the temporary registration notice a certification that it is operating pursuant to such exemption or no-action relief. The Commission believes that these revisions will not materially affect the proposed part 37 information collection estimate.

(b) § 37.4—Procedures for Listing Products and Implementing Rules

CME commented that the proposed product and rule certification process substantially increased the documentation burden, which in turn would increase the cost and amount of time it takes to list new products and implement new rules, with no corresponding benefit to the public.[900] While CME cited the 8,300 additional aggregate hours that product and rule submissions were estimated to impose on all registered entities,[901] the Commission notes that this figure was already accounted for in the Commission's information collection estimate in the part 40 rulemaking titled ''Provisions Common to Registered Entities.'' [902] Therefore, the burden

[887] *Id.* SPDC ECMs were subject to 9 core principles, DTEFs were subject to 9 core principles, and DCMs are subject to 23 core principles. SEFs will be subject to 15 core principles. *Id.* at 1236 n. 124.

[888] *Id.* at 1236.

[889] After passage of the Commodity Futures Modernization Act of 2000 and a switch to the core principles framework for DCMs, the Commission estimated that the recordkeeping and reporting obligations imposed by part 38 would total 300 burden hours per DCM. *See* A New Regulatory Framework for Trading Facilities, Intermediaries and Clearing Organizations, 66 FR 42256, 42268 (Aug. 10, 2001); 66 FR 14262, 14268 (proposed Mar. 9, 2001). In 2007, the Commission amended the acceptable practices in part 38 for minimizing conflicts of interest, estimating that the amendments would increase the information collection and reporting burden by an additional 70 hours per DCM. *See* Conflicts of Interest in Self-Regulation and Self-Regulatory Organizations (''SROs''), 72 FR 6936, 6957 (Feb. 14, 2007); 71 FR 38740, 38748 (proposed Jul. 7, 2006). Most recently, the Commission adopted revisions to part 38 to implement the Dodd-Frank Act, estimating that the revisions would increase the information collection and reporting burden by an additional 70 hours per DCM. *See* Core Principles and Other Requirements for Designated Contract Markets, 77 FR 36612, 36662 (Jun. 19, 2012). The average for purposes of the initial burden hour estimate for SEFs averages both initial estimates for DCMs with the other most recent estimates.

[890] A New Regulatory Framework for Trading Facilities, Intermediaries and Clearing Organizations, 66 FR at 42268; 66 FR at 14268.

[891] Significant Price Discovery Contracts on Exempt Commercial Markets, 74 FR 12178, 12187 (Mar. 23, 2009); 73 FR 75888, 75902 (proposed Dec. 12, 2008).

[892] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1236. For hourly reporting requirements, an average of 35 SEFs was used for calculation purposes. *Id.* at 1236 n. 125.

[893] *Id.* at 1236.

[894] In arriving at a wage rate for the hourly costs imposed, the Commission consulted the Management and Professional Earnings in the Securities Industry Report, published in 2010 by the Securities Industry and Financial Markets Association (SIFMA Report). The wage rate is a composite (blended) wage rate arrived at by averaging the mean annual salaries of an Assistant/Associate General Counsel, an Assistant Compliance Director, a Senior Programmer, and a Senior Treasury/Cash Management Manager as published in the SIFMA Report and dividing that figure by 2,000 annual work hours to arrive at the hourly rate of $52.

[895] Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1236.

[896] *Id.*

[897] 308 average hours per respondent × 35 respondents = 10,780 total hours/year. *Id.*

[898] WMBAA Comment Letter at 14 (Mar. 8, 2011).

[899] MarketAxess Comment Letter at 20–21 (Mar. 8, 2011).

[900] CME Comment Letter at 10, 13 (Feb. 22, 2011).

[901] *Id.* at 10.

[902] Provisions Common to Registered Entities, 76 FR 44776, 44789 (Jul. 27, 2011). The Commission also notes that the annual burden hour estimate for DCMs that was used to calculate the annual burden hour estimate for SEFs in this part 37 rulemaking did not include the recordkeeping and reporting hours accounted for in the part 40 rulemaking's information collection estimate. Therefore, there is no double counting of hours for product and rule submissions. Furthermore, the Commission notes that, similar to the DCM rulemaking, many of the collection burdens associated with this part 37

Continued

associated with that information collection is not duplicated here.

(c) § 37.5(c)—Equity Interest Transfers

CME commented that the ''level of immediacy'' contemplated by the 24-hour timeframe for submitting agreements with the notification to the Commission of an equity interest transfer in proposed § 37.5(c) may be unrealistic.[903] CME further commented that the representation of compliance with the requirements of CEA section 5h and the Commission's regulations adopted thereunder would be more appropriate if required upon consummation of the equity interest transfer, rather than with the initial notification.[904] In this final rulemaking, the Commission has revised proposed § 37.5(c) to remove references to specific documents that must be provided with the equity transfer notification, and instead provided that the Commission may request supporting documentation. The Commission has also revised the proposed rule to increase the threshold of when a SEF must file an equity interest transfer notification with the Commission from ten percent to fifty percent and has extended the time period for a SEF to file the notification to up to ten business days from one business day under the proposed rule. In addition, the Commission has deleted the requirement for a SEF to provide a representation of compliance with section 5h of the Act and the Commission regulations thereunder with the equity interest transfer notification, as requested by CME. The Commission notes that these revisions should slightly reduce the burden of the information collection requirements for those respondents who are not requested to provide supporting documentation.

(d) § 37.202(b)—Jurisdiction

CME stated that it would be costly for a SEF to obtain every customer's consent to its regulatory jurisdiction as required by proposed § 37.202(b).[905] As noted in the preamble, the Commission believes that jurisdiction must be established by a SEF prior to granting members and market participants access to its markets in order to effectuate the statutory mandate of Core Principle 2 that a SEF shall have the capacity to detect, investigate, and enforce rules of the SEF. The Commission notes that any information collection costs associated with this rule is covered by the Commission's information collection estimate.

(e) § 37.203(f)—Investigations and Investigation Reports

CME stated that minor transgressions could be handled effectively through the issuance of a warning letter rather than a formal investigatory report.[906] As explained in the preamble, the Commission clarifies that warning letters may be issued for minor transgressions; however, no more than one warning letter may be issued to the same person or entity found to have committed the same rule violation more than once within a rolling 12-month period. The Commission also clarifies that the limit on the number of warning letters is not applicable when a rule violation has not been found. The Commission believes that these clarifications will not materially affect the proposed part 37 information collection estimate.

(f) § 37.205—Audit Trail

WMBAA commented that the proposed audit trail requirement in § 37.205(b) to retain records of customer orders should not apply to indicative quotes because it would be burdensome and costly.[907] As discussed in the preamble, the Commission believes that this requirement is necessary so that a SEF has a complete picture of all trading activity in order to carry out its statutory mandate to monitor its markets to detect abusive trading practices and trading rule violations. The Commission accounted for this recordkeeping requirement in the proposed burden hour estimate; therefore, the estimate remains unaffected.

(g) § 37.404—Ability to Obtain Information

WMBAA commented that the requirement for SEFs to mandate that traders maintain trading and financial records is not required under the Act.[908] The Commission notes that market participants' trading records are an invaluable tool in its surveillance efforts and believes that a SEF should have direct access to such information in order to discharge its obligations under the SEF core principles. However, as noted in the preamble, the Commission states in the guidance that SEFs may limit the application of this requirement to those market participants who conduct substantial trading on their facility. The Commission notes that the requirement for market participants to keep such records is sound commercial practice, and that market participants are likely already maintaining such trading records; therefore, the Commission believes that the revision above will not materially affect the proposed part 37 information collection estimate.

(h) § 37.703—Monitoring for Financial Soundness

FXall commented that SEFs would be burdened by the ''onerous financial surveillance obligations'' of proposed § 37.703, which include the routine review of members' financial records.[909] The Commission agrees that burdensome financial surveillance obligations may lead to higher transaction costs; therefore, as discussed in the preamble, the Commission has revised the proposed rule to state that SEFs must monitor their market participants to ensure that they continue to qualify as ECPs. The Commission believes that this revision will not materially affect the proposed part 37 information collection estimate and is thus maintaining the estimate.

(i) § 37.1306—Financial Resources Reporting to the Commission

MarketAxess commented that the financial resources reporting requirements are unnecessary and burdensome and recommended that the Commission allow a senior officer of the SEF to represent to the Commission that it satisfies the financial resources requirements.[910] The Commission disagrees with MarketAxess and, as discussed in the preamble, believes that much of the information required by the reports should be readily available to a SEF in the ordinary course of business. The Commission's proposed burden hour estimate includes this reporting requirement.

(j) § 37.1401—System Safeguards Requirements

CME commented that the requirements to notify the Commission staff of all system security-related events and all planned changes to automated systems that may impact the reliability, security, or scalability of the systems are overly burdensome.[911] As noted in the preamble, the Commission has revised the rule to only require notification of material system malfunctions and material planned system changes. While

rulemaking are covered by other existing or pending collections of information. Therefore, only those burdens that are not covered elsewhere are included in this collection of information.

[903] CME Comment Letter at 13 (Feb. 22, 2011).

[904] *Id.*

[905] *Id.* at 16.

[906] *Id.* at 22.

[907] WMBAA Comment Letter at 23 (Mar. 8, 2011).

[908] *Id.* at 26.

[909] FXall Comment Letter at 3 (Mar. 8, 2011).

[910] MarketAxess Comment Letter at 40 (Mar. 8, 2011).

[911] CME Comment Letter at 36–37 (Feb 22, 2011).

these revisions should decrease the regulatory burden imposed by the rule, the Commission believes that, given the infrequent nature of the information collection requirement as originally proposed, the effect of the revisions should be de minimis and therefore not affect the proposed burden hour estimate.

(k) § 37.1501(e)—Preparation of Annual Compliance Report

FXall commented that the information required by the proposed regulations to be included in the annual compliance report is too detailed and will be too costly to compile.[912] The Commission is not persuaded by FXall's comment, and notes that the annual compliance report is meant to be the primary tool by which the Commission can evaluate the effectiveness of a SEF's compliance and self-regulatory programs, thus requiring a high level of detail. The Commission's proposed burden hour estimate includes the annual compliance report requirement.

3. Final Burden Estimate

The final regulations require each respondent to file information with the Commission. For instance, SEF applicants must file registration applications with the Commission pursuant to § 37.3. SEFs must record, report, and disclose information related to prices, trading volume, and other trading data for swaps pursuant to Core Principles 9 and 10 (''Timely Publication of Trading Information'' and ''Recordkeeping and Reporting''). In general, the collections of information are required to demonstrate a SEF's operational capability and are a tool by which both the SEF and the Commission can evaluate the effectiveness of a SEF's self-regulatory programs.

The mandatory information collections are contained in several of the general provisions being adopted in subpart A, as well as in certain regulations implementing Core Principles 2, 3, 4, 5, 7, 8, 9, 10, 13, 14, and 15. Generally, the information collections covered in this final part 37 rulemaking are not covered in other existing collections or collections that are being established in connection with other Dodd-Frank rulemakings, and pertain to the following general categories of recordkeeping and reporting: registration; submissions related to material changes in the SEF's operations or business structure; compliance; financial resources reports, and an annual report by the CCO related to the SEF's performance of its self-regulatory responsibilities.

As discussed above, the methodology used to formulate the proposed estimate was an average of other registered entities. Due to the relatively low magnitude of changes made to the mandatory information collection provisions in this final part 37 rulemaking, the Commission has determined not to alter its proposed estimate of 308 hours per SEF respondent. By definition, averages are meant to serve as only a reference point; the Commission understands that due to both discretionary and mandatory requirements, some SEFs may go above the final estimate of 308 hours to complete mandatory information collection requirements, while others may stay below. The Commission is, however, adjusting the proposed estimate of annual and quarterly responses to clarify the Commission's original intent. In this regard, the Commission is adding an estimated average hours per response number below, which is based on 5 responses per year (1 annual response and 4 quarterly responses) per respondent.

Estimated number of respondents: 35

Annual responses by each respondent: 1[913]

Total annual responses: 35

Quarterly responses by each respondent: 1[914]

Total quarterly responses: 140[915]

Estimated average hours per response: 62[916]

Aggregate annual reporting hours burden: 10,780

Therefore, the Commission estimates that based on 35 registered SEFs, this final part 37 rulemaking will result in 10,780 information collection hours across all respondents.[917]

4. Aggregate Information Burden

The Commission concludes that new information collection 3038–0074 will result in each SEF respondent expending, on average, $16,632 annually based on an hourly wage rate of $54 to comply with the recordkeeping and reporting requirements of this final part 37 rulemaking.[918] In aggregate, this will result in a cost to all SEF respondents of $582,120 per annum based on 35 expected respondents. This aggregate cost estimate has been adjusted from the estimate in the SEF NPRM to account for updated wage rate data.[919]

C. Cost Benefit Considerations

1. Introduction

Section 15(a) of the Commodity Exchange Act (''CEA'' or ''Act'') mandates that the Commodity Futures Trading Commission (''Commission'' or ''CFTC'') consider the costs and benefits of the regulations that it is adopting in this rulemaking to implement the statutory requirements for the registration and operation of swap execution facilities (''SEFs''), a new type of regulated marketplace for the trading and execution of financial derivative contracts known as swaps.[920] In considering the costs and benefits of the final SEF regulations, the Commission has grouped the same into the following categories—SEF Market Structure, Registration, Recordkeeping and Reporting, Compliance, Monitoring and Surveillance, Financial Resources and Integrity, and Emergency Operations and System Safeguards.

Several preliminary matters, however, provide background for the Commission's consideration of the costs and benefits of the rules adopted in this release. Discussed in this Introduction section, these preliminary matters are: (a) The circumstances and events that form the backdrop for the statutory requirements that this rulemaking implements; (b) the Commission's statutory mandate to consider costs and benefits and its methodology for doing so; and (c) the estimated aggregate costs of forming and operating a SEF.

[912] FXall Comment Letter at 16 (Mar. 8, 2011).

[913] Under § 37.1501, the SEF's CCO is required to submit to the Commission annually a compliance report.

[914] Under § 37.1306, a SEF is required to submit to the Commission each fiscal quarter a report of its financial resources available to meet the financial resources requirements of Core Principle 13.

[915] 1 quarterly response × 4 quarters per year × 35 respondents.

[916] 308 average burden hours per respondent/5 responses total per year (1 annual response and 4 quarterly responses) = 61.6 average hours per response.

[917] 5 responses total per year × 61.6 average hours per response × 35 respondents.

[918] *See supra* footnote 894 for a discussion of the wage rate. The Commission has revised the wage rate to $54 per hour based on data from the 2011 SIFMA Report.

[919] While the Commission recognizes that some estimates cited in the following cost-benefit consideration section suggest that reporting and recordkeeping requirements may result in a much higher aggregate cost to SEFs and market participants, it notes that all of the estimates provided therein account for more than pure recordkeeping and reporting costs subject to the PRA. Therefore, the Commission has not considered those estimates for purposes of reaching its final burden hour estimate and aggregate cost projection.

[920] CEA section 15(a); 7 U.S.C. 19(a). A more complete explanation of this statutory requirement is provided below. *See infra* section 1(b) of this Cost Benefit Considerations section. Swaps, futures, and options are collectively referred to as derivatives—contracts used by market participants to hedge against the risk of a future change in prices, such as commodity prices, interest rates, and exchange rates.

(a) Background

An appreciation of certain background elements is helpful to understand the costs and benefits of this rulemaking. These are: (i) The definition of the derivative financial transactions (*i.e.,* swaps) that will be executed on SEFs; (ii) the execution and regulation of swaps prior to the Dodd-Frank Act; (iii) the 2008 financial crisis and the role of the over-the-counter (''OTC'') swaps market; (iv) the new regulatory regime to reform the swaps market in Title VII of the Dodd-Frank Act; and, more specifically, (v) the role and purpose of SEFs within the Title VII regulatory regime. Each of these background elements is discussed below.

(1) The Definition of a Swap

Congress defined the term ''swap'' in the Dodd-Frank Act.[921] The statutory definition of the term ''swap'' includes, in part, any agreement, contract, or transaction ''that provides for any purchase, sale, payment, or delivery (other than a dividend on an equity security) that is dependent on the occurrence, nonoccurrence, or the extent of the occurrence of an event or contingency associated with a potential financial, economic, or commercial consequence.'' [922] The statutory definition, among other things, generally includes options (other than options on futures) as well as transactions that now or in the future are commonly known to the trade as swaps.[923] The definition also articulates a broad range of underlying interests upon which a swap may be based: ''1 or more interest or other rates, currencies, commodities, securities, instruments of indebtedness, indices, quantitative measures, or other financial or economic interests or property of any kind . . .'' [924] or ''the occurrence, nonoccurrence, or the extent of the occurrence of any event or contingency associated with a potential financial, economic, or commercial consequence.'' [925] In a joint rulemaking with the Securities and Exchange Commission (''SEC''), the Commission also adopted rules further defining the term ''swap.'' [926]

(2) The Execution and Regulation of Swaps Prior to the Dodd-Frank Act

Unlike futures contracts which are regulated by the Commission and are listed for trading on exchanges called designated contract markets (''DCMs''), swap transactions (excluding some exchange-traded options encompassed by the post-Dodd-Frank Act definition) evolved off-exchange—largely to provide customized solutions for unique risk management needs that exchange-traded products addressed less effectively—lending themselves to the often used label of ''OTC derivatives.'' Accordingly, many swap transactions prior to the Dodd-Frank Act were negotiated privately OTC between counterparties.[927] In these situations, only the counterparties knew that the swap transaction was taking place, and regulators and other market participants lacked access to pricing information during the negotiation phase (pre-trade) and after the agreement was consummated (post-trade). While centralized exchanges permit multiple market participants to compare, assess, accept, or reject bids (offers to buy) and asks (offers to sell), the privately negotiated OTC market provided little, if any, pre- or post-trade transparency.[928]

In a typical privately negotiated OTC swap transaction, a customer for a swap is likely to obtain a private quote from, and bilaterally negotiate contract terms with, one of a small number of market-making dealers. These dealers, often large financial institutions, may stand ready to take either a long position (if they want to buy) or a short position (if they want to sell), profiting from spreads (the difference between the bid and the offer price) and fees. Relative to their non-dealer (usually ''buy-side'') counterparties, these dealers enjoy asymmetric information advantages.[929] The Commodity Futures Modernization Act of 2000 (''CFMA'')—which largely excluded swaps transacted between ''eligible contract participants'' [930] from regulation under the CEA—reinforced this outcome.[931] Swaps remained largely insulated from regulation prior to the enactment of the Dodd-Frank Act.[932]

[921] *See* Dodd-Frank Act section 721(a)(21), *adding* CEA section 1a(47). 7 U.S.C. 1a(47).

[922] CEA section 1a(47)(A)(ii); 7 U.S.C. 1a(47)(A)(ii).

[923] CEA section 1a(47)(A)(i) & (iv); 7 U.S.C. 1a(47)(A)(i) & (iv). Futures are not within the definition of swap and remain separately subject to requirements of the CEA. *See* CEA section 1a(47)(B)(i); 7 U.S.C. 1a(47)(B)(i).

[924] CEA section 1a(47)(A)(i) & (iii); 7 U.S.C. 1a(47)(A)(i) & (iii).

[925] CEA section 1a(47)(A)(ii); 7 U.S.C. 1a(47)(A)(ii).

[926] *See* Further Definition of ''Swap,'' ''Security-Based Swap,'' and ''Security-Based Swap Agreement''; Mixed Swaps; Security-Based Swap Agreement Recordkeeping, 77 FR 48208 (Aug. 13, 2012).

[927] The Commission notes that privately negotiated swap transactions between counterparties is only one method to execute or trade a swap transaction in the OTC market. Counterparties in the OTC market may execute or trade swap transactions through many trading methods such as order books, RFQ systems, or systems that incorporate electronic and voice components.

[928] Absent a centralized trading mechanism such as a limit order book, buyers and sellers ''negotiated terms privately, often in ignorance of prices currently available from other potential counterparties and with limited knowledge of trades recently negotiated elsewhere in the market. OTC markets are thus said to be relatively opaque; investors are somewhat in the dark about the most attractive available terms and conditions and about whom to contact for attractive terms.'' Darrell Duffie, Dark Markets: Asset Pricing and Information Transmission in Over-the-Counter Markets 1 (Princeton University Press) (2012).

[929] Asymmetric information exists when one party to a transaction has more or better information than the other. In the context of the swaps market, as dealers are always on one side of a large fraction of trades, it is highly likely that they will have better information on prevailing market conditions and valuations compared to their non-dealer counterparties. *See* Michael Fleming, John Jackson, Ada Li, Asani Sarkar & Patricia Zobel, ''An Analysis of OTC Interest Rate Derivatives Transactions: Implications for Public Reporting,'' Federal Reserve Bank of New York Staff Reports, No. 557, at 6 n. 14 (Mar. 2012), *available at http://www.newyorkfed.org/research/staff_reports/sr557.pdf.* Major derivatives dealer activity accounts for 89% of the total interest rate swap activity in notional terms. *Id.*

[930] CEA section 1a(18); 7 U.S.C. 1a(18).

[931] Under the CFMA, prior to the adoption of Title VII of the Dodd-Frank Act, swaps based on exempt commodities—including energy and metals—could be traded among eligible contract participants without CFTC regulation, but certain CEA provisions against fraud and manipulation continued to apply to these markets. No statutory exclusions were provided for swaps on agricultural commodities by the CFMA, although they could be traded under certain regulatory exemptions provided by the CFTC prior to its enactment. Swaps based on securities were subject to certain SEC enforcement authorities, but the SEC was prohibited from prophylactic regulation of such swaps. *See* Commodity Futures Modernization Act of 2000, Pub. L. 106–554, 114 Stat. 2763 (2000). The Financial Crisis Inquiry Commission majority found that the CFMA ''effectively shielded OTC derivatives from virtually all regulation or oversight,'' and ''OTC derivatives markets boomed'' in the law's wake, increasing ''more than sevenfold'' after the CFMA was enacted. *See* The Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States (Official Government Edition), at 48, 364 (2011) (hereinafter the ''FCIC Report''), *available at http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.*

[932] Legislative history indicates that in enacting the Dodd-Frank Act, Congress recognized that OTC market opacity, combined with the availability of superior price information primarily to dealers, limited the ability of swaps customers ''to shop for the best price or rate.'' *See* Mark Jickling & Kathleen Ann Ruane, ''The Dodd-Frank Wall Street Reform and Consumer Protection Act: Title VII, Derivatives,'' Cong. Research Serv., R41398, at 7 (Aug. 30, 2010). *See also* S. Rep. No. 111–176, at 30 (2010) (''Information on [OTC derivative contract] prices and quantities is opaque. . . . This can lead to inefficient pricing and risk assessment for derivatives users and leave regulators ill-informed about risks building up throughout the financial system''). Ben Bernanke, Chairman of the Board of Governors of the Federal Reserve System, stated, ''[a]t times [during the crisis], the complexity and diversity of derivatives instruments also posed

From these beginnings, the unregulated swaps market has expanded exponentially over the last thirty years. According to the Bank for International Settlements (''BIS''), the global OTC derivatives market measures at over $647 trillion in notional size.[933]

(3) The 2008 Financial Crisis and the Role of the OTC Swaps Market

In the fall of 2008, the United States experienced a financial crisis that led to millions of Americans losing their jobs, millions of families losing their homes, and thousands of small businesses closing their doors. The BIS characterized 2008 as a year that escalated for ''what many had hoped would be merely . . . manageable market turmoil [to] a full-fledged global crisis.'' [934] Faced with what policy makers at the time perceived as a grave threat that without immediate and unprecedented government action U.S. and global credit markets would freeze, the federal government mounted an extraordinary intervention at great cost to the American taxpayer to buttress the stability of the U.S. financial system.

While there were multiple causes of the financial crisis, unregulated swaps played an important role. Swaps contributed significantly to the interconnectedness between banks, investment banks, hedge funds, and other financial entities. As the swaps market grew, additional participation added risk to the already highly-leveraged and interconnected market. Accordingly, swaps concentrated and heightened risks in the financial system and to the public.

The crisis elevated concern among regulators that the opaque structure of the OTC swaps market and the consequent lack of information about swap prices and quantities would hinder efficient pricing, and that the lack of information about outstanding positions and exposures could ''leave regulators ill-informed about the risks building up in the financial system. . . . Lack of transparency in the massive OTC market intensified systemic fears during the crisis about interrelated derivatives exposures from counterparty risk.'' [935] As regulators did not have a clear view into how OTC derivatives were being used, they also feared that ''the complexity and limited transparency of the market reinforced the potential for excessive risk-taking. . . .'' [936]

(4) The New Regulatory Regime To Reform the Swaps Market in Title VII of the Dodd-Frank Act

On July 21, 2010, President Obama signed the Dodd-Frank Act into law. Title VII of the Dodd-Frank Act established a comprehensive new regulatory framework for swaps and charged the Commission and the SEC with oversight of the more than $300 trillion domestic swaps market.[937] The legislation was enacted, among other reasons, to promote market integrity within the financial system, reduce risk, and increase transparency, including by: (i) Providing for the registration and comprehensive regulation of swap dealers and major swap participants; (ii) imposing clearing and trade execution requirements on swaps; (iii) creating a rigorous recordkeeping and real-time reporting regime; and (iv) enhancing the rulemaking and enforcement authority of the Commission with respect to, among others, all registered entities, including SEFs. These various elements work in concert to provide the Commission with a comprehensive view of the entire swaps market, furthering the Commission's ability to monitor the market. Consistent with the view that the vulnerability of the OTC derivatives market during the financial crisis was not attributable to a single weakness, but a combination of several,[938] Title VII does not provide for a single-dimensional fix. Rather, it weaves together a multidimensional regulatory construct designed to ''mitigate costs and risks to taxpayers and the financial system.'' [939]

(5) The Role and Purpose of SEFs Within the Title VII Regulatory Regime

One of the most important goals of the Dodd-Frank Act is to bring transparency to the opaque OTC swaps market. It is generally accepted that when markets are open and transparent, prices are more competitive and markets are more efficient.[940] The legislative history of the Dodd-Frank Act indicates that Congress viewed exchange trading as a mechanism to ''provide pre- and post-trade transparency for end users, market participants, and regulators.'' [941] As such, exchange trading was intended as ''a price transparency mechanism'' that complements Title VII's separate central clearing requirement to mitigate counterparty risk.[942] Additionally, legislative history reveals a Congressional expectation that, over time, exchange trading of swaps would reduce transaction costs, enhance market efficiency, and counter the ability of dealers to extract economic rents from higher bid/ask spreads at the expense of other market participants.[943]

Consistent with this purpose, the Dodd-Frank Act amended the CEA to create SEFs, a new type of regulated marketplace, and promotes swap trading and execution on them. The statutory requirements for SEFs are similar to the requirements for the existing Commission-regulated futures market, which incorporates pre-trade and post-trade transparency aspects not present in the OTC swaps market. SEFs will allow buyers and sellers to meet in an open, centralized marketplace, where prices are publicly available. As statutorily defined, a SEF is ''a trading

problems. Financial firms sometimes found it quite difficult to fully assess their own net derivatives exposures or to communicate to counterparties and regulators the nature and extent of those exposures. The associated uncertainties helped fuel losses of confidence that contributed importantly to the liquidity problems I mentioned earlier. The recent legislation addresses these issues by requiring that derivatives contracts be traded on exchanges or other regulated trading facilities when possible and that they be centrally cleared.'' ''Too Big To Fail: Expectations and Impact of Extraordinary Government Intervention and the Role of Systemic Risk in the Financial Crisis: Hearing Before the Financial Crisis Inquiry Commission,'' 11 (Sep. 2, 2010) (statement of Ben Bernanke, Chairman, Board of Governors of the Federal Reserve System), *available at http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2010-0902-Bernanke.pdf.*

[933] The Bank for International Settlements, Quarterly Review, at A 131 (Sep. 2012), *available at http://www.bis.org/statistics/otcder/dt1920a.pdf.*

[934] The Bank for International Settlements, 79th Annual Report, at 23 (2009), *available at http://www.bis.org/publ/arpdf/ar2009e2.pdf,* for a broader discussion of the development of the crisis.

[935] S. Rep. No. 111–176, at 30 (2010).

[936] *See* Darrell Duffie, Ada Li & Theo Lubke, ''Policy Perspectives on OTC Derivatives Market Infrastructure,'' Federal Reserve Bank of New York Staff Reports, No. 424, at 1 (Mar. 2010), *available at http://www.newyorkfed.org/research/staff_reports/sr424.pdf.*

[937] *See* Section 733 of the Dodd-Frank Act, which adopted CEA section 5h regarding registration, operation, and compliance requirements for SEFs. 7 U.S.C. 7b–3. *See also* Section 723(a)(3) of the Dodd-Frank Act, which amended CEA section 2(h) to add CEA section 2(h)(8) setting forth a trade execution requirement. 7 U.S.C. 2(h)(8). Similarly, the Dodd-Frank Act authorized the SEC to regulate security-based swaps. *See* Section 763 of the Dodd-Frank Act, which amended the Securities and Exchange Act of 1934 to add section 3D of the Exchange Act, among other provisions.

[938] *See* FCIC Report at xxiv (listing uncontrolled leverage; lack of transparency, capital and collateral requirements; speculation; interconnection among firms; and concentrations of risk in the market as contributing factors).

[939] S. Rep. No. 111–176, at 92 (2010).

[940] *See* academic research discussed below.

[941] S. Rep. No. 111–176, at 34 (2010).

[942] *Id.* at 33–34 (quoting former CFTC Chair Brooksley Born, the report states '' '[w]hile central clearing would mitigate counterparty risk, central clearing alone is not enough. . . . [e]xchange trading is also essential in order to provide price discovery, transparency, and meaningful regulatory oversight of trading and intermediaries.' '').

[943] *Id.* at 34 (quoting Stanford University Professor Darrel Duffie, '' '[t]he relative opaqueness of the OTC market implies that bid/ask spreads are in many cases not being set as competitively as they would be on exchanges. . . . [t]his entails a loss in market efficiency.' '').

system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that (A) facilitates the execution of swaps between persons; and (B) is not a designated contract market.'' [944]

With this rulemaking, in conjunction with the separate made available to trade rulemaking [945] and the swaps block rulemaking,[946] the Commission is implementing the Dodd-Frank Act's trade execution mandate.[947] Pursuant to this trade execution requirement, transactions involving swaps subject to the clearing requirement in CEA section 2(h)(1) [948] must be executed on a SEF or a DCM, unless no SEF or DCM ''makes the swap available to trade'' or the related transaction is subject to the clearing exception under CEA section 2(h)(7).[949] Further, no facility may be operated for the trading or processing of swaps unless first registered as a SEF or DCM.[950] SEFs are required to comply with 15 statutorily enumerated core principles,[951] as well as any other requirements that the Commission prescribes by rule or regulation.[952]

Taken together, these statutory provisions provide the framework that transforms the swaps market from one in which prices for bilaterally-negotiated contracts are privately quoted—often by dealers with an informational advantage—to one in which bid/offer prices for swap contracts are accessible to multiple market participants to compare, assess, accept, or reject. By improving price transparency, the new provisions should reduce information asymmetry and, in turn, the informational advantage enjoyed by a small number of dealers to the detriment of other market participants.[953] These provisions benefit the financial system as a whole by creating more efficient market places, where market participants will take into account the price at which recent transactions have occurred when determining at what price to display quotes or orders.

As discussed, this rulemaking furthers Congress' goal of promoting transparency in the swaps market.[954] The goal of pre-trade transparency on SEFs is statutorily mandated in the Dodd-Frank Act.[955] Notwithstanding the fact that Congress directed the Commission to construe the statute in light of this goal, some commenters have questioned the benefits of the Commission's proposals in furtherance of that goal.[956]

In response to commenters who question the Congressionally-directed goal of pre-trade price transparency and the Commission's implementation of that goal, the Commission notes that there is a body of research that tends to be generally supportive, albeit based on experience in other markets, as discussed below. Although this research was not critical to or relied upon by the Commission in its decision-making of how to best implement Congress' goal of promoting pre-trade price transparency, it does provide a useful counterpoint to many of the general comments raised by commenters and therefore merits brief mention.

While there are no studies on the effect of pre-trade transparency in the swaps market, empirical research on the likely effects of transparency on market participants exists in other markets, including the equity market, which has pre-trade transparency, and the corporate bond market, which has a similar market structure to the OTC swaps market and has post-trade transparency.[957] While academics have a range of perspectives on market structure and transparency issues,[958] the empirical research discussed below and throughout this document supports the general proposition that a lack of pre- and post-trade transparency, which are characteristics of any dark, opaque market, generally increases search and transaction costs, and negatively impacts price discovery.

While some commenters contend that pre-trade price transparency requirements would increase costs for market participants, there is academic support for the general proposition that increased transparency will actually

[944] CEA section 1a(50), as amended by section 721 of the Dodd-Frank Act. 7 U.S.C. 1a(50). ''Trading facility'' is also a statutorily defined term. *See* CEA section 1a(51); 7 U.S.C. 1a(51).

[945] The Commission separately proposed rules to determine whether a swap is ''made available to trade'' for purposes of the trade execution requirement in CEA section 2(h)(8). Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available To Trade, 76 FR 77728 (proposed Dec. 14, 2011).

[946] The Commission separately proposed rules to determine minimum block trade sizes for swaps. Since the execution methods for Required Transactions excludes block trades, this rulemaking affects the scope of the trade execution mandate. *See* Procedures to Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades, 77 FR 15460 (proposed Mar. 15, 2012).

[947] *See* Section 723(a)(3) of the Dodd-Frank Act, which amended the CEA to add section 2(h)(8). 7 U.S.C. 2(h)(8).

[948] *See* Section 723(a)(3) of the Dodd-Frank Act, which amended the CEA to add section 2(h)(1). 7 U.S.C. 2(h)(1).

[949] *See* Section 723(a)(3) of the Dodd-Frank Act, which amended the CEA to add section 2(h)(7). 7 U.S.C. 2(h)(7). The Commission separately proposed rules to determine whether a swap is ''made available to trade'' for purposes of the trade execution requirement in CEA section 2(h)(8). Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available To Trade, 76 FR 77728 (proposed Dec. 14, 2011).

[950] CEA section 5h(a)(1); 7 U.S.C. 7b–3(a)(1).

[951] CEA section 5h(f); 7 U.S.C. 7b–3(f).

[952] CEA section 5h(f)(1)(A); 7 U.S.C. 7b–3(f)(1)(A). Further, CEA section 5h(h) mandates that the Commission prescribe rules governing SEF regulation. 7 U.S.C. 7b–3(h).

[953] While the SEF rules focus on measures to promote pre-trade price transparency and trade execution, they complement other Commission rules pertaining to real-time reporting (part 43 of the Commission's regulations) and swap data recordkeeping and reporting (part 45 of the Commission's regulations). The addition of the CEA section 5h rules for registration, operation, and compliance of SEFs to this mix results in a suite of rules covering all critical aspects of the trading process—pre-trade, trade, and post-trade.

[954] Pre-trade transparency is defined as ''the dissemination of current bid and ask quotations, depths, and information about limit orders away from the best prices. Post-trade transparency refers to the public and timely transmission of information on past trades, including execution time, volume and price.'' *See* Ananth Madhavan, David Porter & Daniel Weaver, ''Should securities markets be transparent?,'' 8 Journal of Financial Markets 265, 268 (Aug. 2005). *See also* Larry Harris, Trading and Exchanges—Market Microstructure for Practitioners 102 (Oxford University Press) (2003) (hereinafter Harris, ''Trading and Exchanges'').

[955] *See* section 733 of the Dodd-Frank Act, adding CEA section 5h. 7 U.S.C. 7b–3. Under section 5h, Congress provided an explicit rule of construction, stating that ''[t]he goal of this section is to promote the trading of swaps on swap execution facilities and to promote pre-trade price transparency in the swaps market.'' CEA section 5h(e); 7 U.S.C. 7b–3(e).

[956] *See, e.g.,* ISDA Research Staff & NERA Economic Consulting, Costs and Benefits of Mandatory Electronic Execution Requirements for Interest Rate Products, ISDA Discussion Papers Series, Number Two, at 1, 4 (Nov. 2011) (added to the public comment file for the SEF rulemaking on Nov. 10, 2011) (hereinafter ''ISDA Discussion Paper''); ISDA/SIFMA Comment Letter at 5–6 (Mar. 8, 2011); MetLife Comment Letter at 2–3 (Mar. 8, 2011).

[957] The corporate bond markets are generally comparable to the OTC swap markets in terms of the large number of instruments traded, with potentially a large overlap of market participants. Additionally, any single issuer will have multiple bonds outstanding, with different maturity dates and coupons. Some potential SEF registrants will likely be firms operating trading platforms for corporate bonds.

[958] For example, Larry Harris notes that market participants might be ''ambivalent about transparency,'' and explains that traders ''favor transparency when it allows them to see more of what other traders are doing, but they oppose it when it requires that they reveal more of what they are doing. Generally, those who know the least about market conditions most favor transparency. Those who know the most oppose transparency because they do not want to give up their informational advantages.'' The Commission also recognizes that there is a continuum of markets occupying ''various points between high and low transparency.'' *See* Harris, ''Trading and Exchanges,'' at 101. *See also* ISDA Research Notes, ''Transparency and over-the-counter derivatives: The role of transaction transparency,'' No. 1, at 2–3 (2009), *available at http://www2.isda.org/attachment/MTY4NA==/ISDA-Research-Notes1.pdf.*

lower costs for market participants,[959] ''help them predict future price changes, to predict when their orders will execute, and to evaluate their brokers' performance,'' [960] and will improve the quality of execution they receive from the marketplace.[961] Greater transparency in general can increase market liquidity by reducing information asymmetry between informed and less informed market participants, and greater pre-trade transparency also helps improve price discovery by promoting competition among liquidity providers.[962]

Academic research supports the view that a lack of pre-trade transparency affects trading costs because it contributes to frictions in the search process, which in turn can translate into higher transaction costs and impact equilibrium prices and allocations. Given the lack of pre-trade transparency and the absence of centralized markets (*i.e.,* exchanges) in the OTC swaps market, market participants will likely contact multiple dealers sequentially by phone or by some other electronic means of communication.[963] Bessembinder and Maxwell explain that the take-it-or-leave-it aspect of the negotiation process in the bond markets (which is also present in the OTC swaps market) ''limits one's ability to obtain multiple quotations before committing to trade.'' [964]

More generally, this area of research, also called search and matching theory, ''offers a framework for studying frictions in real-world transactions and has led to new insights into the working of markets.'' [965] This research shows that ''even with very minor search costs and with a large number of sellers, a search and matching environment would deliver a rather large departure from the outcome under perfect competition (which would prevail if the search costs were zero).'' [966] This ''Diamond paradox'' [967] is of relevance to this rulemaking because given search costs, no matter how small, the presence of multiple dealers can result in trades being transacted at the single monopoly price.[968] This highlights the importance of reducing the costs that exist when a market is dominated by a small number of dealers—in other words, an oligopoly.[969]

Academic research into the impact of pre-trade transparency on market quality in the context of the equity markets is an active area of research. As buy and sell interest at the best bid and offer price is widely available to all market participants in these markets, they are not necessarily analogous to the OTC swap markets, where such information is simply not available. Nevertheless, research in this area is notable because the equity markets have pre-trade transparency, and Congress has mandated pre-trade transparency on SEFs. Various research papers examine the impact of changes in relative levels of pre-trade transparency within a specific trading venue or exchange, and depending on the specific circumstances of each such event, market participants' behavior can be influenced, which in turn can impact liquidity and costs.[970]

[959] Discussing the trade-off between higher costs to liquidity providers and the lower costs to institutional investors from greater post-trade transparency in the corporate bond markets, Bessembinder & Maxell conclude that while ''[T]raders employed by insurance companies and investment management firms bear costs associated with decreases in service provided by bond dealers . . . these higher costs are offset by lower trade execution costs that . . . benefit the investors who ultimately own the bonds transacted. . . .'' *See* Hendrik Bessembinder & William Maxwell, ''Markets: Transparency and the Corporate Bond Market,'' 22 Journal of Economic Perspectives 217, 232–33 (Spring 2008) (hereinafter Bessembinder & Maxwell, ''Transparency'').

[960] Harris, ''Trading and Exchanges,'' at 101.

[961] It is instructive to note the view that transparency is ''not an objective *per se* but rather a means for ensuring the proper functioning of the market.'' *See* Marco Avellaneda & Rama Cont, ''Transparency in Credit Default Swap Markets,'' Finance Concepts, at 3 (Jul. 2010), *available at http://www.finance-concepts.com/images/fc/CDSMarketTransparency.pdf.*

[962] Pagano & Röell explain the regulatory policy support for pre-trade transparency as a means ''to enable ordinary traders to check for themselves whether they have gotten a fair price.'' Comparing the price formation in auction and dealer markets, they find that greater transparency generates lower trading costs for uninformed traders on average, although not necessarily for every trade size. *See* Marco Pagano & Ailsa Röell, ''Transparency and Liquidity: A Comparison of Auction and Dealer Markets with Informed Trading,'' 51 Journal of Finance 579 (Jun. 1996). Research referenced later in the release has found that such competition can reduce revenues and increase costs and risks for liquidity providers, thus causing them to reduce their participation in the markets.

[963] Many of the existing electronic trading platforms for bonds and for swaps display indicative quotes, but the Commission is not aware of research on the quality of these indicative quotes, and of their likely impact on price discovery and market quality in terms of transaction costs.

[964] *See* Bessembinder & Maxwell, ''Transparency,'' at 223 (explaining that in addition to the cost of conducting the search, market participants are exposed to the additional cost from the fact that a dealer's quote is only good ''as long as the breath is warm''). Comparing execution cost in the equity and corporate bond markets, Edwards, Harris & Piwowar theorize that despite the fact that corporate bonds are less risky than equity (in the same company), differences in pre- and post-trade transparency between the two markets contribute to higher transaction costs in the bond markets. *See* Amy Edwards, Lawrence Harris & Michael Piwowar, ''Corporate Bond Market Transactions Costs and Transparency,'' 62 Journal of Finance 1421, 1438 (Jun. 2007) (hereinafter Edwards et al., ''Transaction Costs and Transparency'').

[965] *See* ''Markets with Search Frictions,'' The Royal Swedish Academy of Sciences, at 1 (Oct. 11, 2010), *available at http://www.nobelprize.org/nobel_prizes/economics/laureates/2010/advanced-economicsciences2010.pdf.*

[966] *Id.* at 5.

[967] *See* Peter Diamond, ''A Model of Price Adjustment,'' 3 Journal of Economic Theory 156 (Jun. 1971).

[968] *See* Darrell Duffie, Nicolae Gârleanu & Lasse Heje Pedersen, ''Valuation in Over-the-Counter Markets,'' 20 The Review of Financial Studies 1865, 1888–89 (Nov. 2007) (hereinafter Duffie et al., ''Valuation in OTC Markets'') for a series of examples of markets where search costs impact price discovery, adversely resulting in prices diverging from competitive market outcomes.

[969] An oligopoly is a market form in which a market or industry is dominated by a small number of sellers (oligopolists)—dealers or market makers in the context of the OTC swaps markets. While the traditional research into oligopolistic behavior has focused on attempts by firms to collude, which could potentially result in non-competitive or monopoly pricing for the rest of the market, the search literature explains that the monopoly pricing is due to the presence of search costs. Indicative of the potential impact of such oligopolistic behavior by dealers in an environment with low pre-trade transparency, Hendershott & Madhavan reference research comparing transactions costs between equity and corporate and municipal bond markets. *See* Terrence Hendershott & Ananth Madhavan, ''Click or Call? Auction versus Search in the Over-the-Counter Market,'' Working Paper, at 2 (Mar. 19, 2012) (hereinafter Hendershott & Madhavan, ''Click or Call''). They explain that despite improvements in the post-trade transparency in both corporate and municipal bond markets, transaction costs are higher compared to equivalent-sized equity trades due to ''the lack of pre-trade transparency that confers rents to dealers.'' *Id.*

[970] Empirical research evaluating the impact of transparency on market quality are typically in the context of natural experiments when there is a change in the set of trading rules in a particular market. Madhavan, Porter & Weaver examined the outcomes when the Toronto Stock Exchange increased transparency levels for stocks traded on the floor and on the screen, and found that it reduced the earnings of specialists (or liquidity providers); lower order flows from them in turn reduced market depth and caused the market to exhibit increased price volatility and higher transaction costs. *See* Ananth Madhavan, David Porter & Daniel Weaver, ''Should securities markets be transparent?,'' 8 Journal of Financial Markets 265 (Aug. 2005). Eom, Ok & Park focus on the impact of changes in the display in the level of depth of the limit order book in the Korean equity market and find evidence of positive effects on market quality measured in terms of depth, volume and quoted spreads, but beyond a point, these effects taper-off, and can even become negative. *See* Kyong Shik Eom, Jinho Ok & Jong Ho Park, ''Pre-trade transparency and market quality,'' 10 Journal of Financial Markets 319 (Nov. 2007). In another paper, Boehmer, Saar & Yu present evidence that when the New York Stock Exchange took specific steps to display limit-order book information to traders off the exchange floor, ''an increase in pre-trade transparency affects investors' trading strategies and can improve certain dimensions of market quality.'' *See* Ekkehart Boehmer, Gideon Saar & Lei Yu, ''Lifting the Veil: An Analysis of Pre-trade Transparency at the NYSE,'' 60 The Journal of Finance 783 (Apr. 2005). Additionally, in a paper highlighting the impact of pre-trade transparency on price discovery, and highlighting the risks of driving trading activity to competing markets, Hendershott & Jones found that when the Island electronic communications network stopped displaying its limit order book in certain exchange-traded funds (''ETFs''), ETF prices adjusted more

Continued

While the literature from the equity markets referenced above focuses on changes in relative levels of pre-trade transparency, research from the corporate bond markets also directly addresses the benefits from bringing post-trade transparency into dark markets. Edwards, Harris, and Piwowar examine trading costs in the corporate bond market using a record of every corporate bond trade reported on the TRACE[971] system between January 2003 and January 2005.[972] In their paper, they find evidence that post-trade transparency through TRACE has lowered transaction costs in the corporate bond market and that higher post-transparency has helped improve liquidity in this market.[973] Summarizing findings from studies by other researchers on the impact of TRACE on market participants, Bessembinder and Maxwell confirm that it has helped provide a level playing field—in the context of information regarding current prices at which various corporate bonds are being traded.[974]

slowly, and there was ''substantial price discovery movement from ETFs to the futures market.'' *See* Terrence Hendershott & Charles M. Jones, ''Island Goes Dark: Transparency, Fragmentation, and Regulation,'' 18 The Review of Financial Studies 743 (Fall 2005).

[971] The Trade Reporting and Compliance Engine (''TRACE'') is operated by the Financial Industry Regulatory Authority (''FINRA''), and facilitates the mandatory reporting of OTC secondary market transactions in eligible fixed income securities. All broker/dealers who are FINRA member firms have an obligation to report transactions in corporate bonds to TRACE under an SEC-approved set of rules. *See http://www.finra.org/Industry/Compliance/MarketTransparency/TRACE/for further details.*

[972] *See* Edwards et al., ''Transaction Costs and Transparency,'' at 1426. As with OTC swaps, given that there is no pre-trade transparency in the corporate bond markets, bid-ask spreads, a key determinant of transaction costs, have to be estimated using specialized econometric techniques. In this paper, they assume that there has been no change in the market structure (in terms of execution methods) before and after TRACE.

[973] In a related paper on the impact of higher transparency on liquidity, research examining the impact of higher post-trade transparency on the liquidity of the BBB-rated corporate bond market shows that ''overall, adding transparency has either a neutral or a positive effect on liquidity.'' *Id.* at 1438.

[974] Bessembinder & Maxwell point out that prior to the introduction of TRACE, ''customers found it difficult to know whether their trade price reflected market conditions . . . . With transaction reporting, customers are able to assess the competitiveness of their own trade price by comparing it to recent and subsequent transactions in the same and similar issues.'' Bessembinder & Maxwell, ''Transparency,'' at 226.

(b) The Statutory Mandate To Consider the Costs and Benefits of the Commission's Action: Section 15(a) of the CEA

Section 15(a) of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders.[975] CEA section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations.[976] The Commission considers below the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

To aid the Commission in its consideration of the costs and benefits resulting from its regulations, the Commission requested in the SEF NPRM that commenters provide data and supporting information which quantify or qualify the costs and benefits of the proposed rules.[977] While a number of industry commenters expressed the general view that implementing and complying with the proposed rules would come at considerable cost and that the proposed rules would be burdensome,[978] the Commission only received one comment quantifying the costs that may result from the proposed regulations.[979] In meetings requested by potential SEF registrants during the comment period, the Commission staff invited those entities to provide specific data to support general assertions that the proposed regulations would be costly. Again, no such information was provided. In another effort to gather such data, the Commission staff initiated follow-up contacts with certain potential SEFs regarding their projected expenses in light of the Commission's proposed regulations. The product of these conversations is reflected in the cost estimates included in this release.

While certain costs are amenable to quantification, other costs are not easily monetized, such as the costs to the public of another financial crisis. The Commission's final regulations are intended to mitigate that risk, and, therefore, serve an important if unquantifiable public benefit. While the benefits of effective regulation are difficult to value in dollar terms, the Commission believes that they are no less important to consider given the Commission's mission to protect both market users and the public.

Additionally, where appropriate, in response to the cost concerns of some commenters, the Commission, as discussed below, adopted cost-mitigating alternatives presented by commenters where doing so would still achieve the goals of the Dodd-Frank Act.

The discussion of costs and benefits that follows begins with an informational discussion of the aggregate estimated costs of forming and operating a SEF. Although these costs are mostly attributable to Congress' mandate that there be SEFs, they provide useful context for the costs and benefits attributable to the Commission's action of implementing that mandate in this rulemaking. Relatedly, the Commission believes that many of the costs that arise from the application of the final rules are a consequence of the Congressional trade execution mandate of section 2(h)(8) of the CEA, as well as the Congressional goals to promote the trading of swaps on SEFs and to promote pre-trade price transparency in the swaps market in section 5h(e) of the CEA. For example, those market participants who are not eligible for the CEA section 2(h)(7) end user exception will no longer have the option to execute Required Transactions bilaterally even when they consider it more costly or less convenient to execute trades on a SEF (or a DCM). As described more fully below, the Commission has considered these costs in adopting these final rules, and has, where appropriate, attempted to mitigate the costs while observing the express direction of Congress in CEA sections 2(h)(8) and 5h(e).

After the discussion of the aggregate costs of forming and operating a SEF, the Commission's consideration of costs and benefits is organized into seven categories: (1) SEF Market Structure; (2) Registration; (3) Recordkeeping and Reporting; (4) Compliance; (5) Monitoring and Surveillance; (6) Financial Resources and Integrity; and (7) Emergency Operations and System Safeguards. For each category,[980] the

[975] CEA section 15(a); 7 U.S.C. 19(a).

[976] *Id.*

[977] *See* Core Principles and Other Requirements for Swap Execution Facilities, 76 FR 1214, 1237 (proposed Jan. 7, 2011).

[978] *See, e.g.,* FXall Comment Letter at 2–4 (Mar. 8, 2011); CME Comment Letter at 2 (Mar. 8, 2011).

[979] *See* ISDA Discussion Paper (Nov. 2011).

[980] The costs and benefits of Core Principle 12 are discussed in connection with a separate proposed rulemaking entitled Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities Regarding

Commission summarizes the final regulations; describes and responds to comments discussing the costs and benefits; [981] assesses alternatives, including those raised by commenters; and considers the costs and benefits in light of the five factors set out in CEA section 15(a), which expressly requires the Commission to consider the costs and benefits of ''the action of the Commission.'' [982] In this regard, as with the aggregate costs of forming and operating a SEF attributable to Congress, where the Commission merely codifies a statutory requirement, the Commission believes that there is no act of discretion for consideration under CEA section 15(a). For example, for each core principle, the first section of the Commission's regulations is a codification of the statutory language of the core principle as a rule and, accordingly, there is no Commission act of discretion and thus no costs and benefits for the Commission to consider under section 15(a). In other cases, such as Core Principle 1, the rule simply codifies the text of the core principle, and thus will not be discussed as it is outside the scope of section 15(a).

The Commission expects that the costs and benefits will vary based on the specific circumstances of the individual entity seeking registration as a SEF. For example, some SEF-like execution platforms that currently operate in the OTC marketplace may generally already have the infrastructure to comply with the Commission's regulations without the need for sizeable additional expenditures. For these potential SEF registrants, the regulations may occasion minimal incremental costs above their existing cost structure. In contrast, potential SEF registrants that are not currently operating in the OTC marketplace, registered as a DCM, or operating as an exempt board of trade will likely lack existing infrastructure and may incur costs, at times significant, in both physical and human capital to meet the requirements of the regulations.[983] Accordingly, where appropriate and possible to account for these differences, the Commission has attempted to express costs and benefits as a range, sometimes one that is wide.

Finally, in some instances, quantification of costs to certain market participants is not reasonably feasible because costs will depend on the size, structure, and product offering of a SEF, which are likely to have considerable variation, or because required information or data will not exist until after a SEF commences operation as a registrant. In other instances—for example with respect to protection of market participants and the public—suitable metrics to quantify costs and benefits simply do not exist. Notwithstanding the above-mentioned limitations, the Commission identifies and considers the costs and benefits of these rules in qualitative terms.

(c) Estimated Aggregate Costs of Forming and Operating a SEF

In its discussion paper, ISDA estimated the cost of establishing a new SEF to be $7.4 million,[984] and estimated ongoing operating costs to be nearly $12 million per year.[985] ISDA based its cost estimates on a survey of groups which included a ''small number of (large) Buy-Side firms and the 16 largest dealers.'' [986] ISDA's estimate is based on a trading architecture that includes an order matching engine, and a Request for Quote system or other means of interstate commerce that will allow members to show (and see) bids and offers.[987] In addition, ISDA's estimate includes costs associated with: systems to capture and retain data necessary to create an audit trail for at least 5 years; an electronic analysis capability and the ability to collect and evaluate market data on a daily basis; a real-time electronic monitoring system to detect and deter manipulation, distortion, and market disruption; reporting transaction information to the Commission and data repositories using unique product identifiers; a Chief Compliance Officer; and disaster recovery.[988] ISDA also identified major operating costs to include the cost of compensation and benefits for staff, leasing office space, maintaining and upgrading operational infrastructure and systems, maintaining sufficient financial resources to cover operating costs for at least one year, maintaining an independent board of governors, and maintaining emergency backup facilities.[989]

In another comment letter, MarketAxess stated that the SEC's cost estimates in its proposed rulemaking for security-based SEFs (''SB–SEFs''), were ''generally realistic and accurate estimates of the costs of establishing and operating a SB–SEF'' and that these estimates would be ''comparable to, and thus relevant for, calculation of costs for a SEF.'' [990]

The SEC estimated that the cost of forming an SB–SEF is approximately $15–20 million, including the first year of operation.[991] These costs included a software and product development estimate of $6.5–10 million for the first year and ongoing technology and maintenance costs of $2–4 million.[992] The SEC also estimated that it would cost approximately $50,000–$3 million for an operator of an existing platform to modify its platform to conform to the statute and the SEC's proposed rules, depending on the enhancements that would be required by the final regulations.[993]

In the Commission staff's follow-up conversations, potential SEFs stated that the costs associated with the SEF NPRM may differ from the SEC's cost estimates in various areas. For example, one commenter estimated first-year software and product development costs of $4 million rather than the $6.5–10 million estimated by the SEC. Another commenter stated that existing entities will be able to leverage existing technology at minimal cost, and that there is no real cost associated with the rulemaking from a technology perspective if an entity is not a startup. As stated above, ISDA's estimates also differed from those of the SEC, including estimated initial software development costs of $1 million and

the Mitigation of Conflicts of Interest, 75 FR 63732 (proposed Oct. 18, 2010).

[981] The Commission notes that a number of these regulations also refer to requirements that are contained in other rulemakings, some that have been finalized and others that have not. The costs and benefits of these regulations have been, or will be, discussed in those other rulemakings.

[982] CEA section 15(a); 7 U.S.C. 19(a).

[983] The Commission notes that these registrants will also incur costs to meet the statutory requirements.

[984] ISDA Discussion Paper at 30–31 (Nov. 2011). While the ISDA discussion paper is largely concerned with the costs and benefits resulting from the statute and regulations implemented by other rulemakings, relevant portions are discussed in this release. ISDA's estimate includes the costs of: registering with the Commission; developing an electronic system capable of providing market participants with the ability to make bids and offers to multiple participants and capable of maintaining safe storage capacity; developing and maintaining electronic analysis, reporting, and monitoring software; developing new products; drafting contractual arrangements with SEF users and vendors; drafting market rules and policies; and developing emergency backup procedures and systems.

[985] *Id.* at 31–32. This estimate includes the cost of compensation and benefits for staff, leasing office space, maintaining and upgrading operational infrastructure and systems, maintaining sufficient financial resources to cover operating costs for at least one year, maintaining an independent board of governors, and maintaining emergency backup facilities.

[986] *Id.* at 31, 34.

[987] *Id.* at 29.

[988] *Id.* at 30.

[989] *Id.* at 31.

[990] MarketAxess Comment Letter at 5 (Jun. 3, 2011).

[991] Registration and Regulation of Security-Based Swap Execution Facilities, 76 FR 10948, 11041 (proposed Feb. 28, 2011).

[992] *Id.*

[993] *Id.*

initial product development costs of $1.25 million.[994]

In the Commission staff's follow-up conversations, potential SEFs stated that total ongoing costs would range from $3.5 million to $5 million per year. These potential SEFs also told the Commission staff that it would cost them approximately $2 million to conform to the statute and the Commission's proposed rules, including contracting with the National Futures Association (''NFA'') to perform regulatory services.

While the Commission believes that the various cost estimates (including those for SB–SEFs and those reflecting costs imposed by statute) can be used as a rough guide to the costs that would be incurred to establish and operate a SEF, the Commission notes that the majority of these costs are necessary to establish and operate any platform for the trading of swaps, as a number of firms had already done prior to the enactment of the Dodd-Frank Act. The Commission believes that the additional costs of modifying a platform to comply with the Commission's regulations to implement the statute represent a relatively modest proportion of these costs.

(1) Regulatory Costs

Pursuant to final § 37.204 adopted in this release, SEFs may utilize a regulatory service provider for assistance in performing certain self-regulatory functions, including, among others, trade practice surveillance, market surveillance, real-time market monitoring, investigations of possible rule violations, and disciplinary actions.[995] The costs described in this cost benefit consideration section reflect the costs that a SEF is likely to face if it does not choose to utilize the services of a regulatory service provider. To the extent that utilizing a regulatory service provider is more cost-effective for a SEF than performing the functions independently, the quantitative and qualitative cost discussions in this release may overstate the costs of complying with the rules. Based on the Commission staff's follow-up discussions with potential SEFs, it appears that most SEFs will be entering into agreements with regulatory service providers for the provision of these functions. In fact, the Commission understands that many potential SEFs have already entered into formal agreements with a regulatory service provider. The Commission notes that competition among regulatory service providers, including NFA and the Financial Industry Regulatory Authority, may result in additional cost savings for SEFs that choose to outsource compliance obligations.

2. SEF Market Structure

(a) Background

(1) Minimum Trading Functionality (Order Book)

Final § 37.3(a)(2) requires that each SEF provide its market participants with a minimum trading functionality referred to as an Order Book,[996] which the Commission believes is consistent with the SEF definition and promotes the goals provided in section 733 of the Dodd-Frank Act.[997] As noted in the preamble, the Commission is withdrawing the proposed requirement that SEFs offer indicative quote functionality because the Commission believes that, at this time, such a requirement is unnecessary.[998]

(2) Methods of Execution on a SEF

Final § 37.9 governs the execution methods that are available on a SEF and classifies transactions executed on a SEF as either Required Transactions (*i.e.,* any transaction involving a swap that is subject to the trade execution requirement in section 2(h)(8) of the Act[999]) or Permitted Transactions (*i.e.,* any transaction not involving a swap that is subject to the trade execution requirement in section 2(h)(8) of the Act).

Pursuant to final § 37.9(a)(2), market participants may only execute Required Transactions using either the SEF's Order Book or an RFQ System that will transmit a request for a quote to at least three market participants and that operates in conjunction with the Order Book. In contrast, while SEFs must offer an Order Book for Permitted Transactions, market participants may execute Permitted Transactions on a SEF using any method of execution.[1000]

(3) Request for Quote (''RFQ'') System for Required Transactions

The RFQ System definition in final § 37.9(a)(3) requires that each market participant transmit a request for a quote to at least three market participants, with each of these market participants being given the opportunity to respond. As described in greater detail in the preamble, permitting RFQ requesters to send RFQs to a single market participant would undermine the multiple participant to multiple participant requirement in the SEF definition and the goal of pre-trade price transparency.[1001] The three market participant requirement will help the RFQ requester benefit from price competition among multiple RFQ responders and thus promotes price discovery. In addition, final § 37.9(a)(3) requires that any firm bid or offer pertaining to the same instrument resting on any of the SEF's Order Books must be communicated to the RFQ requester at the same time the first responsive bid or offer is received by such requester.

(4) Time Delay Requirement

Final § 37.9(b)(1) sets forth a time delay requirement for a broker or dealer who has the ability to execute against its

[994] ISDA Discussion Paper at 32 (Nov. 2011). ISDA's paper also contained a discussion of the costs likely to be faced by dealers and buy-side users of interest rate swaps that must be executed on regulated exchanges. Some of these costs result from statutory requirements that were not the product of Commission discretion, while other costs are likely to derive from regulations being implemented in other rulemakings. Other costs simply reflect the cost of doing business and are not directly imposed by Commission regulations. Accordingly, these costs are beyond the scope of this rulemaking and will not be discussed in this release.

[995] Rule 37.204 permits SEFs to contract with a regulatory service provider for the provision of services to assist in compliance with the core principles, as approved by the Commission.

[996] An Order Book means: (i) An electronic trading facility, as that term is defined in section 1a(16) of the Act; (ii) a trading facility, as that term is defined in section 1a(51) of the Act; or (iii) a trading system or platform in which all market participants in the trading system or platform have the ability to enter multiple bids and offers, observe or receive bids and offers entered by other market participants, and transact on such bids and offers. *See* Final § 37.3(a)(3) of the Commission's regulations.

[997] CEA section 1a(50) defines a SEF as ''a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce . . .'' 7 U.S.C. 1a(50). In section 5h(e) of the Act, Congress provided a ''rule of construction'' to guide the Commission's interpretation of certain SEF provisions (stating that the goals of section 5h of the Act are to ''promote the trading of swaps on [SEFs] and to promote pre-trade price transparency in the swaps market''). 7 U.S.C. 7b–3(e).

[998] *See* Minimum Trading Functionality discussion above under § 37.3—Requirements for Registration in the preamble.

[999] Transactions that are subject to the trade execution requirement of CEA section 2(h)(8) are subject to the clearing requirement of CEA section 2(h)(1) and are ''available to trade'' on a SEF or DCM. *See* Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available To Trade, 76 FR 77728 (proposed Dec. 14, 2011).

[1000] The SEF NPRM provided that Permitted Transactions may be executed by an Order Book, RFQ System, Voice-Based System, or any such other system for trading as may be permitted by the Commission. Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1241.

[1001] *See* RFQ System Definition and Transmission to Five Market Participants discussion above under § 37.9(a)(1)(ii)—Request for Quote System in the preamble.

customer's order or to execute two of its customers' orders against each other. These orders (*i.e.,* price, size, and other terms) are subject to a 15-second time delay between the entry of the two orders, such that one side of the potential transaction is disclosed and made available to other market participants before the second side of the potential transaction is submitted for execution. This time delay requirement is similar to certain timing delays applicable to futures transactions executed on DCMs, which are also designed to promote pre-trade transparency by allowing other market participants the opportunity to participate in the transaction and thus prevent any two market participants from crossing a bilaterally (off-exchange) negotiated trade. The Commission notes that the 15-second requirement is a default time delay; the final rule also permits SEFs to adjust this time delay requirement based upon a swap's liquidity or other product-specific characteristics.

(b) Costs

(1) Costs to SEFs

(i) Minimum Trading Functionality (Order Book) and Methods of Execution on a SEF

In the Commission staff's follow-up conversations with potential SEFs, one commenter noted that it would cost approximately $250,000 to upgrade its existing system to provide the required minimum trading functionality, while another stated that there is no real cost associated with the rulemaking from a technology perspective if an entity is already operating a trading platform, and that an existing platform could become compliant with the rule by leveraging existing technology at minimal cost. The Commission believes that these estimates are reasonable for existing platforms. Though the Commission is not requiring that systems be upgraded once they have achieved compliance with the rules, it expects that SEFs may have business incentives to incur ongoing programming costs to upgrade their systems.

ISDA/SIFMA noted that the minimum trading functionality may limit competition by increasing costs to applicants that would otherwise prefer to offer solely RFQ functionality.[1002] As discussed in the preamble to this release,[1003] the Commission believes that the minimum trading functionality is consistent with the SEF definition and promotes the statutory goals of pre-trade price transparency and trading on SEFs provided in section 733 of Dodd-Frank.[1004] Nevertheless, the Commission has adopted cost-mitigating alternatives identified by commenters, including: (1) Deleting the requirement that indicative bids and offers must be posted on a SEF's Order Book; (2) allowing work-up sessions [1005] where the original counterparties to a trade and other market participants can trade additional quantities of a swap at the previously executed price; and (3) allowing SEFs to use any means of interstate commerce in providing the execution methods for Required Transactions in § 37.9(a)(2)(i)(A) or (B) of this final rulemaking (*i.e.,* Order Book or RFQ System that operates in conjunction with an Order Book). Not having to display indicative quotes will likely reduce the programming costs for SEFs, since they will not need to program that functionality into the platform. The Commission believes the requirement to communicate any firm bid or offer will marginally add to the programming costs for SEFs and is included in the $250,000 estimate provided above. As commenters have described, work-up sessions are part of current OTC market practice, and the Commission believes that this additional flexibility for market participants to execute transactions in the SEF context will promote the trading of swaps on SEFs consistent with CEA section 5h(e).

(ii) Time Delay Requirement

A SEF will incur some additional programming costs as a result of the requirement that a SEF must provide for a 15-second time delay in certain circumstances. The Commission did not receive any specific estimates of these programming costs and notes that the rule permits a SEF to adjust the minimum time delay requirement based upon a swap's liquidity or other product-specific characteristics. For example, less liquid contracts may need a longer time delay than more liquid contracts.

(2) Costs to Market Participants

(i) General Costs

In its discussion paper, ISDA described what it asserted would be the likely costs and benefits of what it labeled the ''electronic execution mandate,'' that is, mandating the execution of interest rate swaps on DCMs or on SEFs.[1006] According to ISDA, ''[t]he study indicates that the EE mandate [electronic execution mandate], in all likelihood, will bring little benefit to the market while adding significantly to the costs of using derivatives.''[1007] ISDA stated that the electronic execution mandate will result in higher bid/ask spreads and significant operational, technological, and compliance costs for those transacting in interest rate swaps.[1008] ISDA further stated that these costs will be borne by end users and may force some participants to withdraw from the market with ''virtually no effect on small end users.'' [1009] ISDA stated that the electronic execution mandate is both unnecessary and counterproductive as electronic trading is already developing rapidly as users take advantage of the existing choice in execution venues.[1010]

According to ISDA, the electronic execution mandate will take away users' choice, create inefficiencies, and discourage innovation.[1011] ISDA stated that the electronic execution mandate will impose new costs because:

> SEFs themselves need to be established, licensed and operated. Buy-Side users will face significant technology and operational challenges as well as increased regulatory reporting requirements. Dealers will have to upgrade infrastructure to deal with automated trading and comply with increased regulatory reporting and record-keeping. All participants will face increased reconciliations, oversight and reporting requirements as well. Finally, regulators will need additional staff to properly oversee the new markets.[1012]

According to ISDA, the aggregate market-wide ''set up costs are estimated to exceed $750 million and annual costs may run to $250 million.''[1013]

In terms of benefits, ISDA concluded that:

> Transparency and market access may improve marginally for small financial entities that use IRS [interest rate swaps] but any benefit they receive will be very modest relative to the added costs of execution.

[1002] ISDA/SIFMA Comment Letter at 5–6 (Mar. 8, 2011).

[1003] *See* Minimum Trading Functionality discussion above under § 37.3—Requirements for Registration in the preamble.

[1004] In section 5h(e) of the Act (as adopted by section 733 of the Dodd-Frank Act), Congress provided a ''rule of construction'' to guide the Commission's interpretation of certain SEF provisions (stating that the goals of section 5h of the Act are to ''promote the trading of swaps on [SEFs] and to promote pre-trade price transparency in the swaps market''). 7 U.S.C. 7b–3(e).

[1005] As described earlier, a work-up session refers to a practice wherein once a trade has been executed, one of the counterparties to the trade can express an interest in transacting additional volume at the same price.

[1006] ISDA Discussion Paper at 20–21 (Nov. 2011).

[1007] *Id.* at 1.

[1008] *Id.* at 4.

[1009] *Id.*

[1010] *Id.*

[1011] *Id.*

[1012] *Id.* at 24.

[1013] *Id.* at 4.

Indeed, the imposition of clearing and the higher fees that will result from the EE Mandate [electronic execution mandate] and other provisions of DFA [Dodd-Frank Act] may cause these and other participants to reduce their activity or even withdraw from the IRS market.[1014]

ISDA asserted that transaction costs for OTC trades in interest rate swaps are already low with levels of transparency that market participants consider sufficient, and that trading in a regulated market or on an exchange does not guarantee a more efficient market because traders often get better execution off-exchange.[1015] ISDA further asserted that liquidity in OTC interest rate swaps is at least as good as liquidity in exchange-traded futures contracts, especially outside of the most liquid futures contract months, and that market participants predicted that bid-ask spreads in interest rate swaps would increase after the execution mandate takes effect.[1016]

ISDA also estimated that the market as a whole will need to absorb at least an additional $400 million in annual expenses as a result of the changes implemented in connection with the Dodd-Frank Act, and that assuming SEFs will execute 1,000 trades a day (comparable to what ISDA states is the current number of transactions in the OTC market), this will amount to execution costs of $1,280 per trade.[1017] As a result, ISDA stated that dealer costs will be passed on to end users and will cause participants to withdraw from the market, discouraging innovation.[1018]

The Commission notes that a majority of the costs identified by ISDA result from statutory requirements that were not the product of Commission discretion. For example, the requirements that certain swaps must be executed on a SEF or DCM,[1019] and that no person may operate a facility for the trading or processing of swaps unless the facility is registered as a SEF or as a DCM,[1020] are statutory requirements. Additionally, CEA section 5h(e) contains a rule of construction that states ''[t]he goal of this section is to promote the trading of swaps on swap execution facilities and to promote pre-trade price transparency in the swaps market.'' [1021] The interest rate swaps discussed by ISDA are included in these statutory requirements. Moreover, notwithstanding ISDA's use of the term ''electronic execution mandate,'' this rulemaking does not require that market participants execute swaps in Required Transactions electronically, since SEFs will be allowed to use any means of interstate commerce in providing the execution methods for such transactions as described in § 37.9(a)(2)(ii). Nevertheless, the Commission addresses below many of ISDA's comments regarding the statutory trading mandate for interest rate swaps.

Further, while commenters did not submit any data to support or refute ISDA's estimates, during follow-up calls with potential SEFs, one commenter stated that the U.S. credit default swap market experiences approximately 1,350 trades per day. If interest rate swaps and other swaps are included, the total number of trades per day is likely to be a much higher figure. In turn, this would imply that the execution costs per trade are likely to be lower than ISDA's estimate, which was based on only 1,000 trades per day.

The Commission notes that while SEFs are expected to list for trading a wide variety of swaps, ISDA's comment addresses only the costs and benefits applicable to the interest rate swap market. The interest rate swap market is one of the most liquid swap markets and is characterized by relatively tight bid-ask spreads, a high level of notional principal, and relatively high volume compared to other swap markets, including credit default swaps. Most other swap markets, especially many of the instruments like credit derivatives which contributed to the financial crisis, are less liquid than the interest rate swap market and thus will benefit more from the enhanced pre-trade and post-trade price transparency and centralized marketplaces that will be available on SEFs.

While it may be true, as ISDA asserts, that some buy-side users contend that current levels of price transparency in the interest rate swap market are adequate, the Commission notes that an increase in pre-trade transparency benefits the public because it will allow all market participants (not just those with a strong business relationship with a particular swap dealer) [1022] to transact in the market on a level playing field, and will likely enhance price discovery in the swaps market. Moreover, as noted, section 5h(e) of the CEA states that a purpose of SEFs is to promote pre-trade transparency in the swaps market.[1023]

According to ISDA, market participants asserted that bid-ask spreads in interest rate swaps will widen after SEFs begin trading.[1024] The Commission notes that such predictions are speculative and are not based on data, which does not yet exist because SEFs have yet to begin trading. Moreover, during the Commission staff's follow-up conversations, other market participants (potential SEFs) shared information illustrating that after the financial crisis, participation by dealers or liquidity providers increased on their trading platforms. These sources stated that in some instances, new entrants now account for over a quarter of the total business transacted on such platforms. The Commission believes that, holding all else constant, increased participation and competition among liquidity providers should result in tighter spreads and greater depth, both key components of improved liquidity.[1025]

However, to promote the trading of swaps on SEFs, the Commission's final rules, as mentioned above, further increase the flexibility regarding the trading platforms that a SEF may offer for Required Transactions (which the Commission expects will include many interest rate swap contracts).[1026] In addition, as discussed above,[1027] work-up sessions will allow market participants to continue using certain existing market practices, which will help facilitate the transition of swap markets to SEFs.

To support its comments on the potentially adverse impact of moving interest rate swaps to centralized execution platforms, ISDA provided data on bid-offer spreads from both interest rate swap markets and

[1014] *Id.* at 36.

[1015] *Id.* at 20–21.

[1016] *Id.* at 2–4, 20–21.

[1017] *Id.* at 35.

[1018] *Id.* at 4.

[1019] CEA section 2(h)(8); 7 U.S.C. 2(h)(8).

[1020] CEA section 5h(a)(1); 7 U.S.C. 7b–3(a)(1).

[1021] CEA section 5h(e); 7 U.S.C. 7b–3(e).

[1022] The ISDA comment ignores the liquidity risk inherent in the current bilateral interest rate swap market. It addresses the cost of entering into a new position, but not of unwinding it. If a buy-side firm wishes to unwind a swap in the OTC market, it will typically have to complete the unwind trade with the original counterparty or swap dealer. Given that the dealer is aware of the true trading interest of the buy-side firm, the quote might be one-sided favoring the dealer. Assuming sufficient liquidity, any anonymous trading platform will pose a lower unwind risk/cost to most non-dealer or buy-side firms.

[1023] CEA section 5h(e); 7 U.S.C. 7b–3(e).

[1024] ISDA Discussion Paper at 2–4 (Nov. 2011).

[1025] *See* Hendershott & Madhavan, ''Click or Call,'' at 2; Darrell Duffie, Nicolae Gârleanu & Lasse Heje Pedersen, ''Over-the-Counter Markets,'' 73 Econometrica 1815 (Nov. 2005) (hereinafter Duffie et al., ''OTC Markets'').

[1026] *See, e.g.,* Minimum Trading Functionality discussion above under § 37.3—Requirements for Registration in the preamble and ''Through Any Means of Interstate Commerce'' Language in the SEF Definition discussion above under § 37.9(b)(1) and (b)(4)—Execution Methods for Required Transactions in the preamble.

[1027] *See* ''Through Any Means of Interstate Commerce'' Language in the SEF Definition discussion above under § 37.9(b)(1) and (b)(4)—Execution Methods for Required Transactions in the preamble.

exchange-traded futures markets.[1028] The Commission notes that interest rate swap dealers use exchange-traded interest rate futures, primarily the Eurodollar futures, to hedge the exposures that arise from their interest rate swap dealing activity. A dealer seeking to hedge an interest rate swap using Eurodollar futures will typically trade a strip of Eurodollar futures.[1029] In its comparisons of typical bid-offer spreads in exchange-traded interest rate futures and in OTC interest rate swaps, ISDA provided spreads in the front month Treasury bond and Treasury note futures contracts and the relatively illiquid interest rate swap futures contracts, but not the highly liquid Eurodollar futures contract.[1030] As noted, the Eurodollar futures contract is the primary vehicle used by interest rate swap dealers to hedge their residual interest rate exposure. Therefore, the Commission believes that Eurodollar futures bid-offer spreads are a more appropriate metric for comparison to interest rate swap bid-ask spreads than the interest rate swap futures contracts bid-ask spreads used by ISDA. Likewise, Eurodollar futures are more closely related to the OTC interest rate swap market and more useful for hedging interest rate swap positions than Treasury futures contracts. Thus, Eurodollar futures are also a better metric for comparison to interest rate swaps than Treasury futures.

Underlying ISDA's comment is an implicit assumption that moving swaps to electronic trading platforms will not result in any major changes to the number of transactions that occur. In computing its cost estimates, ISDA assumes that the number of trades on SEFs will be comparable to the number of trades that occur in the OTC market today. As noted above, ISDA states that, assuming SEFs will execute 1,000 trades a day, total execution costs will amount to $1,280 per trade.[1031] However, transaction volume has increased dramatically in securities markets and DCM futures markets that have migrated to electronic trading platforms (such as order books) from open outcry and other non-electronic trading environments. This volume increase is due to a tendency for typical transaction sizes to be much smaller on electronic order book markets and also because order books attract participation from new and alternate sources of liquidity, including participants using automated trading strategies.[1032] Transactions levels increased in the securities and futures markets when trading moved to electronic platforms, and the Commission believes that it is likely that the number of transactions in the swap markets will increase as swap trading migrates to SEFs and DCMs. The Commission is unaware of any comments or studies indicating that transaction sizes in the swap markets will remain unchanged when they move to electronic platforms.

(ii) RFQ–5 Market Participant Requirement

Several commenters stated that the five market participant requirement in proposed § 37.9(a)(1)(ii) is likely to increase costs, but commenters did not provide any data to support this assertion.[1033] MetLife stated that disclosure of a large expected trade by RFQ to five swap dealers would likely result in a material widening of bid/ask spreads and increased hedging costs, as swap dealers will pass on to their customers the cost of protecting themselves against potential adverse price movements due to the required pre-trade transparency.[1034] Some commenters specifically noted that these adverse price movements would be due to non-executing market participants receiving the RFQ front-running the transaction in anticipation of the executing market participant's forthcoming and offsetting transactions.[1035] Commenters additionally stated that the risks associated with the five market participant requirement would be most pronounced in illiquid swaps or large-sized trades (*i.e.,* transactions approaching the block trade threshold).[1036] Some commenters also stated that the five market participant requirement would negatively impact liquidity.[1037]

While the Commission believes that the five market participant requirement promotes the statutory goal of pre-trade transparency because the RFQ requester will have access to quotes from a larger group of potential responders, the Commission is sensitive to commenters' concerns about this requirement, such as the potential for increased trading costs and information leakage to the non-executing market participants in the RFQ. To address these concerns, while still complying with the statutory SEF definition and promoting the goals provided in section 733 of the Dodd-Frank, the Commission is revising final § 37.9(a)(3) so that a market participant must transmit an RFQ to no less than three market participants.

As noted in the preamble, the Commission believes that the three market participant requirement is consistent with current market practice where, in certain markets, many market participants already choose to send an RFQ to multiple market participants, while still complying with the statutory SEF definition and promoting the goal of pre-trade transparency.

Additionally, the Commission believes that adopting a minimum market participant requirement of fewer than three (*e.g.,* a minimum of two market participants) will expose market participants to a higher risk of not receiving multiple responses to their RFQs. The receipt of multiple responses increases the likelihood that the requestor will execute at the best possible price. The Commission has learned that business or technology reasons may prevent any given market participant from responding to a specific RFQ. For example, DCM market maker programs typically require participants to quote two-sided markets for 75 to 85 percent of the trading day. Therefore, if the Commission established a minimum market

[1028] ISDA Discussion Paper at 12–20 (Nov. 2011).

[1029] A strip of Eurodollar futures contracts is a position consisting of a sequence of contract months, for example, a position consisting of the March 2013, June 2013, September 2013, and December 2013 Eurodollar futures contracts. This position is economically equivalent to a one year interest rate swap with quarterly payment dates on the futures expiration dates.

[1030] According to the CME Group Web site, during the first eight months of 2012, Eurodollar futures contracts had a total volume of approximately 2300 million contracts. During that same period, the combined volume of CME Group's interest rate swap futures contracts was only about 312,000 contracts, approximately 1/10 of one percent of the volume in Eurodollar futures contracts. *See http://www.cmegroup.com/wrappedpages/web_monthly_report/Web_Volume_Report_CMEG.pdf,* updated monthly and viewed in September 2012.

[1031] *See* ISDA Discussion Paper at 35 (Nov. 2011). A recent paper by the New York Federal Reserve estimated 2,500 trades/day in the interest rate swap market. *See* Michael Fleming, John Jackson, Ada Li, Asani Sarkar, & Patricia Zobel, ''An Analysis of OTC Interest Rate Derivatives Transactions: Implications for Public Reporting,'' Federal Reserve Bank of New York Staff Reports, No. 557, at 2 (Mar. 2012), *available at http://www.newyorkfed.org/research/staff_reports/sr557.pdf.*

[1032] *See, e.g.,* George H. K. Wang & Aysegul Ates, ''When Size Matters: The Case of Equity Index Futures,'' EFMA 2004 Basel Meetings Paper (Dec. 2003); Samarth Shah & B. Wade Brorsen, ''Electronic vs. Open Outcry: Side-by-Side Trading of KCBT Wheat Futures,'' 36 Journal of Agricultural and Resource Economics 48 (Apr. 2011).

[1033] *See* RFQ System Definition and Transmission to Five Market Participants discussion above under § 37.9(a)(1)(ii)—Request for Quote System in the preamble.

[1034] MetLife Comment Letter at 2–3 (Mar. 8, 2011).

[1035] *See* RFQ System Definition and Transmission to Five Market Participants discussion above under § 37.9(a)(1)(ii)—Request for Quote System in the preamble.

[1036] *Id.*

[1037] *Id.;* ISDA Discussion Paper at 2 (Nov. 2011).

participant requirement of two, there could be instances where one market participant does not respond to the RFQ, leaving the RFQ requester with only a single response. While there is no guarantee that even a minimum of three market participants will ensure that multiple responses are available for all RFQs at all times, it increases the probability that the goal of pre-trade price transparency is achieved and that a competitive market is created for market participants.

In response to the concerns raised by commenters about increased trading costs, the Commission also notes that research in the corporate bond market supports the view that RFQ systems in general increase search options for investors, and that the competition that ensues among market participants results in lower bid-ask spreads.[1038] One paper by Hendershott and Madhavan provides evidence that by allowing a market participant to negotiate simultaneously with multiple participants, and thus not be constrained by the limitations of the sequential search process as discussed above, RFQ systems contribute to a statistically significant reduction in transaction costs for quote requesters.[1039]

Specifically, the authors compare transaction costs across two different market structures, one with an RFQ and one with a traditional OTC structure, and find that investors are more likely to use RFQ systems when their costs are high because increased RFQ participation reduces their transaction costs.[1040] This is so because competition among dealers lowers costs.[1041] While Hendershott and Madhavan's estimates for transaction costs in the corporate bond market are consistent with those reported by others,[1042] access to RFQ market data, plus their choice of econometric model, help them obtain deeper insights into the reasons for differences in costs across different types of bonds.[1043] This research in the debt markets supports the final rules' three market participant requirement because it demonstrates that unless multiple market participants receive the RFQ, the quote requester will not be able to generate a minimal level of competition sufficient to reduce the quoted bid-ask spread.

As stated by commenters, in a market with high levels of pre-trade transparency, concerns about leakage of trading interest typically grow with trade size; a market participant posting a bid or offer in the order book, or sending a request for a quote to multiple dealers, will typically be concerned that information about their trading interest will adversely impact the market price. However, empirical research by Hendershott and Madhavan demonstrates that standard-sized (as opposed to large size) trades are more likely to be traded on an RFQ system.[1044] For these trade sizes, market participants believe that the benefits from lowering search costs mitigate concerns about information leakage.[1045] On the other hand, for larger trades (*i.e.,* block trades), leakage concerns could dominate any expected savings in search costs from participating in the order book or RFQ system, and larger trades are more likely to be executed though a bilateral bargaining process. The Commission's understanding of this potential trade-off between lower search costs and higher leakage risk is generally consistent with the results from Hendershott and Madhavan described above. These findings are relevant for the final rules' exclusion of block-sized trades from the execution methods for Required Transactions.

While some commenters stated that the five market participant requirement would result in excessive and costly disclosure, other commenters argued that the requirement would result in insufficient transparency, comparing the proposed requirement to the current status quo of private OTC markets, where large swap dealers can choose to only interact with one another.[1046] According to Mallers et al., because the SEF NPRM would permit a market participant to interact with a limited number of market participants (*i.e.,* less than the entire market), the proposal would allow ''semi-private side deals'' to take place, and that in light of the 2008 financial crisis, the ''costs and risks of permitting private RFQ markets [remained] high.'' [1047]

As noted above, the Commission agrees that a broader group of potential responders will encourage price competition and provide a fairer assessment of market value; however, the Commission is mindful of concerns that the five RFQ recipient model may impose additional costs, especially for illiquid and bespoke swaps. Following the practice for futures on DCMs, the Commission could have required that RFQs be disseminated to all market participants.[1048] However, the Commission recognizes that swaps tend to be less standardized than futures; therefore, the rules pertaining to the execution methods for SEFs should provide the requisite flexibility to market participants trading swaps. As such, the Commission is implementing the minimum three market participant requirement. The Commission also believes that the three market participant requirement reflects the more flexible statutory provisions for SEFs as compared to DCMs.

While commenters have not submitted any data on the potential impact of the proposed five market participant requirement from the potential information leakage and front-running risks, the Commission believes that the three market participant requirement adopted in this final release does not necessarily introduce a new source of risk for market participants as these risks to the extent that they exist are present in the current OTC market. The Commission also believes that the prices of bids and offers made in response to RFQs will reflect any subsequent hedging risks by the responders, and the potential winner's curse to the extent one exists will, if at all, be realized only if the market participant does not price this risk fully into its quote. Nonetheless, the revision from five to three market participants should help to mitigate this potential

[1038] *See* Hendershott & Madhavan, ''Click or Call,'' at 10–12.

[1039] *Id.* at 10.

[1040] *Id.* at 14.

[1041] *Id.* at 17.

[1042] *See, e.g.,* Edwards et al., ''Transaction Costs and Transparency,'' 1421–51.

[1043] Hendershott & Madhavan, ''Click or Call,'' at 1–4.

[1044] *Id.* at 15, 18, 28.

[1045] *Id.* A market participant sending an order to the market is likely to be concerned about others in the market being able to glean information through the order. In the context of a firm sending a large size trade, one substantially bigger than the typical trade size, there will always be concern that the size of the order will be interpreted as containing information, and elicit responses from other market participants. Firms will typically be interested in ensuring that the size of the order does not have an adverse impact on the order price, or the quotes from liquidity providers. Accordingly, while looking to execute such orders, firms will take steps to avoid leakage of the information of their trading interest beyond a very small group of potential counterparties.

[1046] Mallers et al. Comment Letter at 3–5 (Mar. 21, 2011).

[1047] *Id.* at 5.

[1048] The Commission notes that a SEF market participant may send an RFQ to the entire market. Core Principles and Other Requirements for Swap Execution Facilities, 76 FR at 1220. Based on its experience with RFQ-to-all functionality offered by DCMs, the Commission notes that there are two distinct differences between these and the requirements finalized in this release. First, RFQs submitted to DCMs are disseminated to all market participants. Second, the responses to the RFQs take the form of executable bids or offers that are entered into the DCM's order book or other centralized market, such that orders from any market participant, not just the one submitting the RFQ, can be matched against such responsive bids or offers.

risk, while still complying with the statutory SEF definition and promoting pre-trade price transparency and price competition.

Furthermore, regarding comments concerns' about the potential winner's curse for illiquid swaps, the Commission notes that the three market participant requirement will only apply to transactions in swaps that are subject to the CEA section 2(h)(8) trade execution mandate (*i.e.,* transactions in more liquid swaps, which are subject to the clearing mandate and made available to trade, and not to illiquid and bespoke swaps).[1049] The Commission also notes that the interest rate swaps and credit default swaps that the Commission has determined are required to be cleared under CEA section 2(h)(1) (and are likely to be subject to the trade execution mandate of CEA section 2(h)(8)) are some of the most liquid swaps.[1050] Additionally, 77 swap dealers have registered with the Commission and nearly all of them make markets in such swaps.[1051] SEFs may offer RFQ systems without the three market participant requirement for Permitted Transactions (*i.e.,* transactions not involving swaps that are subject to the trade execution mandate of CEA section 2(h)(8)). In response to commenters' concerns about the potential winner's curse for large-sized trades, the Commission notes that block-sized transactions would not be subject to the execution methods for Required Transactions, including the three market participant requirement.[1052] Therefore, excluding block-sized transactions from the execution methods for Required Transactions will address the potential risk of a winner's curse for large-sized trades.

As noted in the preamble, the three market participants may not be affiliated with or controlled by the RFQ requester and may not be affiliated with or controlled by each other, and the Commission is revising final § 37.9(a)(3) to clarify this point. The Commission believes that for an RFQ requester to send an RFQ to another entity who is affiliated with or controlled by the RFQ requester would undermine the benefits of the requirement.

The costs associated with the no-affiliate rule may include, for example, the costs that a SEF would incur to upgrade its systems to create filters that would prevent RFQs from being sent to affiliated parties, but these costs could be mitigated or eliminated by, for example, the SEF requiring market participants accepting RFQs to disclose their affiliations to potential RFQ requestors before a request is transmitted. Another possibility is for a SEF to monitor RFQs and cancel trades that it determines are made pursuant to RFQs between affiliated parties. Yet another possibility is for the SEF to include in its rules a requirement that market participants must not transmit RFQs to their affiliates or to market participants who are affiliated with each other.

The primary benefit of this no-affiliate rule is to ensure that RFQs are sent to three unaffiliated parties who can be expected to provide truly independent quotes. If an RFQ requester were to transmit an RFQ to one non-affiliate and two affiliates or if an RFQ requester transmits an RFQ to three requestees who are affiliates of each other, then the goal of pre-trade price transparency would be undermined (since the quotes might be coordinated or otherwise not independent) and the RFQ could effectively turn into an RFQ-to-one, which is contrary to the statutory SEF definition. The Commission also notes that such an outcome could disincentivize entities from responding to an RFQ, which would reduce price competition and liquidity.[1053]

The Commission clarifies that SEFs are not required to: (1) Display RFQs to market participants not participating in the RFQ, (2) disclose RFQ responses to all market participants, or (3) disclose the identity of the RFQ requester. The Commission also clarifies that an acceptable RFQ System may allow for a transaction to be consummated if the original request to three potential counterparties receives fewer than three responses. Moreover, § 37.9(a)(2)(ii) clarifies that in providing either one of the execution methods for Required Transactions (*i.e.,* an Order Book or an RFQ System that operates in conjunction with an Order Book), a swap execution facility may for purposes of execution and communication use any means of interstate commerce, including, but not limited to, the mail, internet, email, and telephone, provided that the chosen execution method satisfies the requirements provided in § 37.3(a)(3) for Order Books or in § 37.9(a)(3) for Request for Quote Systems. Finally, in order to provide market participants, SEFs, and the swaps industry generally with additional time to adapt to the new SEF regime, the Commission is phasing-in the three market participant requirement so that from the effective date of the SEF rule until one year after the compliance date for the SEF rule, RFQ requesters may transmit RFQs to no less than two market participants (rather than three). These provisions will likely significantly mitigate the likelihood and magnitude of the potential costs noted by commenters.

(iii) Time Delay Requirement

Some commenters stated that the rule requiring a 15-second time delay before crossing a trade between two customers should be eliminated because it may impact liquidity or result in increased costs.[1054] FHLB stated that this requirement would likely increase the bid-ask spread, because ''by waiting for 15 seconds before entering into an offsetting transaction, brokers will be exposed to risks associated with market fluctuations and will have to pass the costs of these risks along to its customer.'' [1055] No commenter provided dollar estimates or data regarding these costs.

The time delay requirement (which only applies to a SEF's Order Book and not to its RFQ System) supports the Congressional goal of pre-trade transparency on SEFs by allowing other market participants the opportunity to participate in a trade where dealer internalization or a dealer crossing customers' orders would otherwise reduce such pre-trade price transparency.[1056] The Commission

[1049] Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284 (Dec. 13, 2012); Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available To Trade, 76 FR 77728 (proposed Dec. 14, 2011).

[1050] Clearing Requirement Determination Under Section 2(h) of the CEA, 77 FR 74284. The Commission notes that these swaps already went through a Commission determination process that included a five factor review, including a liquidity review. *Id.* ISDA, in its letter requesting interpretive relief regarding the obligation to provide a pre-trade mid-market mark, recognized that many of the swaps that the Commission has determined are required to be cleared under CEA section 2(h)(1) are ''highly-liquid, exhibit narrow bid-ask spreads and are widely quoted by SD/MSPs in the marketplace . . .'' ISDA Comment Letter at 2 (Nov. 30, 2012).

[1051] The Commission recognizes that not all swap dealers will be active in all Required Transactions. The Commission also notes that of the 77 swap dealers, 35 swap dealers are not affiliated with any of the 77 swap dealers.

[1052] *See* definition of block trade in § 43.2 of the Commission's regulations.

[1053] As any trades emanating from an RFQ will be subject to real time reporting, if a non-affiliated respondent to an RFQ observes trades happening away from better or equal prices quoted by it, such respondents might be discouraged from responding to future RFQ requests, thus hurting market integrity.

[1054] *See* Time Delay Requirement discussion above under § 37.9—Permitted Execution Methods in the preamble.

[1055] FHLB Comment Letter at 13 (Jun. 13, 2011).

[1056] Dealer internalized or cross-trades are not open and competitive and may result in inferior execution for one of the parties compared to

Continued

believes that this requirement will minimize the possibility of dealer internalization and incentivize competition between market participants. Absent this requirement, market participants would be free to conduct pre-execution communications away from the centralized market and then ensure that the orders from such private negotiations are matched by coordinating their submission to the SEF.

Further, the Commission notes that the costs outlined by commenters are speculative, since SEFs have not yet begun operation. Moreover, the time delay requirement is similar to certain timing delays adopted by DCMs, and the Commission is not aware of evidence that those DCM rules are imposing significant costs on participants in those markets.[1057] Nevertheless, the Commission's final rules recognize that a one-size-fits-all approach to the time delay requirement is not appropriate for all swap products and markets on a SEF. Accordingly, the Commission is revising the proposed rule to allow a SEF to adjust the duration of the time delay requirement based upon a swap's liquidity or other product-specific characteristics. SEFs therefore will have the ability to reduce the costs described by the commenters, if they arise.

(c) Benefits

As a whole, the minimum trading functionality (*i.e.,* Order Book) and permissible execution methods established by §§ 37.3 and 37.9 advance the Congressional goals of promoting pre-trade price transparency in the swaps market and promoting trading of swaps on SEFs.[1058]

(1) Promotion of Pre-Trade Price Transparency

The order book requirement is designed to ensure a base level of pre-trade transparency to all market participants by providing for live executable bids and offers in Required Transactions. This requirement gives all market participants (and potential market participants) access to the same key information that swap dealers have, including current information about the price of a particular swap, at the same time. An order book with executable bids and offers will ensure that prior to placing an order or executing a trade, a market participant will be able to view other bids and offers submitted to the SEF, including prices, quantities, and order book depth.[1059] Access to such information allows market participants to make informed trading decisions involving variables such as price, size, and timing, and to better assess the quality of execution effected by their intermediaries.

Intermediaries will know that their market participants have information to assess the quality of executions and can send their business elsewhere if they are not satisfied with their executions. Thus, intermediaries will have greater incentive to provide efficient execution to their customers at competitive prices.

In addition, an order book is an efficient method of execution of transactions for swaps that are subject to the CEA section 2(h)(8) trade execution mandate because it provides prompt and fast executions of marketable orders at market prices, while providing for a variety of functionalities such as limit orders and stop-loss orders. The order book functionality for such transactions will introduce core levels of pre-trade transparency without hindering the ability of SEFs and market participants to deploy other market structures depending on the needs of the individual products and markets.

As discussed above, the benefits of pre-trade (and post-trade) transparency generally flow from reducing information asymmetries.[1060] In transparent markets, all market participants (and potential market participants) have timely access to the same public pricing information that insiders or professionals have, reducing potential negotiating advantages. Also, in a transparent market, market participants can better assess the quality of executions effected by their intermediaries by comparing execution prices against quotations and other transactions. A potential entrant can view current price quotations as well as prices of recent trades in an instrument, and can thereby assess whether it can offer a better price. Market transparency can thus provide incentives for new participants to enter the market, increasing competition, reducing concentration, and narrowing spreads.

The 15-second time delay requirement is intended to limit dealer internalization of trades (cross trades) and to incentivize competition between market participants. This requirement will also promote pre-trade price transparency of swaps executed on SEFs by allowing other market participants the opportunity to participate in the trade. The Commission's final rules also recognize that a one-size-fits-all approach to the time delay requirement is not appropriate for all swap products on a SEF. Therefore, the final rules provide SEFs with an appropriate level of discretion to adjust the minimum time delay requirement based upon a swap's liquidity or other product-specific characteristics. Moreover, the Commission has clarified that the time delay requirement does not apply to the RFQ System.

The Commission recognizes commenters' concerns, as discussed in this section, that there may be certain circumstances in which pre-trade price transparency may reduce overall market liquidity. Therefore, the Commission has taken certain steps in the final regulations to mitigate such benefit-reducing effects (such as excluding block trades, tying the time-delay requirement to a swap's liquidity, clarifying the subset of swaps that are Required Transactions, and allowing SEFs to offer any method of execution for Permitted Transactions).

(2) Promotion of Trading on SEFs

While the statutory goal of pre-trade price transparency is reflected in the minimum trading functionality (*i.e.,* Order Book) requirement, the regulations also provide a SEF with additional flexibility for offering the trading and execution of swaps by providing additional execution methods (*e.g.,* RFQ Systems along with the discretion to offer any method of execution for Permitted Transactions). The Commission believes that these additional functionalities will provide flexibility in methods of execution that will promote the trading of swaps on SEFs, which in turn will promote price transparency.

For example, execution methods and market structures in general can vary depending on the product—simple or complex, the state of development of the market—established or new, market participants—retail or institutional, and other related factors. The Commission anticipates that the order book method will typically work well for liquid Required Transactions (*i.e.,* transactions involving swaps that are subject to the trade execution requirement under CEA section 2(h)(8)), but for less liquid

situations where the bid or offer is exposed to the market. Accordingly, DCM rules typically require that an order be exposed to an order book or trading pit before it can be crossed with another order.

[1057] *See, e.g.,* NYMEX rule 533, which provides for a 5-second delay for futures and a 15-second delay for options, *available at http://www.cmegroup.com/rulebook/NYMEX/1/5.pdf.*

[1058] CEA section 5h(e); 7 U.S.C. 7b–3(e).

[1059] *See* Duffie et al., ''OTC Markets,'' at 1827 (presenting results showing that bid-ask spreads are lower if investors can find each other more easily).

[1060] *See, e.g.,* Transparency of Structured Finance Products (Final Report), Technical Committee of the International Organization of Securities Commissions, at 17, 21 (Jul. 2010), *available at http://www.iosco.org/library/pubdocs/pdf/IOSCOPD326.pdf.*

Required Transactions, RFQ systems are expected to help facilitate trading. RFQ systems are currently used by market participants in the OTC swap market, many in conjunction with order book functionality. By providing a SEF with the flexibility to offer alternate execution methods to its market participants, the Commission is leveraging best practices from current swap trading platforms. The additional flexibility offered for the trading and execution of Permitted Transactions will allow a SEF to offer new, innovative market structures to facilitate trading in these swaps that are not subject to the trade execution requirement under CEA section 2(h)(8), and thus may help to promote the trading of these swaps on SEFs.

Additionally, the RFQ system communication requirement helps promote the trading of swaps on SEFs and enhances price competition and pre-trade price transparency by ensuring that RFQ requesters have access to competitive prices, and that competitive resting bids and offers left by market participants on the SEF will be transmitted to the RFQ requester for possible execution.

(3) Facilitating Search

The Duffie, Gârleanu, and Pedersen (''DGP'') approach reflects the typical search process, which involves approaching intermediaries sequentially (similar to making phone calls to different dealers asking for quotes); strategic bargaining then ensues—prices negotiated reflect each investor's or the dealer's alternatives to trade.[1061] DGP's results show that both traded prices as well as transaction costs depend on investors' search abilities, access to market makers, and investors' bargaining powers.[1062] DGP's results show that bid-ask spreads are lower if investors can find each other more easily, through market structures designed to allow them to negotiate simultaneously, instead of sequentially, with multiple, competing liquidity providers.[1063] Contrary to what commenters have stated, DGP reason that improvements in an investor's ability to search for alternate counterparties forces dealers to improve on their quoted prices and spreads.[1064] Further, they demonstrate that those with better access to market makers (or liquidity providers) receive tighter bid-ask spreads.[1065]

The final rules establishing a market structure for SEFs, including the provisions governing Order Books and RFQ Systems are designed to deliver improved search capabilities to investors and better access to market makers. These provisions will facilitate the shifting of trading to the centralized SEF market structure from the bilateral OTC market structure where investors may have limited ability to find one another.

The importance of facilitating investors' ability to find each other more easily is highlighted by evidence in the DGP paper of another dealer-centric market—the one prevailing at Nasdaq until the mid-1990s, where all trades had to be routed to a dealer.[1066] Notwithstanding competition among the dealers, and the fact that there was both pre- and post-trade transparency in the equity markets, spreads at Nasdaq at that time were wider than at the New York Stock Exchange.[1067] Though the latter had ''a single specialist for each stock, floor brokers can find and trade among themselves, and outside brokers can find each other and trade 'around' the specialist with limit orders.'' [1068] Along these lines, the final rules provide for an anonymous but transparent order book that will facilitate trading among market participants directly without having to route all trades through dealers.

(d) Consideration of Alternatives

Some commenters recommended that the Commission modify the proposed five market participant requirement from no less than five market participants to either ''one or more'' [1069] or to all market participants.[1070] Other commenters recommended an alternative that would include some level of order interaction between the SEF's order book functionality and RFQ systems, including the order interaction model proposed by the SEC for SB–SEFs.[1071] MFA recommended that the Commission expand the definition of Permitted Transaction to include other transactions, such as exchanges of swaps for physicals, exchanges of swaps for swaps, and linked or packaged transactions.[1072] Each of these alternatives is discussed below.

(1) Modification to the Number of RFQ Requests

Numerous commenters recommended that the Commission adopt the SEC's proposed approach for SB–SEFs by allowing RFQs to be sent to one or more market participants (while not recommending that the Commission adopt the SEC's proposed order interaction requirement), instead of requiring that RFQs be sent to at least five market participants.[1073] The benefit of this approach, cited favorably by some commenters, would be to protect proprietary trading strategies and mitigate hedging costs.[1074]

Other commenters, however, stated that only requiring RFQs to be sent to one or more market participants would preserve the single-dealer status quo, would diminish the transparency and efficiency of the regulated swaps markets, and would be inconsistent with the goals of the Dodd-Frank Act.[1075] These commenters supported another alternative under which an RFQ must be transmitted to all participants on the SEF.[1076] In particular, one commenter stated that participants would not be disadvantaged by disclosing an RFQ to the entire market for transactions below the block trade threshold, which would not move the market.[1077] In this commenter's view, the proposed five market participant requirement would still allow a participant to conduct semi-private deals with a few favored participants to the exclusion of other market participants, which would ultimately decrease liquidity and create a

[1061] *See* Duffie et al., ''OTC Markets,'' at 1818–20.

[1062] *Id.* at 1815.

[1063] *Id.* at 1827.

[1064] *Id.* at 1817.

[1065] *Id.*

[1066] *Id.* at 1834–35.

[1067] *Id.; see also* Hendrik Bessembinder & Herbert M. Kaufman, ''A Comparison of Trade Execution Costs for NYSE and NASDAQ-Listed Stocks,'' 32 The Journal of Financial and Quantitative Analysis 287 (Sep. 1997).

[1068] Duffie et al., ''OTC Markets,'' at 1834–35.

[1069] *See, e.g.,* Rosen et al. Comment Letter at 11 (Apr. 5, 2011).

[1070] Mallers et al. Comment Letter at 4 (Mar. 21, 2011); AFR Comment Letter at 4–5 (Mar. 8, 2011).

[1071] Rosen et al. Comment Letter at 12–14 (Apr. 5, 2011); JP Morgan Comment Letter at 5–6 (Mar. 8, 2011); FXall Comment Letter at 9–10 (Mar. 8, 2011); Tradeweb Comment Letter at 8 (Mar. 8, 2011); FSR Comment Letter at 5 (Mar. 8, 2011); MetLife Comment Letter at 3 (Mar. 8, 2011); SIFMA AMG Comment Letter at 9 (Mar. 8, 2011); MarketAxess Comment Letter at 32 (Mar. 8, 2011); Barclays Comment Letter at 7 (Mar. 8, 2011); ABC/CIEBA Comment Letter at 6–7 (Mar. 8, 2011); ISDA/SIFMA Comment Letter at 3–4; Evolution Comment Letter at 5–6 (Mar. 8, 2011).

[1072] MFA Comment Letter at 8 (Mar. 8, 2011).

[1073] *See* RFQ System Definition and Transmission to Five Market Participants discussion above under § 37.9(a)(1)(ii)—Request for Quote System in the preamble. Under the SEC's interpretation of the SB–SEF definition, such an RFQ system would provide multiple participants with the ability, but not the obligation, to transact with multiple other participants. Registration and Regulation of Security-Based Swap Execution Facilities, 76 FR at 10953.

[1074] *See, e.g.,* Rosen et al. Comment Letter at 11 (Apr. 5, 2011).

[1075] *See, e.g.,* Mallers et al. Comment Letter at 3–5 (Mar. 21, 2011).

[1076] *Id.*

[1077] *Id.* at 4.

substantial barrier to entry into the swaps market.[1078]

The Commission considered the costs and benefits of the above alternatives, but believes that neither alternative would satisfy the objectives of the Dodd-Frank Act. As noted by one commenter, only requiring that RFQs be sent to one market participant would preserve the status quo,[1079] while requiring that RFQs be sent to the entire market may not be feasible for certain less liquid swaps. Nevertheless, in light of the comments, the Commission is reducing the required minimum number of recipients for RFQs in the final rule from five to three. The Commission expects that this will mitigate the concerns of commenters as discussed above, while continuing to satisfy the objectives of the Dodd-Frank Act. As discussed above in connection with the RFQ to three market participant requirement, the Commission views three RFQ recipients as appropriately balancing between ensuring liquidity in the swaps market and promoting pre-trade price transparency. The Commission further notes that the three RFQ recipient model will provide a more reliable indicator of market value than a quote from a single RFQ responder.

(2) Order Interaction

Another alternative was to allow for one-to-one RFQs, but to mandate full order interaction.[1080] However, according to commenters, an order interaction requirement across trading platforms would impose significant architectural and operational costs on SEFs.[1081] In particular, potential SEFs were concerned that they would incur significant expenses by having to create the technological capabilities necessary to ensure that market participants execute against the best price.

The Commission did not propose this type of order interaction and has declined to impose such a requirement herein. Accordingly, the final regulations respond to concerns regarding a transacting party's ability to take into consideration factors other than price when choosing a counterparty or clearing entity, by, for example, offsetting an existing position cleared through the Derivatives Clearing Organization (''DCO'') through which the position was entered into, even though a slightly better price may exist for the same instrument at a different DCO. This flexibility will allow market participants to execute swap transactions in accordance with the unique execution requirements of each transaction.

(3) Expand Definition of Permitted Transaction

Another alternative is to expand the definition of Permitted Transaction to include other transactions, such as exchanges of swaps for physicals, exchanges of swaps for swaps, and linked or packaged transactions. The Commission interprets MFA's comment suggesting this alternative to be a request that the Commission create through rulemaking an exception to the CEA section 2(h)(8) trade execution mandate similar to the centralized market trading exception established by DCM Core Principle 9 for certain exchange of futures for related positions (''EFRPs'').[1082]

The Commission has determined not to adopt this alternative, because a broad exception for the off-exchange transactions described by MFA could undermine the trade execution requirement by allowing market participants to execute swaps subject to the trade execution requirement bilaterally rather than on a SEF or DCM. The Commission notes that market participants with a bona fide business purpose for executing exchange of swaps for physicals in physical commodity swaps (should such swaps become subject to the trade execution mandate) are likely to be eligible for the end-user exception. The Commission is not currently aware of any bona fide business purpose for executing such transactions in financial swaps subject to the trade execution mandate. In light of the end-user exception, the Commission expects that the costs associated with the Commission's determination will be minimal. The Commission is aware that the swaps market will evolve in ways that it does not currently anticipate and is open to revisiting this issue should a bona fide business purpose arise to execute swaps that are subject to the trade execution mandate in a manner recommended by the commenter.

(e) Section 15(a) Factors

(1) Protection of Market Participants and the Public

The final regulations, specifically the provisions requiring a minimum trading functionality (*i.e.,* Order Book) and the communication of any firm bid or offer along with responses to the RFQ, promote the protection of market participants and the public by promoting the statutory goals of increased pre-trade transparency and trading on SEFs. Taken together, these final rules should reduce the likelihood that market participants and SEFs execute swaps at non-market prices, thus protecting traders and members of the public that rely on the prices of swaps facilitated or executed on SEFs. The rules should benefit market participants by reducing the potential rents extracted by dealers from customers in opaque markets, ''and more so from less informed customers.'' [1083]

The Commission mitigates the costs to market participants by minimizing the risk of information leakage to other market participants by clarifying that SEFs are not required to: (1) Display RFQs to market participants not participating in the RFQ, (2) disclose RFQ responses to all market participants, or (3) disclose the identity of the RFQ requester.

As discussed above, the Commission anticipates that the requirements in § 37.9 will result in better pricing and liquidity and increased participation on SEFs because market participants will be able to trade on flexible platforms without compromising on pre- and post-trade transparency. The final regulations also provide information and pricing benefits to market participants using an RFQ System because market participants seeking liquidity will have access to additional pricing information after disseminating an RFQ. The final regulations increase the likelihood that RFQ requesters will receive competing quotes from a larger group of responders. The Commission notes that competition between multiple quote providers should result in tighter bid-offer spreads for the RFQ requesters.

The rules promoting trading on SEFs protect the public by encouraging trading on regulated SEFs rather than on unregulated OTC markets. Moreover,

[1078] *Id.*

[1079] IECA Comment Letter at 3 (May 24, 2011).

[1080] Under the SEC's SB–SEF NPRM, an RFQ requester must execute against the best-priced orders of any size within and across an SB–SEF's modes of execution. *See* Registration and Regulation of Security-Based Swap Execution Facilities, 76 FR at 10953–54, 10971–74.

[1081] *See, e.g.,* Tradeweb Comment Letter at 6 (Mar. 8, 2011).

[1082] *See* CEA section 5(d)(9); 7 U.S.C. 7(d)(9). The Commission notes that DCM Core Principle 9 does not explicitly permit DCMs to offer exchange of swaps for physicals or exchange of swaps for swaps.

[1083] Bessembinder & Maxwell, ''Transparency,'' at 226. Their conclusions in the context of post-trade transparency introduced by the TRACE system can be generalized to the improvement in pre-trade transparency introduced through the minimum trading functionality (*i.e.,* Order Book) and the ability to negotiate simultaneously with multiple market participants through the RFQ system.

some market participants may be end users that provide goods and services to the public (*e.g.,* airlines or electric utilities). To the extent that these end users obtain better pricing due to these rules and are able to pass those cost savings to their customers and shareholders, the public would gain additional benefits from the pre-trade transparency and promotion of trading on SEFs.

(2) Efficiency, Competitiveness, and Financial Integrity of the Markets [1084]

The final regulations will improve the efficiency, competitiveness, and financial integrity of the swaps market by providing a SEF with the flexibility to offer several execution methods for Required Transactions to meet the needs of market participants, including RFQ Systems, as well as the flexibility to offer any execution method for Permitted Transactions. This flexibility reflects the fact that there is a continuum of markets occupying ''various points between high and low transparency'' [1085] and will allow participants to efficiently execute trades using various methods of execution depending on the liquidity levels in particular products. For example, participants may execute more liquid products on an Order Book, while executing less liquid products using RFQ functionality. Final § 37.9, specifically the provisions related to RFQ Systems (including the minimum RFQ to three requirement) and the 15 second time delay requirement for cross trades, should also facilitate an increase in the number of market participants that provide liquidity on SEFs by providing greater opportunities for those market participants, which will contribute to the competitiveness of the swaps market.

Research by Hendershott and Madhavan supports the benefits of increased competition facilitated by RFQ systems.[1086] By enabling market participants to meet each other directly (without being forced to go through an intermediary as is the case in the current OTC market structure), and by providing them a facility (via the RFQ system) to simultaneously negotiate with multiple market participants, the rules reduce the search costs inherent in the current OTC market structure as described by Duffie, Gârleanu, and Pedersen,[1087] and thus promote a more efficient and competitive market structure for the swaps markets. In another paper, Zhu addresses the requirement for a minimum of five quote providers as a means to ''increase direct trading among 'end-users' and reduce the fraction of trading volume that is conducted through intermediaries.'' [1088] Similarly, Avellaneda and Cont emphasize the importance of market transparency as ''not an objective *per se* but rather a means for ensuring the proper functioning of the market.'' [1089]

(3) Price Discovery

The final rules provide for pre-trade transparency and promote trading on SEFs, both of which will enhance price discovery on a SEF. The minimum trading functionality will allow non-dealer firms with access to the SEF to compete with dealers by also placing bids and offers on the SEF. The 15 second time delay requirement will ensure a minimum level of pre-trade transparency by allowing other market participants the opportunity to participate in a privately negotiated trade before it is crossed. The broader participation and pre-trade transparency could increase market depth and improve price discovery. Research by Zhu shows that execution methods similar to the RFQ system can help improve the dispersion of quote information across a broader cross-section of market participants, the sensitivity of quoted prices to information, and the ability of the market to aggregate information distributed among multiple participants.[1090] These conclusions support findings from research by Duffie, Gârleanu, and Pedersen that ''[s]earch frictions affect not only the average levels of asset prices but also the asset market's resilience to aggregate shocks[,]'' both of which are critical elements of any efficient and effective price discovery process.[1091]

The differentiation in execution methods for Required and Permitted Transactions, and the ability to use ''any means of interstate commerce'' in providing the execution methods for Required Transactions as described in § 37.9(a)(2)(ii), will allow a SEF to adjust its market structures for emerging and less liquid markets by using a variety of means of communication in providing the execution methods for Required Transactions and using any execution method the SEF deems appropriate for Permitted Transactions. This approach reflects the Commission's belief that the price discovery process varies across markets and products.

(4) Sound Risk Management Practices

Centralized trading platforms have multiple checks and balances built into their systems designed to reduce operational risks (such as human error) inherent in order submission, matching, and confirmation. The Commission believes that adoption of centralized trading platforms for swaps trading on a SEF will contribute to a system-wide reduction in operational risks, and will help standardize risk management practices in the marketplace. This in turn will reduce overall transaction costs, and will, along with pre-trade transparency and the prospects for improved price discovery discussed earlier, encourage market participants to trade swaps on SEFs and thus aid in the development of the swaps market. As markets are interlinked, the growth of the swaps market will likely drive growth of the futures and other derivatives markets through the liquidity externality mechanism, which in turn will improve the ability of a broader range of market participants to measure, hedge, and transfer their risks through such contracts.[1092]

(5) Other Public Interest Considerations

The Commission has not identified any effects that these rules will have on other public interest considerations other than those enumerated above.

3. Registration

(a) Background

Section 5h(a)(1) of the Act provides that no person may operate a facility for

[1084] The Commission notes that CEA § 15(a)(2)(B) requires the Commission to consider the costs and benefits of its actions in light of ''considerations of the efficiency, competitiveness, and financial integrity of futures markets.'' The Commission is also considering the costs and benefits of these rules in light of considerations of the efficiency, competitiveness, and financial integrity of ''swap markets.''

[1085] *See* ISDA Research Notes, ''Transparency and over-the-counter derivatives: The role of transaction transparency,'' No. 1, at 2–3 (2009), *available at http://www2.isda.org/attachment/MTY4NA==/ISDA-Research-Notes1.pdf.*

[1086] *See* Hendershott & Madhavan, ''Click or Call,'' at 3 (stating that ''[T]he evolution of bilateral, sequential trading into an auction type framework'' (their definition of the RFQ system), ''offers a path from an over-the-counter market to centralized, continuous trading'').

[1087] Duffie et al., ''OTC Markets,'' at 1815.

[1088] Haoxiang Zhu, ''Finding a Good Price in Opaque Over-the-Counter Markets,'' 25 The Review of Financial Studies 1255, 1264 (Apr. 2012).

[1089] Marco Avellaneda & Rama Cont, ''Transparency in Credit Default Swap Markets,'' Finance Concepts, at 3 (Jul. 2010), *available at http://www.finance-concepts.com/images/fc/CDSMarketTransparency.pdf.*

[1090] Haoxiang Zhu, ''Finding a Good Price in Opaque Over-the-Counter Markets,'' 25 The Review of Financial Studies 1255, 1257–58 (Apr. 2012).

[1091] Duffie et al., ''Valuation in OTC Markets,'' at 1881.

[1092] *See* Yakov Amihud, Haim Mendelson, & Beni Lauterbach, ''Market microstructure and securities values: Evidence from the Tel Aviv Stock Exchange,'' 45 Journal of Financial Economics 365, 378–80 (Sep. 1997) (discussing liquidity externalities in trading).

the trading or processing of swaps unless the facility is registered as a SEF or a DCM.[1093] The SEF definition in CEA section 1a(50) defines a SEF as ''a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that—(A) Facilitates the execution of swaps between persons; and (B) is not a designated contract market.'' [1094] In accordance with these provisions, the Commission has clarified that a facility would be required to register as a SEF if it offers a trading system or platform in which more than one market participant has the ability to execute or trade swaps with more than one other market participant on the system or platform.[1095] In response to comments, the Commission also provides examples of how it would interpret the registration requirement for certain entities.

Section 37.3(a)(1) codifies this statutory registration requirement and § 37.3(b) requires, among other things, that applicants requesting approval of registration as a SEF must file a complete Form SEF, which consists of general questions and a list of exhibits that will enable the Commission to determine whether the applicant complies with the core principles and the Commission's regulations. Form SEF standardizes the information that an applicant must provide to the Commission and includes comprehensive instructions that will guide applicants through the process.[1096] Section 37.3(b)(5) requires the Commission to review any application for registration as a SEF submitted two years or later after the effective date of part 37 pursuant to the 180-day timeframe and procedures specified in CEA section 6(a).

Under § 37.3(c), SEF applicants may submit a notice to the Commission requesting temporary registration, allowing them to operate during the pending application process once a notice granting temporary registration from the Commission has been received. The SEF NPRM required these applicants to submit transaction data substantiating that they are trading swaps. In response to comments, the Commission is eliminating this requirement from the final rule and is also extending the termination date of the proposed temporary registration provision by one year. In addition, the Commission is shortening the proposed effective date of the regulations from 90 days to 60 days subsequent to publication in the **Federal Register**. In connection with this change, the Commission is also using its discretion to establish alternative dates for the commencement of its enforcement of regulatory provisions and is setting a general compliance date of 120 days subsequent to **Federal Register** publication.

(b) Costs

In its discussion paper, ISDA estimated the average cost of registration would be $333,000.[1097] Based on the Commission staff's follow-up discussions with commenters, the Commission estimates that the total cost of completing and filing a registration application with the Commission will be between $333,000 and $500,000. This range accounts for the time that will be expended to prepare and file Form SEF.[1098]

As noted above, based on the statute as interpreted by the Commission, a facility that meets the SEF definition would be required to register as a SEF and would incur the costs of registration. These facilities would also be required to meet the minimum trading functionality and other requirements of § 37.9. The costs and benefits of those requirements are discussed above. The 180-day review period for SEF applications submitted two years or later after the effective date of part 37 is not expected to impose significant costs on applicants who submit their applications sooner since they will be eligible for two years of temporary registration and will not need to await final Commission approval before commencing SEF operation.

(c) Benefits

As discussed above, based on the statute as interpreted by the Commission, a facility that meets the SEF definition would be required to register as a SEF. These facilities will, as registered SEFs, have the benefit of being able to offer Required Transactions for execution, while alternative entities that are not required to register as SEFs, including one-to-many systems or platforms, will only be able to offer Permitted Transactions for execution. This will ensure, consistent with the statute, a level playing field, that all Required Transactions are executed on registered SEFs. This will provide market participants in Required Transactions with the benefits associated with the minimum trading functionality, core principles, and other requirements set out in this release.

Additionally, the Commission's interpretation of the registration requirement through a set of examples helps to clarify which facilities must register as a SEF. The Commission believes that providing examples of how it would interpret the CEA section 5h(a)(1) registration requirement will ensure that a consistent set of metrics is available to market participants while evaluating the applicability of the registration requirements. Providing specific examples will also mitigate the costs potential registrants may incur in seeking advice on issues pertaining to registration.

Form SEF is designed to ensure that only applicants that comply with the Act and the Commission's regulations are registered as SEFs. Form SEF is expected to minimize the amount of time the Commission staff will need to review applications and reduce the need for the Commission staff to request, and applicants to provide, supplementary information, which, in turn, benefits potential SEFs by reducing the time it takes to become fully registered. This standardized registration process will provide applicants with legal certainty regarding the type of information that is required and will ensure that no applicant is given a competitive advantage in the application process.

Further, granting temporary registration for up to two years will improve market continuity by allowing the Commission ample time to review applications without jeopardizing an applicant's ability to operate pending Commission review. By withdrawing the existing trading activity requirement in proposed § 37.3(b)(1)(ii), all SEF

[1093] CEA section 5h(a)(1); 7 U.S.C. 7b–3(a)(1).

[1094] CEA section 1a(50); 7 U.S.C. 1a(50).

[1095] *See* Requirements for Registration discussion above under § 37.3—Requirements for Registration in the preamble for further details.

[1096] Sections 37.3(d)–(g) provide procedures for other actions involving registration, including reinstating a dormant registration, requesting a transfer of registration, withdrawal of an application for registration, and vacation of registration. These procedures will further the ability of the Commission to efficiently monitor SEFs' compliance with the core principles, and will result in minimal administrative costs for SEFs.

[1097] ISDA Discussion Paper at 32 (Nov. 2011).

[1098] The Commission notes that the SEC estimated that the one-time registration burden to prepare and file Form SB–SEF will be approximately 100 hours for each new and existing entity. *See* Registration and Regulation of Security-Based Swap Execution Facilities, 76 FR at 11024. The SEC based this estimate on its experience with the registration process for national securities exchanges, having last estimated the average time it should take to fill out the securities exchange registration form (Form 1) to be 47 hours. *Id.* The SEC adjusted this figure upwards to account for the greater resources that would be required initially in lieu of an established framework and familiarity of the industry in order to gather supporting documentation and complete Form SB–SEF.

applicants, not only those operating existing platforms, may apply for temporary registration. The withdrawal of the trading activity requirement should promote competition between SEFs by providing opportunities for new entities to establish trading operations that compete with existing platforms. The 180-day review period for SEF applications submitted two years or later after the effective date of part 37 will provide any later SEF applicants with the same review period as is applicable under the CEA to DCMs and will provide greater certainty for SEF applicants regarding the time period for the Commission's review of their applications.

(d) Consideration of Alternatives

Several commenters stated that the Commission should harmonize its registration procedures with the SEC in order to avoid unnecessary cost and duplication for SEFs.[1099] In particular, Tradeweb stated that SEF applicants should not have to file separate applications for each mode of execution, and that where a SEF is offering both swaps and security-based swaps, the SEF should only be required to file one application for both agencies.[1100]

The Commission recognizes that substantially similar registration forms and procedures could facilitate compliance and reduce regulatory costs for SEFs seeking dual registrations. The Commission notes, however, that it must comprehensively review and understand a SEF's proposed trading models and operations, which will facilitate trading for a more diverse universe of financial instruments and underlying commodities than SB–SEFs. Accordingly, the Commission is not permitting notice registration to SEC-registered SB–SEFs. Additionally, in response to comments raised, the Commission clarified in the preamble that a SEF applicant does not need to file separate applications for each mode of execution, but that its application must describe each mode of execution offered. This should allay concerns that multiple costly applications must be filed with the Commission.

(e) Section 15(a) Factors

(1) Protection of Market Participants and the Public

The interpretation of the registration provision to apply to facilities that meet the SEF definition will ensure that market participants transacting any swap on these platforms, whether or not they are subject to the trade execution requirement, will benefit from the core principles and other requirements for SEFs (including the pre-trade transparency available on SEFs), especially those designed to protect market participants and the public. Furthermore, given the critical role that SEFs will play in the financial markets, it is essential that the Commission conduct a comprehensive and thorough review of all SEF applications for registration. Such a review is important for the protection of market participants and the public because it ensures that only qualified applicants who satisfy the statutory requirements and the Commission's regulations thereunder can operate as SEFs. Form SEF will enable the Commission to efficiently and accurately determine whether an applicant meets such requirements.

(2) Efficiency, Competitiveness, and Financial Integrity of the Markets

The Commission's interpretation of the registration provision to apply to facilities that meet the SEF definition, along with the minimum trading functionality requirement, will promote competition in the swaps market by providing a level playing field for entities that meet the SEF definition.

The standardized registration procedures and Form SEF will create an efficient process that will reduce the resources associated with submitting and reviewing completed applications. The final rules promote market competition by not discriminating between new and existing platforms applying to register as SEFs. For example, the elimination of the proposed existing trading activity requirement for temporary registration will ensure that new entities wishing to qualify for temporary registration will not be placed at a competitive disadvantage to existing entities. The required information in Form SEF (Exhibits I–K—Financial Information and M and T—Compliance) will allow the Commission to evaluate each applicant's ability to operate a financially-sound SEF and to appropriately manage the risks associated with its role in the financial markets.

(3) Price Discovery

The Commission has not identified any effects that these procedures will have on price discovery.

(4) Sound Risk Management Practices

The registration procedures will require SEF applicants to examine their proposed risk management program through a series of detailed exhibits and submissions. These risks include risks associated with the SEF applicant's financial resources and operational and market risks associated with trading on the SEF platform. The submission of exhibits relating to risk management, including Exhibits I–K (Financial Information) and M, O, and T (Compliance), will provide data and information that will aid the Commission staff's analysis and evaluation of an applicant's ability to comply with the core principles.

(5) Other Public Interest Considerations

The Commission has not identified any effects that these procedures will have on other public interest considerations other than those enumerated above.

4. Recordkeeping and Reporting

(a) Background

This release finalizes a series of provisions governing the recordkeeping and reporting responsibilities of SEFs and market participants.[1101] Among other requirements, these rules require each SEF to: (1) Provide the Commission with information about its business as a SEF (§§ 37.5(a), 37.503), provide a written demonstration of compliance with any core principle (§ 37.5(b)), and provide notice of any transaction involving the transfer of at least fifty percent of the equity interest in the SEF (§ 37.5(c)); (2) provide each counterparty to a swap on the SEF with a written record of all of the terms of the transaction (§ 37.6(b)); [1102] and (3) maintain records of all business activities, including a complete audit trail, investigatory files, and disciplinary files, in a form and manner acceptable to the Commission for at least 5 years (§ 37.1001).

A SEF must also: (1) Have the ability to obtain the information necessary to perform its self-regulatory responsibilities, including the authority to examine books and records (§§ 37.501, 37.502); (2) share information with other regulatory organizations, data repositories, and third-party data reporting services as required by the Commission (§ 37.504); (3) demonstrate that it has access to sufficient information to assess whether

[1099] *See* Application Procedures discussion above under § 37.3—Requirements for Registration in the preamble.

[1100] Tradeweb Comment Letter at 3–4 (Jun. 3, 2011).

[1101] For example, section 37.901 states that SEFs must report swap data as specified in parts 43 and 45 and meet the requirements of part 16. This provision references other Commission regulations, the costs and benefits of which are discussed in connection with those rulemakings.

[1102] The discretionary costs and benefits specific to the confirmation process are discussed in the part 23 rulemaking for new confirmation standards.

trading is being used to affect prices in its market (§ 37.404(a)); and (4) require market participants to keep records of their trading and make such records available to the SEF or the SEF's regulatory service provider, and the Commission, upon request (§ 37.404(b)).

The final rules also govern a SEF's use of data and records obtained from market participants, and prohibit a SEF from using for business or marketing purposes proprietary or personal information that it collects from any person unless the person clearly consents to the use of its information in such a manner (§ 37.7).

(b) Costs

The costs associated with responding to requests for information or demonstrations of compliance under recordkeeping rules in § 37.5 will include the staff hours required to prepare exhibits, draft responses, and submit materials. These costs will vary among SEFs depending upon the nature and frequency of Commission inquiries.

The Commission is reducing the reporting burden associated with final § 37.5(c) (equity interest transfers) by raising the threshold of when a SEF must file a notification with the Commission from 10 percent to 50 percent, by increasing the time frame for submitting such notification to 10 days rather than the next business day, and by eliminating the proposed requirement that SEFs must provide a series of documents and a representation along with the notification of an equity transfer interest. Under the final rules, the Commission, upon receiving a notification of an equity interest transfer, may request appropriate documentation of the transfer, but all the documentation should already be in the possession of the SEF. Accordingly, a SEF that enters into agreements that could result in equity interest transfers of 50 percent of more will incur one-time costs associated with preparing and submitting the required notification for each event.

Further, final § 37.1001 (requirement to maintain business records including audit trail, investigatory, and disciplinary files) codifies the substantive requirements found in Core Principle 10. Accordingly, most, if not all, of the costs associated with this rule are attributable to statutory mandate. Commenters did not mention any specific costs with respect to this rule. In addition, §§ 37.501 and 37.503 (establish and enforce rules and provide information to the Commission) codify requirements that appear in the statute and impose no additional costs on SEFs or market participants beyond those attributable to Congressional mandate.

Final § 37.502 requires each SEF to have rules that allow it to collect information or examine books and records of participants, but imposes no affirmative obligations on SEFs to do so. Accordingly, the only direct costs associated with § 37.502 are the de minimis costs associated with writing such rules.

Final § 37.504 (information sharing agreements) codifies and implements the Core Principle 5 requirement that a SEF have the capacity to carry out international information-sharing agreements as the Commission may require. Accordingly, SEFs will bear the cost of responding to Commission requests to share information with other regulatory organizations, data repositories, and third-party data reporting services. The cost of responding to Commission requests to share information will vary depending on the frequency and nature of the requests. To the extent that it is necessary for a SEF to enter into an information sharing agreement, the SEF may face additional costs such as negotiating such agreement. However, these costs are unlikely to be significant and will only be incurred should a SEF determine that it is necessary to enter into an information sharing agreement.

A market participant's cost to maintain records under § 37.404 (ability to obtain information) should be minimal if, as expected, it is part of its normal business practice. As a result, a market participant's additional cost to provide records to the SEF, and the SEF's cost to request and process the records, will be nominal if, based upon the Commission's experience with DCMs, such requests are infrequent and targeted to specific and significant market situations.

Additionally, the Commission has moved to guidance the requirement from proposed § 37.404(b) that a SEF require customers engaging in intermediated trades to use a comprehensive large-trader reporting system or be able to demonstrate that they can obtain position data from other sources. This change should mitigate costs by providing SEFs with greater flexibility to identify particular methods of compliance that suit their markets and business structures.

The Commission is also amending § 37.7 (use of proprietary or personal information) to allow SEFs to use certain information for business or marketing purposes if the person consents to the use of such information. The costs imposed by this provision are limited to the cost a SEF might incur in obtaining such person's consent to use its information for the purposes described above. The Commission does not prescribe the method by which a SEF must obtain such consent, which provides flexibility to SEFs.

(c) Benefits

The Dodd-Frank Act created a robust recordkeeping regime in order to reduce risks associated with swaps trading, increase transparency, and promote market integrity. Taken as a whole, the recordkeeping and reporting regulations adopted in this release will provide a SEF and the Commission with access to information that will enhance a SEF's ability to oversee its platforms and markets and enable the Commission to determine whether a SEF is operating in compliance with the statute and the Commission's regulations. The information-sharing requirement in § 37.504 will also provide cost-savings across market regulators by allowing the SEF to serve as the focal point for collecting certain data instead of each regulator duplicating efforts and collecting the information independently.

The confirmation requirement in § 37.6(b) will provide market participants with the certainty that transactions entered into on or pursuant to the rules of a SEF will be legally enforceable on all parties to the transaction. The requirement that a SEF provide each counterparty with a confirmation at the same time as execution will support the policy goal of straight-through processing to ensure that counterparties do not encounter gaps in their records as to their exposure level with other counterparties. This will also reduce the costs and risks involved in resolving disputes between counterparties to a trade; given dependency across trades, for example, if a participant has already unwound a position or taken a position via a trade under dispute or hedged it, any delays or uncertainties in the confirmation will result in higher costs from having to further unwind such linked trades.

The prohibition on the use by a SEF of proprietary or personal information for business purposes without consent (§ 37.7) will ensure that information provided to a SEF for regulatory purposes will not be used to advance the commercial interests of the SEF. The rule does, however, afford market participants the flexibility to consent to a SEF's use of their personal information for commercial purposes, if they so desire.

(d) Section 15(a) Factors

(1) Protection of Market Participants and the Public

The recordkeeping and reporting rules will protect market participants and the public by improving a SEF's and the Commission's ability to detect manipulative or disruptive activity. This, in turn, may deter SEFs and market participants from engaging in practices that may harm other market participants and harm the public by placing the larger economy at risk. Additionally, certification of continued compliance with the core principles will enable the Commission to ensure that performance of SEF functions is limited to only those entities that have adequately demonstrated an ability to comply with the Act and accompanying regulations. This will protect the public by promoting trading on regulated SEFs rather than OTC markets. While SEFs and the Commission may at times require access to market participants' information for regulatory purposes, the rules also protect market participants by stipulating that information they provide to SEFs for regulatory purposes is not used inappropriately to advance the commercial interests of the SEF without their consent.

(2) Efficiency, Competitiveness, and Financial Integrity of the Markets

The recordkeeping and reporting rules promote financial integrity as they ensure that the Commission and SEFs will have access to information to ensure that trading is conducted pursuant to the regulatory requirements, and that SEFs have sufficient documentation to detect, enforce, and deter potential rule violations.

(3) Price Discovery

The Commission has not identified any effects that these rules will have on price discovery considerations.

(4) Sound Risk Management Practices

Requiring that SEFs maintain audit trail, investigatory files, disciplinary, and other records will provide the Commission with access to data that will allow it to assess whether market participants are manipulating or otherwise disrupting trading in the swaps market. The Commission and SEFs can then take action to mitigate these risks.

(5) Other Public Interest Considerations

The Commission has not identified any effects that these rules will have on other public interest considerations other than those enumerated above.

5. Compliance

(a) Rule Writing and Enforcement

Under Core Principle 2, a SEF must implement a number of rule-writing and enforcement-related provisions. Among other requirements, a SEF must: (1) Establish a rulebook that addresses critical areas of market protection (§ 37.201), including rules prohibiting certain abusive trading practices (§ 37.203(a)), rules ensuring impartial access to the SEF's trading system (§ 37.202), and rules governing internal disciplinary procedures (§ 37.206); and (2) have resources for effective rule enforcement, including sufficient compliance staff and resources (§ 37.203(c)), authority to collect information and examine books and records (§ 37.203(b)), and procedures for conducting investigations into possible rule violations (§ 37.203(f)). The Commission is also clarifying that a SEF must establish and enforce rules for its employees that are reasonably designed to prevent violations of the Act and the rules of the Commission.

Additionally, § 37.204 provides SEFs with the option to choose to contract with a regulatory service provider for the provision of services to assist in complying with the CEA and Commission regulations, provided that the SEF supervise the regulatory service provider and retain exclusive authority with respect to all substantive decisions made by the regulatory service provider on the SEF's behalf.

(1) Costs

The costs associated with the rule-writing and enforcement provisions outlined above will consist mostly of one-time administrative outlays such as wages paid to attorneys and other compliance personnel for time spent drafting, reviewing, implementing, and updating rules. While new entities seeking to become SEFs would need to develop a rulebook, existing entities that already have written rules would only incur the incremental expense of updating them.

SEFs will also incur the initial and recurring costs associated with investing in the resources and staff necessary to provide effective rule enforcement. A SEF must have sufficient staff and resources, including resources to collect information and examine books and records, as well as automated systems to assist the compliance staff in carrying out the SEF's self-regulatory responsibilities. One commenter stated that these requirements are overly burdensome, but did not provide any data in support.[1103]

The Commission believes that having a minimum level of resources in place for rule enforcement purposes is a critical element of a sufficient compliance program, and is necessary pursuant to the statutory mandate of Core Principle 2, which requires SEFs to have the capacity to detect, investigate, and enforce its rules.[1104] SEFs may be able to reduce these costs by contracting with a regulatory service provider. In addition, the Commission reduced the costs of the final rules by eliminating the requirement in proposed § 37.203(c)(2) that a SEF monitor the size and workload of its compliance staff on an ongoing basis and, on at least an annual basis, formally evaluate the need to increase its compliance resources and staff. The Commission believes that the final rulemaking provides greater flexibility to SEFs in determining their approach to monitoring their compliance resources.

With respect to the use of a third-party regulatory service provider as permitted under § 37.204 (Regulatory services provided by a third party), two commenters in follow-up conversations indicated to the Commission staff that they each may contract (or have already contracted) with a regulatory service provider to perform various compliance functions at a cost of between $540,000 and $720,000 per year. This estimate represents the total cost of contracting a SEF's compliance functions to a regulatory service provider. Additionally, ISDA estimates an assessment on SEFs of $45,000 per year to contract with a regulatory service provider and $635,000 per year in dues for membership to the regulatory service provider.[1105] Section 37.204 is intended to be a cost-saving provision that mitigates the burden placed on SEFs by the rule enforcement program and, as stated by one commenter, this rule may reduce a SEF's overall costs by at least thirty percent.

SEFs that choose to contract with a regulatory service provider will need to hire sufficient compliance staff to supervise the quality and effectiveness of the services provided by the regulatory service provider, including the cost of holding regular meetings with the regulatory service provider to review and assess the adequacy of the services provided. SEFs will also incur the cost of documenting any instances

[1103] State Street Comment Letter at 5 (Mar. 8, 2011).

[1104] CEA section 5h(f)(2)(B); 7 U.S.C. 7b–3(f)(2)(B).

[1105] ISDA Discussion Paper at 28 (Nov. 2011).

in which their decisions differ from those recommended by their regulatory service provider.

(2) Benefits

Establishing a rulebook and an effective rule enforcement program will ensure that SEFs have specific and transparent procedures for addressing critical areas of market protection, and that SEFs will have the resources needed to implement those procedures. In particular, the requirements that a SEF offer impartial access, provide a fair and competitive market free of abusive trading practices, have sufficient resources to oversee and monitor the market, promptly investigate rule violations, establish disciplinary procedures that will deter abuses, and provide respondents with adequate safeguards will foster greater confidence that SEFs will provide a fair and competitive market free of trading abuses. This confidence is likely to result in increased trading of swaps on SEFs, improving liquidity and resulting in more competitive quotes.

According to conversations with commenters, SEFs that contract-out certain regulatory functions to a regulatory service provider are likely to realize significant cost savings from economies of scale—one commenter stated that contracting with a regulatory service provider would reduce a SEF's overall costs by at least thirty percent. According to NFA's Web site, it appears that many potential SEFs have already contracted with, or are in the process of contracting with, a regulatory service provider.[1106] Additionally, the rule governing the use of regulatory service providers ensures that SEFs will have sufficient staff to adequately supervise their regulatory service providers. By requiring that SEFs oversee the services provided by the regulatory service provider, the rule will likely result in cost savings to the SEF, as the failure of a service provider to adequately fulfill its duties may result in costs to SEFs for not meeting compliance obligations.

(3) Consideration of Alternatives

As referenced above, one of a SEF's rule-writing obligations is to develop rules governing internal disciplinary procedures, including rules governing disciplinary panels. CME stated that the Commission should not provide a prescriptive approach to disciplinary panels in proposed § 37.206(b) by requiring a ''hearing panel'' to be separate from a ''review panel.'' [1107] In response, the Commission removed the proposed requirement to establish separate hearing and review panels, instead allowing a SEF to establish one or more disciplinary panels, which will, among other things, issue notices of charges, conduct hearings, render written decisions, and impose disciplinary sanctions. The final rule will continue to achieve the goals of the proposed regulations by deterring violations of SEF rules, preventing recidivist behavior, and protecting respondents and customers harmed by violations of exchange rules. The procedures will achieve these goals while also providing SEFs with greater flexibility to structure their disciplinary bodies in a manner that best suits their business models and markets. The final rule is unlikely to impose additional personnel expenditures on SEFs, as the Commission anticipates that SEFs, like DCMs, will rely upon unpaid disciplinary panel members. The Commission anticipates that any actual costs associated with the disciplinary panel will be limited to de minimis administrative expenses for convening hearings over which the panel presides, such as postage, facility rentals, and printing.

The Commission notes that it has provided additional flexibility to SEFs by delaying the effective date of proposed § 37.206(o) to 1 year from the effective date of the SEF rules.[1108] Where a rule violation is found to have occurred, this provision limits the number of warning letters to one per rolling twelve month period for the same violation. The delay in the effective date of this provision is likely to mitigate costs for persons and entities so that they may adapt to the new SEF regime.

As recommended by commenters, the Commission has also adopted cost-mitigating alternatives that will provide SEFs with additional flexibility and discretion to implement disciplinary and other enforcement programs in the manner they find most suited to their market. In particular, the Commission has: eliminated the requirement that an investigation report include the member or market participant's disciplinary history at the SEF; removed the requirement that SEFs include a copy of a warning letter in an investigation report; amended the standard for commencing an investigation from a ''possible basis'' to a ''reasonable basis'' that a violation may have occurred or will occur; and deleted several provisions.[1109]

The Commission has also moved part or all of several provisions to guidance.[1110] By moving these provisions to guidance, entities will have the flexibility to tailor compliance programs to varying business models and trading platforms as well as unanticipated technological innovation or behavioral changes. While the Commission's pairing of guidance and regulations provides for a broad and flexible regulatory framework, it also promotes uniformity of safe and sound operation such that market participants and the public receive comparable levels of protection irrespective of the particular SEF on which they transact.

(4) Section 15(a) Factors (Rule Writing and Enforcement)

(i) Protection of Market Participants and the Public

Together, the rule-writing and enforcement provisions described above ensure that SEFs adopt and enforce operational rules that protect market participants and the public through orderly SEF-traded markets that are better protected from manipulative and disruptive conduct than pre-Dodd Frank OTC markets.

Rules prohibiting abusive trade practices such as wash trades and front-running are intended to deter such disruptive practices, and will protect market participants transacting on the SEF, as well as the general public, who may rely on prices derived from the market and who may be customers or shareholders of market participants.

The requirement that a SEF have the capacity to detect and investigate rule violations, including adequate compliance staff and resources to conduct automated trade surveillance

[1106] *See, e.g.,* ''NFA Signs Agreement with ICAP to provide Regulatory Services to ICAP's Swap Execution Facility'' (Mar. 20, 2012), *available at http://www.nfa.futures.org/NFA-regulation/regulationNewsRel.asp?ArticleID=3996.*

[1107] CME Comment Letter at 35 (Feb. 22, 2011).

[1108] The Commission is renumbering proposed § 37.206(o) to § 37.206(f). The Commission is also retitling this section as ''Warning letters.''

[1109] Deleted provisions include proposed § 37.203(c)(2) (ongoing monitoring of compliance staff and resources), the second sentence of proposed § 37.206(a) (annual review of enforcement staff), the majority of proposed § 37.206(c) (timely review of investigation reports), the last sentence of proposed § 37.206(h) (denial of charges and right to a hearing), and proposed § 37.206(j)(1)(vii) (cost of transcribing the record to be borne by the respondent).

[1110] *See* second part of proposed § 37.206(a) (enforcement staff), proposed § 37.206(d) (notice of charges), proposed § 37.206(e) (right to representation), proposed § 37.206(f) (answer to charges), proposed § 37.206(g) (admission or failure to deny charges), proposed § 37.206(h) (denial of charges and right to hearing), proposed § 37.206(i) (settlement of offers), the majority of proposed § 37.206(j) (hearings), proposed § 37.206(l) (right to appeal), proposed § 37.206(m) (final decisions), proposed § 37.206(o) (summary fines for violations of rules regarding timely submission of records), and proposed § 37.206(p) (emergency disciplinary actions).

and real-time monitoring (or contract with a regulatory service provider that has the capacity to perform these functions on its behalf while maintaining ultimate responsibility), will improve a SEF's ability to discover, sanction, and prevent violations and trading practices that could harm market participants and, indirectly, the public.

SEF-initiated investigations are a chief tool in protecting market participants and the public because they provide the first opportunity to respond to rule violations. Rules allowing the SEF to obtain information and inspect books and records will not only deter potential abusive trading practices, but will also enable the SEF to detect any manipulative or fraudulent activity quickly and efficiently. Prompt and thorough investigations are essential to detecting and remedying violations and ensuring that the violations do not harm market participants, result in price distortions, or contribute to systemic risks that can harm the economy.

In the event of demonstrated customer harm, restitution damages are generally required to make that customer whole again. Meaningful sanctions will serve as a general deterrent by discouraging others from engaging in violative conduct.

Impartial access requirements protect market participants from discriminatory treatment by prohibiting similarly situated market participants from receiving different access terms and fee structures.

The requirement that SEFs establish and enforce rules for its employees will protect market participants and the public by helping to ensure that employees operate in conformance with the Act and the rules of the Commission.

(ii) Efficiency, Competitiveness, and Financial Integrity of the Markets

The requirement that a SEF have the capacity to detect and mitigate rule and trade practice violations, including the ability to collect relevant information and examine books and records, and the requirement to establish and enforce rules for its employees will increase confidence in the financial integrity of the market by confirming to market participants that their orders and trades are handled pursuant to the posted rules of the SEF.

In addition, impartial access requirements will eliminate a potential impediment to participation, resulting in a more competitive market. At a minimum, as required by section 2(e) of the Act, market participants must meet the definition of an ECP, which ensures that only those participants with a sufficient level of sophistication and financial resources are able to participate. Similarly, requiring a SEF to maintain minimum level of enforcement resources will promote financial integrity by ensuring that a SEF has sufficient resources to investigate wrongdoing and make aggrieved market participants whole again. Moreover, markets where wrongdoing is detected and deterred will operate more efficiently.

(iii) Price Discovery

Many of the same rule provisions previously discussed that serve to increase efficiency, liquidity, and competitiveness will, by extension, improve price discovery, because the combination of increases in liquidity and competition will help create a marketplace in which the forces of supply and demand reflect more accurate pricing.

Timely investigations will increase the likelihood that manipulation is detected early-on and quickly remedied so that price discovery is not impaired. Additionally, a system of meaningful sanctions will deter disruptive and manipulative trade practices, providing a stable and competitive trading environment more likely to foster price discovery.

(iv) Sound Risk Management Practices

The requirement that SEF participants confirm to the SEF that they meet the definition of an ECP helps assure the market that participants in SEF-traded markets have the skill, knowledge, and/or financial resources necessary to enter into financially-sound transactions and understand sound risk management practices.

(v) Other Public Interest Considerations

The Commission has not identified any effects that these rules will have on other public interest considerations other than those enumerated above.

(b) Chief Compliance Officer

Section 37.1501 implements Core Principle 15 and requires each SEF to designate an individual to serve as Chief Compliance Officer (''CCO'') and to provide its CCO with the authority and resources to develop and enforce such policies and procedures as are necessary for the CCO to fulfill its statutory and regulatory duties.[1111] While the proposed rule prohibited the CCO from serving as a member of the SEF's legal department or as the SEF's general counsel, the Commission has eliminated this restriction from the final rule.

The final rule also outlines the procedures for oversight authority over the CCO and for appointing and removing the CCO. The CCO must meet with the board of directors at least annually and the Regulatory Oversight Committee (''ROC'') at least quarterly. The CCO must also prepare an annual compliance report containing a detailed account of the SEF's compliance with the CEA and Commission regulations, as well as a detailed account of the SEF's self-regulatory program, and submit it to the SEF's board of directors for review and to the Commission. SEFs must maintain records pertaining to, among other things, code of ethics and conflict of interest policies, copies of all materials created in furtherance of the CCO's duties, and any records relevant to the SEF's annual compliance report.

(1) Costs

Several commenters stated that the proposed requirement that the CCO may not be a member of the SEF's legal department and may not serve as its general counsel is prescriptive and unnecessary.[1112] In response to these comments, the Commission has eliminated the proposed prohibition on who may serve as CCO. Accordingly, a SEF may use its general counsel or a member of its legal department to serve as CCO. This change to the final rule should significantly reduce the expense imposed by the proposed rule, which would have necessitated the hiring of an individual specifically to serve as CCO at an estimated annual cost of $181,394.[1113] The cost of assigning the role of CCO to an existing employee will be significantly less.

Several commenters requested that the Commission grant SEFs more flexibility in determining how a CCO is appointed, compensated, supervised, and removed.[1114] In response to these comments, the Commission has removed the requirement in proposed

[1111] There are no costs associated with § 37.1501(a), which simply defines ''board of directors.''

[1112] ICE Comment Letter at 6–7 (Mar. 8, 2011); WMBAA Comment Letter at 6–7 (Mar. 8, 2011); MarketAxess Comment Letter at 27 (Mar. 8, 2011); CME Comment Letter at 12–13 (Mar. 8, 2011).

[1113] This estimate is derived from the 2010 edition of SIFMA's annual report on Management and Professional Earnings in the Securities Industry (hereinafter ''SIFMA Report''). This figure reflects the median total annual compensation (including base salary and bonus) for a CCO in the securities industry. The Commission notes that this estimate only includes the cost of hiring a CCO. Although not required by statute or rule, SEFs may also choose to hire additional staff at additional cost in order to support the CCO.

[1114] Tradeweb Comment Letter at 12 (Mar. 8, 2011); WMBAA Comment Letter II at 7 (Mar. 8, 2011); MarketAxess Comment Letter at 26 (Mar. 8, 2011).

§ 37.1501(c)(1) that a CCO's appointment and compensation requires a majority vote of directors, as well as the requirements in proposed § 37.1501(c)(3) that the SEF explain to the Commission the reason for the CCO's removal upon departure and that the SEF immediately appoint an interim CCO and permanent CCO as soon as reasonably practicable thereafter. The Commission notes that these revisions will provide the board of directors or senior officer of the SEF with a degree of flexibility to appoint, compensate, and remove the CCO in the manner that the SEF deems most appropriate.

Several commenters also stated that the proposed requirement that CCOs ensure ''compliance with the Act and Commission regulations'' is impracticable and overly burdensome, as one individual cannot ensure compliance of an entire organization.[1115] In response, the Commission is modifying § 37.1501(d)(4) to state that one of the CCO's duties shall include ''taking reasonable steps to ensure compliance with the Act and Commission regulations.'' This modification should also reduce potential costs resulting from this rule without diminishing its benefits.

(2) Benefits

The rule ensures that each SEF has a central figure responsible for overseeing major areas of compliance with the CEA and Commission regulations. The annual compliance report will enable a SEF and the Commission to evaluate the effectiveness of the SEF's self-regulatory programs and compliance with core principles, and to take remedial actions and make recommendations to improve the SEF's self-regulatory programs in order to ensure that the SEF remains in compliance with the core principles.

(3) Consideration of Alternatives

With respect to the annual compliance report requirement in proposed § 37.1501(e), FXall stated that compiling the required information and preparing the report in a timely manner annually will consume considerable resources.[1116] FXall proposed an alternative report that would request fewer pieces of information.[1117] Similarly, CME stated that the Commission should specify key areas that should be discussed in the annual report, rather than requiring the report to describe in detail the registrant's compliance with respect to each of the numerous components of the CEA and Commission regulations.[1118]

After weighing the comments and alternative proposals from FXall and CME, the Commission has determined to adopt the rules as proposed, subject to certain revisions detailed in the preamble.[1119] The Commission declines to adopt commenters' proposed alternatives because without the detailed information required by statute in the annual compliance report (including a self-assessment of policies and procedures designed to ensure compliance with each core principle, a discussion of areas for improvement, and a description of the SEF's self-regulatory program's staffing, structure, and cataloguing of disciplinary actions), the Commission would not have access to the information it needs to ensure that each SEF is in compliance with the CEA and Commission regulations.

(4) Section 15(a) Factors (Chief Compliance Officer)

(i) Protection of Market Participants and the Public

The requirements that a CCO oversee the SEF's compliance with the Act and Commission regulations and supervise the SEF's self-regulatory program will ensure that the SEF monitors compliance with key provisions of the CEA designed to protect market participants and the public (including provisions governing trade practice and market surveillance, real-time market monitoring, and financial reporting). To the extent that the Commission's regulations impose more specific or supplemental requirements when compared to those requirements explicitly imposed by section 5h(f)(15) of the CEA, those incremental costs are not likely to be significant. While it is possible that those incremental costs will be passed along to market participants, the size of those costs is likely to be negligible.

The Commission believes the CCO rules will protect market participants and the public by promoting compliance with the core principles and Commission regulations through the designation and effective functioning of the CCO, and the establishment of a framework for preparation of a meaningful annual review of a SEF's compliance program. The annual compliance report will allow the SEF and the Commission to periodically assess, and evaluate where necessary, the SEF's ability to comply with the core principles. Upon review of the compliance report, the SEF and the Commission will be better able to determine whether the SEF has appropriate programs in place to protect market participants and the public from market abuses.

Maintaining records as required under § 37.1501 regarding a CCO's efforts toward ensuring that the SEF complies with core principles provides a check against what is reported in the annual compliance report. Access to these records will assist the Commission in its determination of whether a SEF's self-regulatory program complies with the core principles and the Commission's regulations. If the Commission determines the self-regulatory program is not sufficient, the Commission will be able to use information required by the rule to take steps to remedy the shortcomings and to prevent disruptions that could harm market participants and the public.

(ii) Efficiency, Competitiveness, and Financial Integrity of the Markets

An effective CCO will implement measures that enhance the stability and efficiency of SEFs. Reliable and financially-sound SEFs are essential for the stability of the derivatives markets they serve. The CCO's oversight of self-regulatory programs and the annual compliance report will provide both the SEF and the Commission with an opportunity to assess the effectiveness of the SEF's self-regulatory programs and will help to detect and deter rule violations, increasing participation and competition in the markets.

Likewise, compliance reports will allow the Commission to review the effectiveness of and order changes to self-regulatory programs, thus enabling the market to function more efficiently while promoting confidence and attracting competition. A board that makes proactive changes to a SEF's self-regulatory programs based on the CCO's compliance report will build confidence in the market and increase competition.

(iii) Price Discovery

The Commission has not identified any effects that this rule will have on price discovery.

(iv) Sound Risk Management Policies

The CCO rules and the required annual compliance report will enhance a SEF's risk management policies by enhancing the standards for a SEF's compliance program. This in turn will emphasize risk management compliance

[1115] Tradeweb Comment Letter at 6–7 (Jun. 3, 2011); WMBAA Comment Letter II at 5–6 (Mar. 8, 2011); MarketAxess Comment Letter at 26 (Mar. 8, 2011); Tradeweb Comment Letter at 12 (Mar. 8, 2011); CME Comment Letter at 4 (Feb. 7, 2011).

[1116] FXall Comment Letter at 16 (Mar. 8, 2011).

[1117] *Id.* at 17.

[1118] CME Comment Letter at 7 (Feb. 7, 2011).

[1119] *See* discussion above under § 37.1501(e)—Annual Compliance Report Prepared by Chief Compliance Officer in the preamble.

because of its significance to the overall purpose and functioning of the SEF. Compliance with the SEF core principles and related regulations encompasses, among other things, procedures for ensuring the financial integrity of swaps entered on or through the facilities of the SEF, including the clearance and settlement of swaps, determination of resource adequacy, and system safeguards to establish and maintain a program of risk analysis and oversight. It is the responsibility of the CCO to ensure that the SEF is compliant with the core principles and the regulations thereunder, and is otherwise engaged in appropriate risk management activities in accordance with the SEF's own rules, policies, and procedures.

(v) Other Public Interest Considerations

The Commission has not identified any effects that these rules will have on other public interest considerations other than those enumerated above.

6. Monitoring and Surveillance

Core Principle 2 requires, among other things, that each SEF establish and enforce trading, trade processing, and participation rules that will deter abuses, and have the capacity to detect, investigate, and enforce those rules, including means to provide market participants with impartial access to the market and to capture information that may be used in establishing whether rule violations have occurred. Additionally, Core Principle 4, in part, requires each SEF to monitor trading in swaps to prevent manipulation and price distortion through surveillance, including methods of conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

(a) Monitoring of Trading

The rules that implement Core Principles 2 and 4 will require a SEF to, among other things: (1) Maintain an automated trade surveillance system (§ 37.203(d)); (2) conduct real-time market monitoring of all trading activity on its platform and have the authority to cancel trades and adjust trade prices when necessary (§ 37.203(e)); (3) maintain an acceptable audit trail program that enables the SEF to identify entities that are routinely non-compliant and to levy meaningful sanctions (§ 37.205); [1120] (4) monitor trading in real-time and accurately reconstruct trading activity in order to detect manipulation, price distortions, and other disruptions (§ 37.401); (5) and establish risk control mechanisms (including pauses and halts) to prevent and reduce the potential risk of market disruptions (§ 37.405).

(1) Costs

As discussed above, potential SEFs are likely to outsource these obligations to a regulatory service provider at significantly less cost than performing them in-house.[1121] Accordingly, the ongoing costs associated with these rules would already be included in the total annual cost of contracting with a regulatory service provider (plus the cost of overseeing the service provider's compliance).

Should a potential SEF that is a new entity choose to develop its own automated trade surveillance, real-time market monitoring, and audit trail systems, it is likely to incur the costs of developing and maintaining these systems, as well as the cost of hiring and maintaining adequate staff to administer them. The staff necessary to carry out a SEF's obligations under these rules would likely include analysts, investigators, and systems and/or IT specialists. However, existing entities may already receive the requisite data, and may also have some infrastructure in place to perform automated trade surveillance and real-time market monitoring. Accordingly, the incremental cost for existing entities would be limited to investing in enhancements to existing electronic systems to ensure that data is captured in compliance with the rules and that the systems themselves comply with the rules.[1122] The Commission notes that a SEF may use a unified monitoring system to jointly satisfy the requirements of § 37.401 (monitoring of trading and trade processing) and § 37.205 (audit trail).

Additionally, in response to comments that the standards set forth in the proposed requirements for real-time market monitoring are unreasonably high,[1123] the Commission is modifying the final rule to require a SEF to conduct real-time market monitoring designed to ''identify'' disorderly trading, instead of to ''ensure'' orderly trading. The Commission believes that requiring SEFs to identify disorderly trading when it occurs, rather than to ensure orderly trading at all times, will likely mitigate the overall burden of the rule. Furthermore, in response to CME's comment,[1124] the Commission is deleting the word ''investigating'' from proposed § 37.203(d), thus clarifying that a SEF's automated trade surveillance system will not be expected to conduct the actual investigation of potential trade practice violations. This deletion should further reduce costs for SEFs.

Tradeweb and MarketAxess commented that annual audits for member and market participant compliance with the audit trail requirements pursuant to § 37.205(c)(1) are burdensome and unwarranted.[1125] In the Commission staff's follow-up conversation regarding costs, one commenter asserted that this requirement will cost SEFs at least $300,000 annually.

To mitigate the costs associated with this provision, the Commission is modifying the language in final § 37.205(c) so that it applies only to members and persons and firms subject to the SEF's recordkeeping rules, rather than to members and ''market participants.'' With this change, the Commission limits the number of entities that a SEF must audit, which should reduce the cost noted above without any meaningful reduction in benefits because auditing those market participants subject to recordkeeping rules will ensure complete coverage of all activity pertinent to transactions on any given SEF.

Finally, SEFs may also incur the one-time cost of programming risk controls such as pauses and halts, as well as on-going costs to maintain and adjust such controls. For some SEFs, the costs of adding pause and halt functionality to swap contracts should be reduced since much of that technology is already commercially available and would not necessarily have to be developed in-

[1120] The Commission received no comments discussing the specific costs or benefits of § 37.406, which requires SEFs to make audit trail data available to the Commission and is an explicit requirement of the statute.

[1121] The Commission notes, as described in the preamble, that a SEF that elects to use the services of a regulatory service provider must retain certain decision-making authority and cannot outsource this authority to the regulatory service provider. *See, e.g.,* § 37.204(c)—Regulatory Decisions Required from the Swap Execution Facility in the preamble.

[1122] For example, SEFs are required to comply with a unified set of audit trail requirements for all methods of execution. The Commission notes that a SEF, for example, that utilizes the telephone as a means of interstate commerce in providing the execution methods in § 37.9(a)(2)(i)(A) or (B) may comply with certain of the audit trail requirements by recording all such communications that relate to or result in swap transactions. Such recordings must allow for reconstruction of all relevant communications between the SEF and its customers or involving SEF employees. While it is common industry practice to make and retain electronic time-stamped recordings of conversations, SEFs may incur costs to upgrade their recording systems to ensure that they comply with all of the audit trail requirements.

[1123] CME Comment Letter at 20 (Feb. 22, 2011).

[1124] *Id.* at 19–20.

[1125] Tradeweb Comment Letter at 6 (Jun. 3, 2011); MarketAxess Comment Letter at 22 (Mar. 8, 2011).

house.[1126] As noted in the Pre-Trade Functionality Subcommittee of the CFTC Technology Advisory Committee report, the costs would largely be borne by the exchanges and would center around intellectual property, as many exchanges develop, own, and manage their own technology.[1127] However, the costs associated with implementing risk controls were not described in detail in the Pre-Trade Functionality Subcommittee report and will likely vary greatly from one SEF to another depending on the type of risk controls that will be implemented and the nature of the SEF's trading platform. The Commission received no comments stating that risk controls cannot be implemented in a cost-effective manner using commercially available technology. As further noted in the Pre-Trade Functionality Subcommittee report, ''[s]ome measure of standardization of pre-trade risk controls at the exchange level is the cheapest, most effective and most robust path to addressing the Commission's concern [for preserving market integrity].'' [1128]

The Commission notes that while it is requiring pauses and halts in the rule, it is also enumerating in guidance other types of automated risk controls that may be implemented by SEFs in order to give SEFs greater discretion to select among the enumerated risk controls or to create new risk controls. The Commission believes that this combination of rules and guidance will facilitate orderly markets while maintaining a flexible environment that facilitates cost-effective innovation and development.

(2) Benefits

The automated trade surveillance system, real-time monitoring, audit-trail, and trade reconstruction requirements will promote orderly trading and will ensure that SEFs have the capability to promptly identify and correct market or system anomalies that could harm market participants and the public. These tools will improve SEF compliance staff's ability to record, recover, sort, and query voluminous amounts of data in order to better detect potential rule violations and abusive trading practices that harm market participants and market integrity. By having the tools and data to identify these potential rule violations, a SEF can quickly respond, mitigating their effects and helping to prevent them from generating systemic risk or other severe problems. SEFs will also have the tools and information needed to prosecute rule violations supported by evidence from audit trail data and order and trade information. These tools will not only allow SEFs to more effectively respond to rule violations and trading abuses, but will also deter market participants from engaging in such conduct in the first place since market participants will be aware that rule violations are likely to be detected.

While the provisions described above will increase the likelihood that SEFs will promptly identify market or system anomalies, SEFs must also have systems in place to respond to such anomalies after they occur. Risk controls such as automated trading pauses and halts can, among other things, allow time for market participants to analyze the market impact of new information that may have caused a sudden market move, allow new orders to come into a market that has moved dramatically, and allow traders to assess and secure their capital needs in the face of potential margin calls. Pauses and halts are intended to apply in the event of extraordinary price movements that may trigger or propagate systemic disruptions. Accordingly, a SEF's ability to pause or halt trading in certain circumstances and, importantly, to re-start trading through the appropriate re-opening procedures, will allow SEFs to mitigate the propagation of shocks that are of a systemic nature.

(3) Consideration of Alternatives

While commenters requested additional flexibility to determine the risk controls that should be implemented within their market,[1129] the Commission views pauses and halts as effective risk management tools that must be implemented to facilitate orderly markets. Moreover, in recognition that such risk controls should be adapted to the unique characteristics of the markets to which they apply, and that any controls should consider the balance between avoiding a market disruption while facilitating a market's price discovery function, the Commission enumerated the other types of risk controls in guidance. Accordingly, a SEF will have discretion to select and create risk controls to meet the unique characteristics of its market and cost structure.

Finally, in response to concerns about a lack of flexibility in the proposed requirement to coordinate risk controls among other markets or exchanges,[1130] the Commission is moving the language in proposed § 37.405 to guidance.[1131] The combination of rules and guidance pertaining to risk controls will ensure that, at a minimum, SEFs implement pauses and halts, while also granting SEFs the discretion to coordinate and adopt additional risk controls in a manner they find most cost effective and appropriate for their markets.

(4) Section 15(a) Factors (Monitoring of Trading)

(i) Protection of Market Participants and the Public

These rules will help ensure fair and equitable markets that are protected from abusive trading practices or manipulative conditions, and will ensure that rule violations and market disruptions that could harm market participants and the public may be prevented or detected, reconstructed, investigated, and prosecuted. The absence of these regulations would result in an increased potential for violations to go undetected and for market disruptions to create distorted prices or systemic risks that could harm the economy and the public. These requirements will strengthen SEFs' oversight of their trading platforms, increase the likelihood of early detection and prompt responses to rule violations and market disruptions, and result in stronger protection of market participants and the general public from rule violations, trading abuses, and other market disruptions that could harm market participants and, directly or indirectly, the public and the economy as a whole.

[1126] In a separate Dodd-Frank rulemaking, DCMs are now required to have the same types of risk controls. *See* Core Principles and Other Requirements for Designated Contract Markets, 77 FR 36612 (Jun. 19, 2012).

[1127] *See* ''Recommendations on Pre-Trade Practices for Trading Firms, Clearing Firms and Exchanges involved in Direct Market Access,'' Pre-Trade Functionality Subcommittee of the CFTC Technology Advisory Committee (''TAC Subcommittee Recommendations''), at 4 (Mar. 1, 2011), *available at http://www.cftc.gov/ucm/groups/public/@swaps/documents/dfsubmission/tacpresentation030111_ptfs2.pdf*. The Commission notes that the subcommittee report was submitted to the Technology Advisory Committee and made available for public comment, but no final action has been taken by the full committee.

[1128] *See* TAC Subcommittee Recommendations at 4 (Mar. 1, 2011).

[1129] *See, e.g.,* ICE Comment Letter at 5 (Mar. 8, 2011); Tradeweb Comment Letter at 11 (Mar. 8, 2011); CME Comment Letter at 27 (Feb. 22, 2011).

[1130] CME Comment Letter at 26 (Feb. 22, 2011).

[1131] The guidance provides that a SEF with a swap that is linked to, or a substitute for, other products, either on its market or on other trading venues, must, to the extent practicable, coordinate its risk controls with any similar controls placed on those other products. If a SEF's swap is based on the level of an equity index, such risk controls must, to the extent practicable, be coordinated with any similar controls placed on national security exchanges. *See* guidance to Core Principle 4 in appendix B to part 37.

(ii) Efficiency, Competitiveness, and Financial Integrity of the Markets

These rules ensure that violations and market anomalies are detected and promptly addressed and do not generate systemic risk or other problems that could interfere with efficient and competitive markets. The requirements also help ensure that market prices are not distorted by prohibited activities. The rules strengthen market confidence and enable the market to operate more efficiently by deterring rule violations and by establishing conditions under which trading will be paused or halted, thereby promoting efficient pricing and competitive trading.

(iii) Price Discovery

Requiring SEFs to conduct effective monitoring and surveillance of their markets and to have the capacity to detect rule violations will help ensure that legitimate trades and fundamental supply and demand information are accurately reflected in market prices. The mitigation of rule violations, which detract from the price discovery process in SEF markets, will promote confidence in the prices market participants use to hedge risk and provide confidence in the price discovery process.

(iv) Sound Risk Management Practices

The rules are designed to allow SEFs to better deter, detect, and address operational risks posed by trading practices or trading activities. To the extent they deter overly risky actions by market participants, the rules will lower potential losses and costs to SEFs and market participants and promote sound risk management practices.

(v) Other Public Interest Considerations

The Commission has not identified any effects that these rules will have on other public interest considerations other than those enumerated above.

(b) Monitoring of Contracts

The Commission is adopting rules that will require a SEF to: (1) Submit new swap contracts to the Commission in advance of listing and trading and demonstrate that the contracts are not readily susceptible to manipulation (§ 37.301); [1132] (2) monitor physical delivery swaps' terms and conditions and availability of the deliverable commodity (§ 37.402); (3) monitor the reference price of cash-settled swaps used to determine cash flow or settlement, the continued appropriateness of the methodology for the reference price for SEFs that derive that price, and the continued appropriateness of the third-party index or instrument for reference prices that rely on such index or instrument (§ 37.403); and (4) adopt position limitation or position accountability in accordance with Commission regulations (§ 37.601).[1133]

(1) Swaps Not Readily Susceptible to Manipulation

(i) Costs

Compliance with these regulations will impose costs equally on startups and entities with existing trading platforms seeking SEF registration because all SEFs must monitor their contracts in accordance with the rules on an ongoing basis. However, SEFs have incentives to review their contracts to ensure they are not susceptible to manipulation even in the absence of the core principle or these rules. For example, SEFs have a business need to develop products that provide market participants with reliable instruments that can be used for hedging and risk management. In order to do so, new and existing entities will need staff to research the underlying markets (at times using data from private sources) and to certify that the contract rules comply with Core Principle 3. SEFs likely will already have staff to ensure compliance with the applicable core principles and should plan on legal staff devoting approximately four hours per contract at a cost of approximately $400 to review a swap's compliance with Core Principle 3 as part of a sound business practice. The scale of these costs largely depends on how novel or complex a contract is, how many contracts the SEF plans to list at any given time, and whether listed swaps are similar to each other.

The Commission notes that this guidance will likely reduce the time and costs that regulated markets will incur in providing the appropriate information and will likely reduce the amount of time it takes the Commission staff to analyze whether a new product or rule amendment is in compliance with the CEA.

(ii) Benefits

When SEFs list contracts that are not readily susceptible to manipulation, they contribute to the integrity and stability of the marketplace by giving traders confidence that the prices associated with swaps reflect the true supply of and demand for the underlying commodities or financial instruments. Section 37.301, which implements the Core Principle 3 requirement that SEFs permit trading only in swaps that are not readily susceptible to manipulation, will promote an environment where swap prices are less likely to be subject to distortion and extreme volatility, allowing market participants to buy and sell physical and financial products at fair prices and to hedge price risk appropriately.

The guidance outlined in appendix C to part 38 provides a reference for existing and new regulated markets for information that should be provided to the Commission for new products and rule amendments based on best practices developed over the past three decades by the Commission and other regulators. This guidance will likely reduce the time and costs that regulated markets will incur in providing the appropriate information and should mitigate the need for extensive follow-up discussions with the Commission. The guidance also reduces the amount of time it takes the Commission staff to analyze whether a new product or rule amendment is in compliance with the CEA.

(2) Monitoring of Physical-Delivery Swaps

(i) Costs

While the Commission did not receive comments discussing the costs of this provision, the Commission is revising the requirement in proposed § 37.402(a)(2) [1134] so that SEFs only have to monitor the availability of the commodity supply, instead of monitoring whether the supply is adequate. This reduced monitoring obligation should lower ongoing costs for SEFs since they will not have to make determinations regarding adequacy of deliverable supply as frequently as under the proposed rule, while achieving comparable benefit for market participants and the public. Costs will be further reduced by the Commission's decision to remove from proposed § 37.402 the requirements that SEFs monitor specific details of the supply, marketing, and ownership of the

[1132] SEFs must make this demonstration by providing the information set forth in appendix C to part 38. *See* Core Principles and Other Requirements for Designated Contract Markets, 77 FR at 36722.

[1133] Core Principle 6 requires that SEFs, for each contract and as necessary and appropriate, adopt position limitation or position accountability, and that, for any contract that is subject to a position limitation established by the Commission pursuant to CEA section 4a(a), SEFs must set the position limit at a level not higher than the position limitation established by the Commission. *See* Position Limits for Derivatives, 76 FR 4752 (proposed Jan. 26, 2011).

[1134] Proposed § 37.402(a)(2) is now final § 37.402(b).

commodity to be physically delivered. Instead, final appendix B to part 37 lists guidance for monitoring conditions that may cause a physical-delivery swap to become susceptible to price manipulation or distortion. Listing these details in guidance will provide SEFs with flexibility in meeting their monitoring obligations associated with physical-delivery swaps, which will likely further mitigate any burden associated with compliance. The Commission notes that a SEF may contract with a regulatory service provider to perform these duties at potentially a lower cost.

(ii) Benefits

Section 37.402 requires that SEFs monitor physical-delivery swaps' terms and conditions as they relate to the underlying commodity market and monitor the availability of the supply of the commodity specified by the delivery requirements of the swap. Such monitoring will allow SEFs to take appropriate steps to relieve the potential for market congestion or manipulation in situations where participants' ability to make good on their delivery obligations is threatened due to supply shortages, disruptions or shortages of transportation, or disruptions due to weather or labor strikes. Any interference with the physical-delivery process will likely lead to disruptions in fair and orderly trading and participants' ability to properly manage commercial risk. Moreover, close monitoring of physical-delivery contracts helps prevent the manipulation of prices, and the public benefits from prices that reflect actual market conditions.

(3) Monitoring of Cash-Settled Swaps

(i) Costs

Argus commented that monitoring of trading in underlying price indexes will be costly, and that if SEFs are required to monitor the availability and pricing of the commodity that forms the basis of a price index (particularly where an index price is published based upon transactions that are executed off the DCM or SEF), the SEF may choose not to list the contract and thus traders will lose a hedging instrument.[1135]

In response to this comment, the Commission is amending the requirement in proposed § 37.403(a)(1) that a SEF monitor the availability and pricing of the commodity making up the index to which the swap will be settled, to only require the SEF to monitor the pricing. The Commission is also moving the other requirements for monitoring and obtaining information on traders' activities in proposed § 37.403(a) and (b) to guidance. The combination of rules and guidance implementing Core Principle 4 will help ensure that the cash settlement process is not susceptible to manipulation by providing rules and guidance on how to meet the requirements of the core principle, while providing SEFs with the flexibility to adopt the most appropriate method of compliance in light of the nature of their contracts and market structure.

As discussed above, the Commission notes that compliance with these provisions can likely be outsourced to a regulatory service provider at lower cost, and that on-going monitoring of pricing could be handled by the regulatory service provider.

(ii) Benefits

The § 37.403 requirement that a SEF monitor cash-settled swaps as they relate to the reference price, instrument, or index to which the swap is settled will reduce the potential for market disruptions or manipulations and ensure that they are discovered and promptly addressed. The interconnected nature of swap and underlying cash markets may create incentives for traders to disrupt or manipulate prices in the cash market in order to influence the prices in the swap market (potentially to benefit the trader's position in the swap). Detecting and preventing this sort of manipulation requires information on traders' activities in the cash-settled contract and in, or related to, the underlying instrument or index to which it is settled. This rule ensures that SEFs have the information and tools they need to accomplish their statutory duty to prevent manipulation and disruptions to the cash-settlement process.

(4) Section 15(a) Factors (Monitoring of Contracts)

(i) Protection of Market Participants and the Public

The demonstration required by § 37.301 and the monitoring requirements in §§ 37.402 and 37.403 allow for a timely review by the Commission staff of the SEF's supporting analysis and data to determine whether a contract is not readily susceptible to manipulation, and to ensure that SEFs are able to adequately collect information on market activity, including special considerations for physical-delivery contracts and cash-settled contracts. As a group, these rules protect market participants by helping to prevent price manipulation and protect the public by creating an environment that fosters prices that reflect actual market conditions.

(ii) Efficiency, Competitiveness, and Financial Integrity of the Markets

By providing guidance based on best practices regarding what a SEF should consider when developing a swap or amending the terms and conditions of an existing swap, the contracts listed by SEFs, as a whole, should be more reflective of the underlying cash market, thus providing for efficient hedging of commercial risk. Sections 37.402 and 37.403 protect against disruptions and market manipulation, promote competition, and promote the efficiency and financial integrity of transactions in SEF markets because market mispricing that is due to disruptions or manipulation interferes with a market's efficiency by limiting its ability to reflect the value of the underlying product. Markets that are prone to disruption or manipulation have a severe competitive disadvantage to those without such problems. These rules are designed to address and mitigate such problems for swap transactions.

(iii) Price Discovery

Manipulation or other market disruptions interfere with the price discovery process by artificially distorting prices and preventing those prices from properly reflecting the fundamental forces of supply and demand. These rules are designed to detect and, where possible, prevent such market mispricing, and to detect disconnects between swaps and their related market prices (*e.g.,* between cash market prices and the prices of related futures and swaps).

(iv) Sound Risk Management Practices

By following the best practices outlined in the guidance in appendix C to part 38 and the requirements of §§ 37.402 and 37.403, a SEF should minimize the susceptibility of a swap to manipulation or price distortion at the time it is developing the contract's terms and conditions. By performing this work early-on, a SEF should minimize risks to its clearing house and to market participants. Sound risk management practices rely upon execution of hedge strategies at market prices that are free of manipulation or other disruptions. These rules are designed to facilitate hedging at prices free of distortions that may be preventable by adequate controls.

[1135] Argus Comment Letter at 6–7 (Feb. 22, 2011).

(v) Other Public Interest Considerations

The Commission has not identified any effects that these rules will have on other public interest considerations other than those enumerated above.

7. Financial Resources and Integrity

(a) Background

Section 37.1301 codifies the Core Principle 13 requirement that a SEF must maintain sufficient financial resources to cover operating costs for at least one year, calculated on a rolling basis. The rules implementing Core Principle 13 also clarify the types of financial resources available to SEFs to satisfy the financial resources requirements (§ 37.1302) and require that each SEF, no less frequently than each fiscal quarter, calculate the financial resources it needs to meet the financial resource requirements, as well as the current market value of each financial resource (§§ 37.1303, 37.1304). The rules also require SEFs to maintain unencumbered liquid financial assets, such as cash or highly liquid securities, equal to at least six months' operating costs, or a committed line of credit or similar facility (§ 37.1305), and to report certain information regarding their financial resources to the Commission quarterly or upon request (§ 37.1306).

Sections 37.701, 37.702, and 37.703 implement Core Principle 7 regarding the financial integrity of transactions. Section 37.701 requires transactions executed on or through a SEF that are mandatorily or voluntarily cleared to be cleared through a Commission-registered DCO, or a DCO that the Commission has determined is exempt from registration. Section 37.702 requires a SEF to establish minimum financial standards for its members, which at a minimum, requires that members qualify as ECPs. Section 37.703 requires a SEF to monitor its members to ensure that they continue to qualify as ECPs.

(b) Costs

ISDA estimated that it would cost each SEF $1.4 million per year to comply with the financial resource requirement.[1136] The Commission notes that the requirement that a SEF maintain sufficient financial resources to cover its operating expenses for one year appears in the statute itself, and that the Commission does not have the discretion to lower the financial resource requirement. Accordingly, § 37.1301 imposes no additional costs on SEFs or market participants beyond those imposed by statute.

With respect to the reporting requirements in § 37.1306, MarketAxess stated that the proposed requirements are unnecessary and burdensome.[1137] The Commission expects that most, if not all, SEFs would calculate and prepare financial statements regularly. Accordingly, the Commission does not believe that requiring SEFs to meet the quarterly reporting requirements imposes a significant burden on SEFs. Extrapolation from the prepared financial statements should be relatively straightforward, but will require staff and technology resources to calculate, monitor, and report financial resources. In follow-up conversations with the Commission staff, one commenter indicated that the reporting requirements would costs SEFs about $100,000 per year. Given the staffing and operational differences among SEFs, this cost will vary, perhaps significantly.

(c) Benefits

The financial resources provisions ensure the financial stability of SEFs, which promotes the integrity of the markets and confidence of market participants trading on SEFs. The requirement that SEFs maintain six months' worth of unencumbered liquid financial assets (*i.e.,* cash and/or highly liquid securities) will also promote market integrity by ensuring that SEFs will have sufficient financial resources to continue to operate and wind-down in an orderly fashion, if necessary. In addition, the reporting requirements will ensure that the Commission can monitor the SEF's compliance with Core Principle 13.

Sections 37.702 and 37.703 promote financial integrity by requiring SEFs to establish minimum financial standards for its members and to ensure that they continue to qualify as ECPs.

(d) Consideration of Alternatives

Phoenix recommended only requiring SEFs to maintain financial resources necessary to operate for six months.[1138] As described above, the statute mandates that a SEF maintain sufficient financial resources to cover its operating expenses for one year. Accordingly, the Commission does not have the discretion to consider alternative financial resource requirements.

CME and Phoenix proposed an alternative liquidity requirement, arguing that a wind-down typically takes three months and that the proposed requirement of six months of liquid assets should be reduced accordingly.[1139] The Commission believes that three months' worth of liquid financial assets is an insufficient buffer to protect against events which may threaten a SEF's viability, and believes that six months of liquid assets will provide enough time for a SEF to liquidate its other assets so that it may have adequate resources to operate for up to one year, as required by the statute.

CME stated that it would not be feasible for SEFs to comply with the proposed 17-business-day filing deadline for submission of the financial resources report and recommended an alternative reporting deadline of 40 calendar days after the end of each fiscal quarter and 60 calendar days after the end of each fiscal year.[1140]

The Commission is adopting the alternative recommended by CME and is extending the proposed 17-business-day filing deadline to 40 calendar days for the first three quarters. The Commission's adoption of this alternative will mitigate the costs of preparing and submitting these reports as the new extended timeline will harmonize the Commission's regulations with the SEC's timelines for submission of Form 10–Q. Similarly, the Commission has extended the filing deadline to 60 days for the fourth quarter report to harmonize the Commission's deadline with the SEC's deadline for Form 10–K.

With respect to proposed § 37.703, FXall stated that SEFs would be burdened by the ''onerous financial surveillance obligations'' and recommended that a SEF, like a DCM, be able to delegate its financial surveillance functions to the NFA Joint Audit Committee.[1141] ABC/CIEBA stated that the rule would create significant barriers to entry, stifle competition, and lead to higher prices.[1142] In response to these comments, the Commission has revised § 37.703 to remove a SEF's financial surveillance obligations and to only require that a SEF monitor its members to ensure that they continue to qualify as ECPs. This amendment obviates the

[1136] ISDA Discussion Paper at 32 (Nov. 2011). The Commission notes that the components of this cost estimate are unclear.

[1137] MarketAxess Comment Letter at 40 (Mar. 8, 2011).

[1138] Phoenix Comment Letter at 4–5 (Mar. 7, 2011).

[1139] CME Comment Letter at 37 (Feb. 22, 2011); Phoenix Comment Letter at 4–5 (Mar. 7, 2011). SDMA, however, recommended that the Commission require that SEFs have at least 12 months of unencumbered capital. SDMA Comment Letter at 12 (Mar. 8, 2011).

[1140] CME Comment Letter at 38 (Feb. 22, 2011).

[1141] FXall Comment Letter at 13 (Mar. 8, 2011).

[1142] ABC/CIEBA Comment Letter at 11 (Mar. 8, 2011).

need to delegate any financial surveillance functions and minimizes the costs imposed by the rule. As a SEF may rely on representations from its members that they continue to qualify as ECPs, the costs of the rule should be de minimis and administrative in nature.

(e) Section 15(a) Factors

(1) Protection of Market Participants and the Public

The financial resources rules will protect market participants and the public by establishing uniform standards and a system of Commission oversight that ensures that trading occurs on a financially stable facility, which in turn, will mitigate the risk of market disruptions, financial losses, and systemic problems that could arise from a SEF's failure to maintain adequate financial resources. These requirements will enable a SEF to fulfill its responsibilities of ensuring that trading occurs on a liquid, fair, and financially secure platform by maintaining appropriate minimum financial resources on hand and on an ongoing basis to sustain operations for a reasonable period of time. Additionally, in the event that a SEF does have to wind down its operations, SEFs that have sufficient amounts of liquid financial resources will be better positioned to close out trading in a manner not disruptive to market participants or to members of the public who rely on SEF prices or who are customers or shareholders of market participants.

(2) Efficiency, Competitiveness, and Financial Integrity of the Markets

The financial resources rules promote the financial integrity of the markets by requiring SEFs to have adequate operating resources (*i.e.,* operating resources sufficient to fund both current operations and ensure operations for a sufficient length of time in the future), and preventing those SEFs that lack these resources from expanding in ways that may ultimately harm the broader financial market (*i.e.,* confining the operations of SEFs to levels their financial resources can support).

Sections 37.702 and 37.703 will promote financial integrity by ensuring that SEFs establish minimum financial standards for their members and monitor those members to ensure that they continue to qualify as ECPs.

(3) Price Discovery

The Commission has not identified any effects that these rules will have on price discovery.

(4) Sound Risk Management Practices

By setting specific standards with respect to how SEFs should assess and monitor the adequacy of their financial resources, the financial resources rules promote sound risk management practices by SEFs and further the goal of minimizing systemic risk.

Sections 37.702 and 37.703 will promote sound risk management practices by ensuring that SEF members have the financial resources necessary for proper management of the risk associated with their swap positions. These rules will also further the goal of minimizing systemic risk.

(5) Other Public Interest Considerations

The Commission has not identified any effects that these rules will have on other public interest considerations other than those enumerated above.

8. Emergency Operations and System Safeguards

(a) Background

The Commission's guidance for Core Principle 8 addresses procedures for handling emergency situations. Specifically, the guidance referenced in § 37.801 provides that a SEF can comply with Core Principle 8 by having rules that allow it to intervene as necessary to maintain markets with fair and orderly trading and to prevent or address manipulation or disruptive trading practices by, among other things, imposing or modifying position limits, intraday market restrictions, or special margin requirements.

Section 37.1401 codifies Core Principle 14 by requiring a SEF to establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk (§ 37.1401(a)) and to maintain a business continuity-disaster recovery (''BC DR'') plan and resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations (§ 37.1401(b)). Under §§ 37.1401(d)–(e), a SEF must notify the Commission promptly of certain significant systems malfunctions, including the activation of the SEF's BC–DR plan, and must provide advance notice of any material planned changes to automated systems or risk analysis and oversight programs.

(b) Costs

ISDA estimated that SEFs will spend an average of $1,116,000 initially and $866,000 annually on disaster recovery procedures covered by the regulations implementing Core Principle 14.[1143] The Commission recognizes that the costs of establishing and maintaining backup facilities could be substantial if the applicant does not already have these facilities in place to support another business area. The Commission also notes that the requirement that a SEF establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery appears in the statute and is not the product of Commission discretion.

CME commented that the requirement under proposed § 37.1401(g) that SEFs provide the Commission with timely advance notice of all planned changes to automated systems that may impact the reliability of such systems is burdensome and not cost-effective.[1144] In response to this comment, the Commission is reducing the burden and cost associated with the proposed rule by requiring a SEF to promptly advise the Commission only of all ''significant'' system malfunctions, and to provide timely advance notification of only ''material'' changes to automated systems or risk analysis and oversight programs (the proposed rule required notice of all system malfunctions and all changes to programs of risk analysis and oversight).

While no comments addressed the subject directly, the Commission is also moving several proposed provisions to guidance.[1145] The Commission believes that the combination of rules and guidance governing a SEF's emergency operations will provide SEFs with sufficient flexibility to develop optimal emergency systems and procedures, while ensuring that SEFs will also take specific measures to maintain markets with fair and orderly trading.

(c) Benefits

The guidance in appendix B to Core Principle 8 governing emergency operations ensures that SEFs have flexible authority to take prompt, decisive action to restore orderly trading

[1143] ISDA Discussion Paper at 32 (Nov. 2011).

[1144] CME Comment Letter at 36–37 (Feb. 22, 2011).

[1145] The Commission is moving the following provisions to guidance: (1) Proposed § 37.1401(c) suggesting that a SEF follow generally accepted standards and best practices in addressing the categories of its risk analysis and oversight program; (2) the portion of proposed § 37.1401(d) discussing the SEFs obligation to resume the trading and clearing of swaps on the next business day following a disruption; (3) the portion of proposed § 37.1401(i) suggesting that a SEF's testing of its automated systems and business continuity-disaster recovery capabilities be conducted by qualified, independent professionals; (4) proposed § 37.1401(j) discussing a SEF's coordination of its business continuity-disaster recovery plan with those of others.

and respond to market behavior that could cause significant financial losses and widespread systemic failures that could harm market participants and the public.

In addition, the rules implementing Core Principle 14 reflect generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems, which will reduce the frequency and severity of automated system security breaches or functional failures, thereby augmenting efforts to mitigate systemic risk and ensure market continuity in the event of system failures. Ensuring the resilience of the automated systems of a SEF and the ability of a SEF to recover and resume trading promptly in the event of a disruption of its operations will be crucial to the robust and transparent systemic risk management framework established by the Dodd-Frank Act.

Based on the Commission's experience, these requirements reflect best practices in the futures markets, where DCM compliance with generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems can reduce the frequency and severity of automated system security breaches or functional failures, thereby augmenting efforts to mitigate systemic risk. These practices will be well-served in the swaps markets as well.

Finally, notice to the Commission concerning systems malfunctions, security incidents, or any events leading to the activation of a SEF's BC–DR plan will assist the Commission's oversight and its ability to assess systemic risk levels and intervene when needed to protect market participants and the public.

(d) Consideration of Alternatives

CME stated that the regulations pursuant to Core Principle 8 should clarify that a SEF has flexibility and independence to address market emergencies.[1146] As discussed in further detail in the preamble, the Commission did not issue rules for compliance with Core Principle 8. However, the Commission clarified its guidance to the core principle and is adopting this cost-mitigating alternative by revising the guidance to make clear that SEFs retain the authority to respond independently to emergencies in an effective and timely manner consistent with the nature of the emergency. Accordingly, a SEF will have flexibility to address market emergencies using the methods that it deems to be most appropriate, provided that its actions are taken in good faith and the Commission is notified of such actions in a certified rule submission.

(e) Section 15(a) Factors

(1) Protection of Market Participants and the Public

The rules and guidance outlining emergency procedures pursuant to Core Principles 8 and 14 protect market participants and the public through both discretionary actions taken by a SEF's management as well as through automated risk analysis systems that trigger specific responses. Because automated systems play a central and critical role in today's electronic financial market environment, oversight of core principle compliance by SEFs with respect to automated systems is an essential part of effective oversight of both futures and swaps markets.

Emergency rules and procedures provide SEFs with the authority and an established process by which to intervene in markets during times of crisis so that trading can continue in an orderly manner to the extent possible and so that potential harm to market participants and the public can be avoided.

Timely reporting to the Commission of significant system malfunctions, material planned changes to automated systems, and material planned changes to programs of risk analysis and oversight is necessary for the Commission to fulfill its responsibility to oversee the swaps markets. Timely reporting will also augment the Commission's efforts to monitor systemic risk (which protects the public), and ultimately further the protection of market participants and, indirectly, the public by ensuring that automated systems are available, reliable, secure, have adequate scalable capacity, and are effectively overseen.

(2) Efficiency, Competitiveness, and Financial Integrity of the Markets

A SEF that has policies and procedures in place addressing its emergency authority will be better positioned to promptly intervene in markets to respond to or eliminate conditions that may deter participation and detract from overall market confidence, which could lead to diminished market efficiency, competitiveness, and perceptions of financial integrity. Sophisticated computer systems capable of automatically predicting operational risks will enhance the efficiency and financial integrity of the markets by ensuring that in emergency situations, trading remains uninterrupted and transactional data and positions are not lost. Active and periodic testing of emergency systems and procedures promotes confidence in the markets, encouraging liquidity and stability.

Safeguarding the reliability, security, and capacity of a SEF's computer systems is also essential to the mitigation of system risk for the financial system as a whole. The global OTC market is estimated to have in excess of $600 trillion in outstanding contracts.[1147] The ability of SEFs to recover and resume trading promptly in the event of a disruption in their operations is important to the U.S. economy. Notice to the Commission concerning systems malfunctions, systems security incidents, or events leading to the activation of a SEF's BC–DR plan will assist the Commission's oversight and its ability to assess systemic risk levels. It would present unacceptable risks to the U.S. financial system if swaps markets that comprise critical components of the world financial system were to become unavailable for an extended period of time.

(3) Price Discovery

Any interruption in trading in a swap on a SEF can distort the price discovery process on other related swaps.[1148] The Commission views the emergency operations rules adopted herein as likely to facilitate the price discovery process by mitigating the risk of operational market interruptions from disjoining the forces of supply and demand. The presence of emergency authority procedures signals to the market that a SEF is a financially sound place to trade, thus attracting greater liquidity which leads to more accurate price discovery.

(4) Sound Risk Management Practices

Participants who use SEF-traded swaps to manage commercial price risks should benefit from markets that behave in an orderly and controlled fashion in the face of emergency situations. If prices move in an uncontrolled fashion due to a market emergency, those who are managing risk may be forced to exit the market as a result of unwarranted margin calls or the deterioration of their capital. Those who want to enter the

[1146] CME Comment Letter at 28 (Feb. 22, 2011).

[1147] *See* Statistical release: OTC derivatives statistics at end–December 2011, The Bank for International Settlements (May 2012), *available at http://www.bis.org/publ/otc_hy1205.htm.*

[1148] For example, one swap may base its prices on the prices of one or more other swaps traded on other SEFs.

market to manage risk may be able to do so only at prices that do not reflect the actual supply and demand fundamentals, but have moved due to an uncontrolled emergency situation.

Reliably functioning computer systems and networks are crucial to comprehensive risk management, and prompt notice to the Commission concerning systems malfunctions, systems security incidents, or any events leading to the activation of a SEF's BC–DR plan will assist the Commission in its oversight role and bolster its ability to assess systemic risk levels. Adequate system safeguards and timely notice to the Commission regarding the status of those safeguards are crucial to mitigation of potential systemic risks. Should an emergency render a SEF temporarily inoperable, market participants will continue to be able to mitigate their risk through open positions transferred from the inoperable SEF to a functioning one with little to no gap in exposure. In the event of a longer period of down-time, market participants could establish functionally equivalent open positions to mimic the intended result of the swap.

(5) Other Public Interest Considerations

The Commission has not identified any effects that these rules will have on other public interest considerations other than those enumerated above.

IV. List of Commenters

1. Alice Corporation (''Alice'')
2. Allston Holdings LLC, on behalf of certain trading firms (''Allston et al.'')
3. Alternative Investment Management Association (''AIMA'')
4. American Benefits Council/Committee on the Investment of Employee Benefit Assets (''ABC/CIEBA'')
5. Americans for Financial Reform (''AFR'')
6. Argus Media (''Argus'')
7. Asset Management Group, Securities Industry and Financial Markets Association (''SIFMA AMG'')
8. Association of Institutional Investors (''AII'')
9. Better Markets
10. Barclays
11. BlackRock
12. Bloomberg
13. CanDeal.ca Inc. (''CanDeal'')
14. CBOE Futures Exchange (''CBOE'')
15. Chris Barnard
16. CME Group (''CME'')
17. Coalition for Derivatives End-Users (''Coalition'')
18. Commissioner Jill Sommers (''Commissioner Sommers'')
19. David Neal
20. Depository Trust & Clearing Corporation (''DTCC'')
21. Deutsche Bank (''Deutsche'')
22. Eaton Vance Management (''Eaton Vance'')
23. Edward Rosen, on behalf of certain dealers (''Rosen et al.'')
24. Edward Rosen, on behalf of certain trade associations (''Rosen et al. II'')
25. Eris Exchange (''Eris'')
26. Evolution Markets (''Evolution'')
27. Farm Credit Council (''FCC'')
28. Federal Home Loan Banks (''FHLB'')
29. Financial Services Roundtable (''FSR'')
30. Freddie Mac
31. FX Alliance (''FXall'')
32. Geneva Energy Markets, LLC (''Geneva'')
33. GFI Group (''GFI'')
34. Global FX Division AFME, SIFMA and ASIFMA (''Global FX'')
35. Goldman, Sachs & Co. (''Goldman'')
36. ICAP
37. Industrial Energy Consumers of America (''IECA'')
38. Intercontinental Exchange (''ICE'')
39. International Swaps and Derivatives Association (''ISDA'')
40. Joanna Mallers, on behalf of certain trading firms (''Mallers et al.'')
41. Joint CFTC–SEC Advisory Committee on Emerging Regulatory Issues
42. JP Morgan
43. LCH.Clearnet Group Limited (''LCH'')
44. Managed Funds Association (''MFA'')
45. MarketAxess Holdings (''MarketAxess'')
46. Markit
47. MarkitSERV
48. MetLife
49. Morgan Stanley
50. National Futures Association (''NFA'')
51. Natural Gas Supply Association (''NGSA'')
52. Nodal Exchange (''Nodal'')
53. NYSE Liffe U.S. (''NYSE Liffe'')
54. Parity Energy
55. Phoenix Partners Group (''Phoenix'')
56. Representative Scott Garrett
57. Representatives Scott Garrett, Gregory Meeks, Robert Hurt, and Gwen Moore (''Representative Garrett et al.'')
58. State Street Corporation (''State Street'')
59. Swap Execution Facilities Hearing Statements
60. Swaps & Derivatives Market Association (''SDMA'')
61. Thomson Reuters (''Reuters'')
62. Traccr Limited
63. Tradeweb Markets (''Tradeweb'')
64. TriOptima
65. TruMarx Data Partners (''TruMarx'')
66. UBS Securities LLC (''UBS'')
67. Wholesale Markets Brokers' Association, Americas (''WMBAA'')
68. Working Group of Commercial Energy Firms (''Energy Working Group'')

List of Subjects in 17 CFR Part 37

Registered entities, Registration application, Reporting and recordkeeping requirements, Swaps, Swap execution facilities.

For the reasons discussed in the preamble, the Commission revises 17 CFR part 37 to read as follows:

PART 37—SWAP EXECUTION FACILITIES

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Authority: 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a–2, 7b–3, and 12a, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376.

Subpart A—General Provisions

§ 37.1 Scope.

The provisions of this part shall apply to every swap execution facility that is registered or is applying to become registered as a swap execution facility under section 5h of the Commodity Exchange Act (''the Act''); provided, however, nothing in this provision affects the eligibility of swap execution facilities to operate under the provisions of parts 38 or 49 of this chapter.

§ 37.2 Applicable provisions.

A swap execution facility shall comply with the requirements of this part and all other applicable Commission regulations, including § 1.60 and part 9 of this chapter, and including any related definitions and cross-referenced sections.

§ 37.3 Requirements and procedures for registration.

(a) *Requirements for registration.* (1) Any person operating a facility that offers a trading system or platform in which more than one market participant has the ability to execute or trade swaps with more than one other market participant on the system or platform shall register the facility as a swap execution facility under this part or as a designated contract market under part 38 of this chapter.

(2) *Minimum trading functionality.* A swap execution facility shall, at a minimum, offer an Order Book as defined in paragraph (a)(3) of this section.

(3) *Order book* means:

(i) An electronic trading facility, as that term is defined in section 1a(16) of the Act;

(ii) A trading facility, as that term is defined in section 1a(51) of the Act; or

(iii) A trading system or platform in which all market participants in the trading system or platform have the ability to enter multiple bids and offers, observe or receive bids and offers entered by other market participants, and transact on such bids and offers.

(b) *Procedures for full registration.* (1) An applicant requesting registration as a swap execution facility shall:

(i) File electronically a complete Form SEF as set forth in appendix A to this part, or any successor forms, and all information and documentation described in such forms with the Secretary of the Commission in the form and manner specified by the Commission;

(ii) Provide to the Commission, upon the Commission's request, any additional information and documentation necessary to review an application; and

(iii) Request from the Commission a unique, extensible, alphanumeric code for the purpose of identifying the swap execution facility pursuant to part 45 of this chapter.

(2) *Request for confidential treatment.* (i) An applicant requesting registration as a swap execution facility shall identify with particularity any information in the application that will be subject to a request for confidential treatment pursuant to § 145.9 of this chapter.

(ii) Section 40.8 of this chapter sets forth those sections of the application that will be made publicly available, notwithstanding a request for confidential treatment pursuant to § 145.9 of this chapter.

(3) *Amendment of application prior or subsequent to full registration.* An applicant amending a pending application for registration as a swap execution facility or requesting an amendment to an order of registration shall file an amended application electronically with the Secretary of the Commission in the manner specified by the Commission. A swap execution facility shall file any amendment to an application subsequent to registration as a submission under part 40 of this chapter or as specified by the Commission.

(4) *Effect of incomplete application.* If an application is incomplete pursuant to paragraph (b)(1) of this section, the Commission shall notify the applicant that its application will not be deemed to have been submitted for purposes of the Commission's review.

(5) *Commission review period.* For an applicant who submits its application for registration as a swap execution facility on or after August 5, 2015 the Commission shall review such application pursuant to the 180-day timeframe and procedures specified in section 6(a) of the Act.

(6) *Commission determination.* (i) The Commission shall issue an order granting registration upon a Commission determination, in its own discretion, that the applicant has demonstrated compliance with the Act and the Commission's regulations applicable to swap execution facilities. If deemed appropriate, the Commission may issue an order granting registration subject to conditions.

(ii) The Commission may issue an order denying registration upon a Commission determination, in its own discretion, that the applicant has not demonstrated compliance with the Act and the Commission's regulations applicable to swap execution facilities.

(c) *Temporary registration.* An applicant seeking registration as a swap execution facility may request that the Commission grant the applicant temporary registration by complying with the requirements in paragraph (c)(1) of this section.

(1) *Requirements for temporary registration.* The Commission shall grant a request for temporary registration upon a Commission determination that the applicant has:

(i) Completed all of the requirements under paragraph (b)(1)(i) of this section; and

(ii) Submitted a notice to the Commission, concurrent with the filing of the application under paragraph (b)(1)(i) of this section, requesting that the Commission grant the applicant temporary registration. An applicant that is currently operating a swaps-trading platform in reliance upon either an exemption granted by the Commission or some form of no-action relief granted by the Commission staff shall include in such notice a certification that the applicant is operating pursuant to such exemption or no-action relief.

(iii) The Commission may deny a request for temporary registration upon a Commission determination that the applicant has not met the requirements under paragraphs (c)(1)(i) and (c)(1)(ii) of this section.

(2) *Operation pursuant to a grant of temporary registration.* An applicant may operate as a swap execution facility under temporary registration upon receipt of a notice from the Commission granting such temporary registration, but in no case may begin operating as a temporarily registered swap execution facility before August 5, 2013.

(3) *Expiration of temporary registration.* The temporary registration for a swap execution facility shall expire on the earlier of the date that:

(i) The Commission grants or denies registration of the swap execution facility as provided under paragraph (b) of this section;

(ii) The swap execution facility withdraws its application for registration pursuant to paragraph (f) of this section; or

(iii) Temporary registration terminates pursuant to paragraph (c)(5) of this section.

(4) *Effect of temporary registration.* A grant of temporary registration by the Commission does not affect the right of the Commission to grant or deny registration as provided under paragraph (b) of this section.

(5) *Termination of temporary registration.* Paragraph (c) of this section shall terminate two years from the effective date of this regulation except as provided for under paragraph (c)(6) of this section and except for an applicant who requested that the Commission grant the applicant temporary registration by complying with the requirements in paragraph (c)(1) of this section before the termination of paragraph (c) of this section and has not been granted or denied registration under paragraph (b)(6) of this section by the time of the termination of paragraph (c) of this section. Such an applicant may operate as a swap execution facility under temporary registration upon receipt of a notice from the Commission granting such temporary registration until the Commission grants or denies registration pursuant to paragraph (b)(6) of this section. On the termination date of paragraph (c) of this section, the Commission shall review such applicant's application pursuant to the time period and procedures in paragraph (b)(5) of this section.

(6) *Temporary registration for applicants that are operational designated contract markets.* An applicant that is an operational designated contract market and is also seeking to register as a swap execution facility in order to transfer one or more of its contracts may request that the Commission grant the applicant temporary registration by complying with the requirements in paragraph (c)(1) of this section. The termination of temporary registration provision in paragraph (c)(5) of this section shall not apply to an applicant that is a non-dormant designated contract market as described in this paragraph.

(d) *Reinstatement of dormant registration.* A dormant swap execution facility as defined in section 40.1 of this chapter may reinstate its registration under the procedures of paragraph (b) of this section. The applicant may rely upon previously submitted materials if such materials accurately describe the dormant swap execution facility's conditions at the time that it applies for reinstatement of its registration.

(e) *Request for transfer of registration.* (1) A swap execution facility seeking to transfer its registration from its current legal entity to a new legal entity as a result of a corporate change shall file a request for approval to transfer such registration with the Secretary of the Commission in the form and manner specified by the Commission.

(2) *Timeline for filing a request for transfer of registration.* A request for transfer of registration shall be filed no later than three months prior to the anticipated corporate change; or in the event that the swap execution facility could not have known of the anticipated change three months prior to the anticipated change, as soon as it knows of such change.

(3) *Required information.* The request for transfer of registration shall include the following:

(i) The underlying agreement that governs the corporate change;

(ii) A description of the corporate change, including the reason for the change and its impact on the swap execution facility, including its governance and operations, and its impact on the rights and obligations of market participants;

(iii) A discussion of the transferee's ability to comply with the Act, including the core principles applicable to swap execution facilities, and the Commission's regulations thereunder;

(iv) The governing documents of the transferee, including, but not limited to, articles of incorporation and bylaws;

(v) The transferee's rules marked to show changes from the current rules of the swap execution facility;

(vi) A representation by the transferee that it:

(A) Will be the surviving entity and successor-in-interest to the transferor swap execution facility and will retain and assume, without limitation, all of the assets and liabilities of the transferor;

(B) Will assume responsibility for complying with all applicable provisions of the Act and the Commission's regulations promulgated thereunder, including this part and appendices thereto;

(C) Will assume, maintain, and enforce all rules implementing and complying with the core principles applicable to swap execution facilities, including the adoption of the transferor's rulebook, as amended in the request, and that any such amendments will be submitted to the Commission pursuant to section 5c(c) of the Act and part 40 of this chapter;

(D) Will comply with all self-regulatory responsibilities except if otherwise indicated in the request, and will maintain and enforce all self-regulatory programs; and

(E) Will notify market participants of all changes to the transferor's rulebook prior to the transfer and will further notify market participants of the concurrent transfer of the registration to the transferee upon Commission approval and issuance of an order permitting this transfer.

(vii) A representation by the transferee that upon the transfer:

(A) It will assume responsibility for and maintain compliance with core principles for all swaps previously made available for trading through the transferor, whether by certification or approval; and

(B) None of the proposed rule changes will affect the rights and obligations of any market participant.

(4) *Commission determination.* Upon review of a request for transfer of registration, the Commission, as soon as practicable, shall issue an order either approving or denying the request.

(f) *Request for withdrawal of application for registration.* An applicant for registration as a swap execution facility may withdraw its application submitted pursuant to

paragraph (b) of this section by filing a withdrawal request electronically with the Secretary of the Commission. Withdrawal of an application for registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the application was pending with the Commission.

(g) *Request for vacation of registration.* A swap execution facility may request that its registration be vacated under section 7 of the Act by filing a vacation request electronically with the Secretary of the Commission. Vacation of registration shall not affect any action taken or to be taken by the Commission based upon actions, activities, or events occurring during the time that the swap execution facility was registered by the Commission.

(h) *Delegation of authority.* The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, upon consultation with the General Counsel or the General Counsel's delegate, authority to notify an applicant seeking registration that its application is incomplete and that it will not be deemed to have been submitted for purposes of the Commission's review, to notify an applicant seeking registration under section 6(a) of the Act that its application is materially incomplete and the running of the 180-day period is stayed, and to notify an applicant seeking temporary registration that its request is granted or denied. The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

§ 37.4 Procedures for listing products and implementing rules.

(a) An applicant for registration as a swap execution facility may submit a swap's terms and conditions prior to listing the product as part of its application for registration.

(b) Any swap terms and conditions or rules submitted as part of a swap execution facility's application for registration shall be considered for approval by the Commission at the time the Commission issues the swap execution facility's order of registration.

(c) After the Commission issues the order of registration, a swap execution facility shall submit a swap's terms and conditions, including amendments to such terms and conditions, new rules, or rule amendments pursuant to the procedures under part 40 of this chapter.

(d) Any swap terms and conditions or rules submitted as part of an application to reinstate the registration of a dormant swap execution facility, as defined in § 40.1 of this chapter, shall be considered for approval by the Commission at the time the Commission approves the dormant swap execution facility's reinstatement of registration.

§ 37.5 Information relating to swap execution facility compliance.

(a) *Request for information.* Upon the Commission's request, a swap execution facility shall file with the Commission information related to its business as a swap execution facility in the form and manner and within the time period as the Commission specifies in its request.

(b) *Demonstration of compliance.* Upon the Commission's request, a swap execution facility shall file with the Commission a written demonstration, containing supporting data, information, and documents that it is in compliance with one or more core principles or with its other obligations under the Act or the Commission's regulations as the Commission specifies in its request. The swap execution facility shall file such written demonstration in the form and manner and within the time period as the Commission specifies in its request.

(c) *Equity interest transfer*—(1) *Equity interest transfer notification.* A swap execution facility shall file with the Commission a notification of each transaction that the swap execution facility enters into involving the transfer of fifty percent or more of the equity interest in the swap execution facility. The Commission may, upon receiving such notification, request supporting documentation of the transaction.

(2) *Timing of notification.* The equity interest transfer notice described in paragraph (c)(1) of this section shall be filed electronically with the Secretary of the Commission at its Washington, DC headquarters at *submissions@cftc.gov* and the Division of Market Oversight at *DMOSubmissions@cftc.gov,* at the earliest possible time but in no event later than the open of business ten business days following the date upon which the swap execution facility enters into a firm obligation to transfer the equity interest.

(3) *Rule filing.* Notwithstanding the foregoing, if any aspect of an equity interest transfer described in paragraph (c)(1) of this section requires a swap execution facility to file a rule as defined in part 40 of this chapter, then the swap execution facility shall comply with the requirements of section 5c(c) of the Act and part 40 of this chapter, and all other applicable Commission regulations.

(4) *Certification.* Upon a transfer of an equity interest of fifty percent or more in a swap execution facility, the swap execution facility shall file electronically with the Secretary of the Commission at its Washington, DC headquarters at *submissions@cftc.gov* and the Division of Market Oversight at *DMOSubmissions@cftc.gov,* a certification that the swap execution facility meets all of the requirements of section 5h of the Act and the Commission regulations adopted thereunder, no later than two business days following the date on which the equity interest of fifty percent or more was acquired.

(d) *Delegation of authority.* The Commission hereby delegates, until it orders otherwise, the authority set forth in this section to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time. The Director may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph.

§ 37.6 Enforceability.

(a) A transaction entered into on or pursuant to the rules of a swap execution facility shall not be void, voidable, subject to rescission, otherwise invalidated, or rendered unenforceable as a result of:

(1) A violation by the swap execution facility of the provisions of section 5h of the Act or this part;

(2) Any Commission proceeding to alter or supplement a rule, term, or condition under section 8a(7) of the Act or to declare an emergency under section 8a(9) of the Act; or

(3) Any other proceeding the effect of which is to:

(i) Alter or supplement a specific term or condition or trading rule or procedure; or

(ii) Require a swap execution facility to adopt a specific term or condition, trading rule or procedure, or to take or refrain from taking a specific action.

(b) A swap execution facility shall provide each counterparty to a transaction that is entered into on or pursuant to the rules of the swap execution facility with a written record of all of the terms of the transaction which shall legally supersede any previous agreement and serve as a confirmation of the transaction. The

confirmation of all terms of the transaction shall take place at the same time as execution; provided that specific customer identifiers for accounts included in bunched orders involving swaps need not be included in confirmations provided by a swap execution facility if the applicable requirements of § 1.35(b)(5) of this chapter are met.

§ 37.7 Prohibited use of data collected for regulatory purposes.

A swap execution facility shall not use for business or marketing purposes any proprietary data or personal information it collects or receives, from or on behalf of any person, for the purpose of fulfilling its regulatory obligations; *provided, however,* that a swap execution facility may use such data or information for business or marketing purposes if the person from whom it collects or receives such data or information clearly consents to the swap execution facility's use of such data or information in such manner. A swap execution facility shall not condition access to its market(s) or market services on a person's consent to the swap execution facility's use of proprietary data or personal information for business or marketing purposes. A swap execution facility, where necessary for regulatory purposes, may share such data or information with one or more swap execution facilities or designated contract markets registered with the Commission.

§ 37.8 Boards of trade operating both a designated contract market and a swap execution facility.

(a) An entity that intends to operate both a designated contract market and a swap execution facility shall separately register the two entities pursuant to the designated contract market designation procedures set forth in part 38 of this chapter and the swap execution facility registration procedures set forth in this part. On an ongoing basis, the entity shall comply with the core principles for designated contract markets under section 5(d) of the Act and the regulations under part 38 of this chapter and the core principles for swap execution facilities under section 5h of the Act and the regulations under this part.

(b) A board of trade, as defined in section 1a(6) of the Act, that operates both a designated contract market and a swap execution facility and that uses the same electronic trade execution system for executing and trading swaps on the designated contract market and on the swap execution facility shall clearly identify to market participants for each swap whether the execution or trading of such swaps is taking place on the designated contract market or on the swap execution facility.

§ 37.9 Methods of execution for required and permitted transactions.

(a) *Execution methods for required transactions.* (1) *Required transaction* means any transaction involving a swap that is subject to the trade execution requirement in section 2(h)(8) of the Act.

(2) *Execution methods.* (i) Each Required Transaction that is not a block trade as defined in § 43.2 of this chapter shall be executed on a swap execution facility in accordance with one of the following methods of execution:

(A) An Order Book as defined in § 37.3(a)(3); or

(B) A Request for Quote System, as defined in paragraph (a)(3) of this section, that operates in conjunction with an Order Book as defined in § 37.3(a)(3).

(ii) In providing either one of the execution methods set forth in paragraph (a)(2)(i)(A) or (B) of this section, a swap execution facility may for purposes of execution and communication use any means of interstate commerce, including, but not limited to, the mail, internet, email, and telephone, provided that the chosen execution method satisfies the requirements provided in § 37.3(a)(3) for Order Books or in paragraph (a)(3) of this section for Request for Quote Systems.

(3) *Request for quote system* means a trading system or platform in which a market participant transmits a request for a quote to buy or sell a specific instrument to no less than three market participants in the trading system or platform, to which all such market participants may respond. The three market participants shall not be affiliates of or controlled by the requester and shall not be affiliates of or controlled by each other. A swap execution facility that offers a request for quote system in connection with Required Transactions shall provide the following functionality:

(i) At the same time that the requester receives the first responsive bid or offer, the swap execution facility shall communicate to the requester any firm bid or offer pertaining to the same instrument resting on any of the swap execution facility's Order Books, as defined in § 37.3(a)(3);

(ii) The swap execution facility shall provide the requester with the ability to execute against such firm resting bids or offers along with any responsive orders; and

(iii) The swap execution facility shall ensure that its trading protocols provide each of its market participants with equal priority in receiving requests for quotes and in transmitting and displaying for execution responsive orders.

(b) *Time delay requirement for required transactions on an order book*—(1) *Time delay requirement.* A swap execution facility shall require that a broker or dealer who seeks to either execute against its customer's order or execute two of its customers' orders against each other through the swap execution facility's Order Book, following some form of pre-arrangement or pre-negotiation of such orders, be subject to at least a 15 second time delay between the entry of those two orders into the Order Book, such that one side of the potential transaction is disclosed and made available to other market participants before the second side of the potential transaction, whether for the broker's or dealer's own account or for a second customer, is submitted for execution.

(2) *Adjustment of time delay requirement.* A swap execution facility may adjust the time period of the 15 second time delay requirement described in paragraph (b)(1) of this section, based upon a swap's liquidity or other product-specific considerations; however, the time delay shall be set for a sufficient period of time so that an order is exposed to the market and other market participants have a meaningful opportunity to execute against such order.

(c) *Execution methods for permitted transactions.* (1) *Permitted transaction* means any transaction not involving a swap that is subject to the trade execution requirement in section 2(h)(8) of the Act.

(2) *Execution methods.* A swap execution facility may offer any method of execution for each Permitted Transaction.

§ 37.10 [Reserved]

Subpart B—Compliance With Core Principles

§ 37.100 Core Principle 1—Compliance with core principles.

(a) *In general.* To be registered, and maintain registration, as a swap execution facility, the swap execution facility shall comply with—

(1) The core principles described in section 5h of the Act; and

(2) Any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the Act.

(b) *Reasonable discretion of a swap execution facility.* Unless otherwise determined by the Commission by rule or regulation, a swap execution facility described in paragraph (a) of this section shall have reasonable discretion in establishing the manner in which the swap execution facility complies with the core principles described in section 5h of the Act.

Subpart C—Compliance With Rules

§ 37.200 Core Principle 2—Compliance with rules.

A swap execution facility shall:

(a) Establish and enforce compliance with any rule of the swap execution facility, including the terms and conditions of the swaps traded or processed on or through the swap execution facility and any limitation on access to the swap execution facility;

(b) Establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means to provide market participants with impartial access to the market and to capture information that may be used in establishing whether rule violations have occurred;

(c) Establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades; and

(d) Provide by its rules that when a swap dealer or major swap participant enters into or facilitates a swap that is subject to the mandatory clearing requirement of section 2(h) of the Act, the swap dealer or major swap participant shall be responsible for compliance with the mandatory trading requirement under section 2(h)(8) of the Act.

§ 37.201 Operation of swap execution facility and compliance with rules.

(a) A swap execution facility shall establish rules governing the operation of the swap execution facility, including, but not limited to, rules specifying trading procedures to be followed by members and market participants when entering and executing orders traded or posted on the swap execution facility, including block trades, as defined in part 43 of this chapter, if offered.

(b) A swap execution facility shall establish and impartially enforce compliance with the rules of the swap execution facility, including, but not limited to—

(1) The terms and conditions of any swaps traded or processed on or through the swap execution facility;

(2) Access to the swap execution facility;

(3) Trade practice rules;

(4) Audit trail requirements;

(5) Disciplinary rules; and

(6) Mandatory trading requirements.

§ 37.202 Access requirements.

(a) *Impartial access to markets and market services.* A swap execution facility shall provide any eligible contract participant and any independent software vendor with impartial access to its market(s) and market services, including any indicative quote screens or any similar pricing data displays, provided that the facility has:

(1) Criteria governing such access that are impartial, transparent, and applied in a fair and nondiscriminatory manner;

(2) Procedures whereby eligible contract participants provide the swap execution facility with written or electronic confirmation of their status as eligible contract participants, as defined by the Act and Commission regulations, prior to obtaining access; and

(3) Comparable fee structures for eligible contract participants and independent software vendors receiving comparable access to, or services from, the swap execution facility.

(b) *Jurisdiction.* Prior to granting any eligible contract participant access to its facilities, a swap execution facility shall require that the eligible contract participant consent to its jurisdiction.

(c) *Limitations on access.* A swap execution facility shall establish and impartially enforce rules governing any decision to allow, deny, suspend, or permanently bar eligible contract participants' access to the swap execution facility, including when such decisions are made as part of a disciplinary or emergency action taken by the swap execution facility.

§ 37.203 Rule enforcement program.

A swap execution facility shall establish and enforce trading, trade processing, and participation rules that will deter abuses and it shall have the capacity to detect, investigate, and enforce those rules.

(a) *Abusive trading practices prohibited.* A swap execution facility shall prohibit abusive trading practices on its markets by members and market participants. Swap execution facilities that permit intermediation shall prohibit customer-related abuses including, but not limited to, trading ahead of customer orders, trading against customer orders, accommodation trading, and improper cross trading. Specific trading practices that shall be prohibited include front-running, wash trading, pre-arranged trading (except for block trades permitted by part 43 of this chapter or other types of transactions certified to or approved by the Commission pursuant to the procedures under part 40 of this chapter), fraudulent trading, money passes, and any other trading practices that a swap execution facility deems to be abusive. A swap execution facility shall also prohibit any other manipulative or disruptive trading practices prohibited by the Act or by the Commission pursuant to Commission regulation.

(b) *Capacity to detect and investigate rule violations.* A swap execution facility shall have arrangements and resources for effective enforcement of its rules. Such arrangements shall include the authority to collect information and documents on both a routine and non-routine basis, including the authority to examine books and records kept by the swap execution facility's members and by persons under investigation. A swap execution facility's arrangements and resources shall also facilitate the direct supervision of the market and the analysis of data collected to determine whether a rule violation has occurred.

(c) *Compliance staff and resources.* A swap execution facility shall establish and maintain sufficient compliance staff and resources to ensure that it can conduct effective audit trail reviews, trade practice surveillance, market surveillance, and real-time market monitoring. The swap execution facility's compliance staff shall also be sufficient to address unusual market or trading events as they arise, and to conduct and complete investigations in a timely manner, as set forth in § 37.203(f).

(d) *Automated trade surveillance system.* A swap execution facility shall maintain an automated trade surveillance system capable of detecting potential trade practice violations. The automated trade surveillance system shall load and process daily orders and trades no later than 24 hours after the completion of the trading day. The automated trade surveillance system shall have the capability to detect and flag specific trade execution patterns and trade anomalies; compute, retain, and compare trading statistics; compute trade gains, losses, and swap-equivalent positions; reconstruct the sequence of market activity; perform market analyses; and support system users to perform in-depth analyses and ad hoc queries of trade-related data.

(e) *Real-time market monitoring.* A swap execution facility shall conduct real-time market monitoring of all trading activity on its system(s) or platform(s) to identify disorderly trading and any market or system anomalies. A swap execution facility shall have the authority to adjust trade prices or cancel trades when necessary to mitigate market disrupting events caused by malfunctions in its system(s) or platform(s) or errors in orders submitted by members and market participants. Any trade price adjustments or trade cancellations shall be transparent to the market and subject to standards that are clear, fair, and publicly available.

(f) *Investigations and investigation reports*—(1) *Procedures.* A swap execution facility shall establish and maintain procedures that require its compliance staff to conduct investigations of possible rule violations. An investigation shall be commenced upon the receipt of a request from Commission staff or upon the discovery or receipt of information by the swap execution facility that indicates a reasonable basis for finding that a violation may have occurred or will occur.

(2) *Timeliness.* Each compliance staff investigation shall be completed in a timely manner. Absent mitigating factors, a timely manner is no later than 12 months after the date that an investigation is opened. Mitigating factors that may reasonably justify an investigation taking longer than 12 months to complete include the complexity of the investigation, the number of firms or individuals involved as potential wrongdoers, the number of potential violations to be investigated, and the volume of documents and data to be examined and analyzed by compliance staff.

(3) *Investigation reports when a reasonable basis exists for finding a violation.* Compliance staff shall submit a written investigation report for disciplinary action in every instance in which compliance staff determines from surveillance or from an investigation that a reasonable basis exists for finding a rule violation. The investigation report shall include the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; compliance staff's analysis and conclusions; and a recommendation as to whether disciplinary action should be pursued.

(4) *Investigation reports when no reasonable basis exists for finding a violation.* If after conducting an investigation, compliance staff determines that no reasonable basis exists for finding a rule violation, it shall prepare a written report including the reason the investigation was initiated; a summary of the complaint, if any; the relevant facts; and compliance staff's analysis and conclusions.

(5) *Warning letters.* No more than one warning letter may be issued to the same person or entity found to have committed the same rule violation within a rolling twelve month period.

(g) *Additional sources for compliance.* A swap execution facility may refer to the guidance and/or acceptable practices in Appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.203.

§ 37.204 Regulatory services provided by a third party.

(a) *Use of regulatory service provider permitted.* A swap execution facility may choose to contract with a registered futures association or another registered entity, as such terms are defined under the Act, or the Financial Industry Regulatory Authority (collectively, ''regulatory service providers''), for the provision of services to assist in complying with the Act and Commission regulations thereunder, as approved by the Commission. Any swap execution facility that chooses to contract with a regulatory service provider shall ensure that such provider has the capacity and resources necessary to provide timely and effective regulatory services, including adequate staff and automated surveillance systems. A swap execution facility shall at all times remain responsible for the performance of any regulatory services received, for compliance with the swap execution facility's obligations under the Act and Commission regulations, and for the regulatory service provider's performance on its behalf.

(b) *Duty to supervise regulatory service provider.* A swap execution facility that elects to use the service of a regulatory service provider shall retain sufficient compliance staff to supervise the quality and effectiveness of the regulatory services provided on its behalf. Compliance staff of the swap execution facility shall hold regular meetings with the regulatory service provider to discuss ongoing investigations, trading patterns, market participants, and any other matters of regulatory concern. A swap execution facility shall also conduct periodic reviews of the adequacy and effectiveness of services provided on its behalf. Such reviews shall be documented carefully and made available to the Commission upon request.

(c) *Regulatory decisions required from the swap execution facility.* A swap execution facility that elects to use the service of a regulatory service provider shall retain exclusive authority in all substantive decisions made by its regulatory service provider, including, but not limited to, decisions involving the cancellation of trades, the issuance of disciplinary charges against members or market participants, and denials of access to the trading platform for disciplinary reasons. A swap execution facility shall document any instances where its actions differ from those recommended by its regulatory service provider, including the reasons for the course of action recommended by the regulatory service provider and the reasons why the swap execution facility chose a different course of action.

§ 37.205 Audit trail.

A swap execution facility shall establish procedures to capture and retain information that may be used in establishing whether rule violations have occurred.

(a) *Audit trail required.* A swap execution facility shall capture and retain all audit trail data necessary to detect, investigate, and prevent customer and market abuses. Such data shall be sufficient to reconstruct all indications of interest, requests for quotes, orders, and trades within a reasonable period of time and to provide evidence of any violations of the rules of the swap execution facility. An acceptable audit trail shall also permit the swap execution facility to track a customer order from the time of receipt through fill, allocation, or other disposition, and shall include both order and trade data.

(b) *Elements of an acceptable audit trail program*—(1) *Original source documents.* A swap execution facility's audit trail shall include original source documents. Original source documents include unalterable, sequentially-identified records on which trade execution information is originally recorded, whether recorded manually or electronically. Records for customer orders (whether filled, unfilled, or cancelled, each of which shall be retained or electronically captured) shall reflect the terms of the order, an account identifier that relates back to the account(s) owner(s), the time of order entry, and the time of trade execution. Swap execution facilities shall require that all orders, indications of interest, and requests for quotes be immediately captured in the audit trail.

(2) *Transaction history database.* A swap execution facility's audit trail program shall include an electronic transaction history database. An adequate transaction history database includes a history of all indications of interest, requests for quotes, orders, and trades entered into a swap execution facility's trading system or platform, including all order modifications and cancellations. An adequate transaction history database also includes:

(i) All data that are input into the trade entry or matching system for the transaction to match and clear;

(ii) The customer type indicator code;

(iii) Timing and sequencing data adequate to reconstruct trading; and

(iv) Identification of each account to which fills are allocated.

(3) *Electronic analysis capability.* A swap execution facility's audit trail program shall include electronic analysis capability with respect to all audit trail data in the transaction history database. Such electronic analysis capability shall ensure that the swap execution facility has the ability to reconstruct indications of interest, requests for quotes, orders, and trades, and identify possible trading violations with respect to both customer and market abuse.

(4) *Safe storage capability.* A swap execution facility's audit trail program shall include the capability to safely store all audit trail data retained in its transaction history database. Such safe storage capability shall include the capability to store all data in the database in a manner that protects it from unauthorized alteration, as well as from accidental erasure or other loss. Data shall be retained in accordance with the recordkeeping requirements of Core Principle 10 for swap execution facilities and the associated regulations in subpart K of this part.

(c) *Enforcement of audit trail requirements*—(1) *Annual audit trail and recordkeeping reviews.* A swap execution facility shall enforce its audit trail and recordkeeping requirements through at least annual reviews of all members and persons and firms subject to the swap execution facility's recordkeeping rules to verify their compliance with the swap execution facility's audit trail and recordkeeping requirements. Such reviews shall include, but are not limited to, reviews of randomly selected samples of front-end audit trail data for order routing systems; a review of the process by which user identifications are assigned and user identification records are maintained; a review of usage patterns associated with user identifications to monitor for violations of user identification rules; and reviews of account numbers and customer type indicator codes in trade records to test for accuracy and improper use.

(2) *Enforcement program required.* A swap execution facility shall establish a program for effective enforcement of its audit trail and recordkeeping requirements. An effective program shall identify members and persons and firms subject to the swap execution facility's recordkeeping rules that have failed to maintain high levels of compliance with such requirements, and impose meaningful sanctions when deficiencies are found. Sanctions shall be sufficient to deter recidivist behavior. No more than one warning letter shall be issued to the same person or entity found to have committed the same violation of audit trail or recordkeeping requirements within a rolling twelve month period.

§ 37.206 Disciplinary procedures and sanctions.

A swap execution facility shall establish trading, trade processing, and participation rules that will deter abuses and have the capacity to enforce such rules through prompt and effective disciplinary action, including suspension or expulsion of members or market participants that violate the rules of the swap execution facility.

(a) *Enforcement staff.* A swap execution facility shall establish and maintain sufficient enforcement staff and resources to effectively and promptly prosecute possible rule violations within the disciplinary jurisdiction of the swap execution facility.

(b) *Disciplinary panels.* A swap execution facility shall establish one or more disciplinary panels that are authorized to fulfill their obligations under the rules of this subpart. Disciplinary panels shall meet the composition requirements of part 40 of this chapter, and shall not include any members of the swap execution facility's compliance staff or any person involved in adjudicating any other stage of the same proceeding.

(c) *Hearings.* A swap execution facility shall adopt rules that provide for the following minimum requirements for any hearing:

(1) The hearing shall be fair, shall be conducted before members of the disciplinary panel, and shall be promptly convened after reasonable notice to the respondent; and

(2) If the respondent has requested a hearing, a copy of the hearing shall be made and shall become a part of the record of the proceeding. The record shall not be required to be transcribed unless:

(i) The transcript is requested by Commission staff or the respondent;

(ii) The decision is appealed pursuant to the rules of the swap execution facility; or

(iii) The decision is reviewed by the Commission pursuant to section 8c of the Act or part 9 of this chapter. In all other instances, a summary record of a hearing is permitted.

(d) *Decisions.* Promptly following a hearing conducted in accordance with the rules of the swap execution facility, the disciplinary panel shall render a written decision based upon the weight of the evidence contained in the record of the proceeding and shall provide a copy to the respondent. The decision shall include:

(1) The notice of charges or a summary of the charges;

(2) The answer, if any, or a summary of the answer;

(3) A summary of the evidence produced at the hearing or, where appropriate, incorporation by reference of the investigation report;

(4) A statement of findings and conclusions with respect to each charge, and a complete explanation of the evidentiary and other basis for such findings and conclusions with respect to each charge;

(5) An indication of each specific rule that the respondent was found to have violated; and

(6) A declaration of all sanctions imposed against the respondent, including the basis for such sanctions and the effective date of such sanctions.

(e) *Disciplinary sanctions.* All disciplinary sanctions imposed by a swap execution facility or its disciplinary panels shall be commensurate with the violations committed and shall be clearly sufficient to deter recidivism or similar violations by other market participants. All disciplinary sanctions, including sanctions imposed pursuant to an accepted settlement offer, shall take into account the respondent's disciplinary history. In the event of demonstrated customer harm, any disciplinary sanction shall also include full customer restitution, except where the amount of restitution or to whom it should be provided cannot be reasonably determined.

(f) *Warning letters.* Where a rule violation is found to have occurred, no more than one warning letter may be issued per rolling twelve month period for the same violation.

(g) *Additional sources for compliance.* A swap execution facility may refer to the guidance and/or acceptable

practices in Appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.206.

Subpart D—Swaps Not Readily Susceptible to Manipulation

§ 37.300 Core Principle 3—Swaps not readily susceptible to manipulation.

The swap execution facility shall permit trading only in swaps that are not readily susceptible to manipulation.

§ 37.301 General requirements.

To demonstrate to the Commission compliance with the requirements of § 37.300, a swap execution facility shall, at the time it submits a new swap contract in advance to the Commission pursuant to part 40 of this chapter, provide the applicable information as set forth in Appendix C to part 38 of this chapter—Demonstration of Compliance That a Contract is not Readily Susceptible to Manipulation. A swap execution facility may also refer to the guidance and/or acceptable practices in Appendix B of this part.

Subpart E—Monitoring of Trading and Trade Processing

§ 37.400 Core Principle 4—Monitoring of trading and trade processing.

The swap execution facility shall:

(a) Establish and enforce rules or terms and conditions defining, or specifications detailing:

(1) Trading procedures to be used in entering and executing orders traded on or through the facilities of the swap execution facility; and

(2) Procedures for trade processing of swaps on or through the facilities of the swap execution facility; and

(b) Monitor trading in swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

§ 37.401 General requirements.

A swap execution facility shall:

(a) Collect and evaluate data on its market participants' market activity on an ongoing basis in order to detect and prevent manipulation, price distortions, and, where possible, disruptions of the physical-delivery or cash-settlement process;

(b) Monitor and evaluate general market data in order to detect and prevent manipulative activity that would result in the failure of the market price to reflect the normal forces of supply and demand;

(c) Demonstrate an effective program for conducting real-time monitoring of trading for the purpose of detecting and resolving abnormalities; and

(d) Demonstrate the ability to comprehensively and accurately reconstruct daily trading activity for the purpose of detecting instances or threats of manipulation, price distortion, and disruptions.

§ 37.402 Additional requirements for physical-delivery swaps.

For physical-delivery swaps, the swap execution facility shall demonstrate that it:

(a) Monitors a swap's terms and conditions as they relate to the underlying commodity market; and

(b) Monitors the availability of the supply of the commodity specified by the delivery requirements of the swap.

§ 37.403 Additional requirements for cash-settled swaps.

(a) For cash-settled swaps, the swap execution facility shall demonstrate that it monitors the pricing of the reference price used to determine cash flows or settlement;

(b) For cash-settled swaps listed on the swap execution facility where the reference price is formulated and computed by the swap execution facility, the swap execution facility shall demonstrate that it monitors the continued appropriateness of its methodology for deriving that price; and

(c) For cash-settled swaps listed on the swap execution facility where the reference price relies on a third-party index or instrument, including an index or instrument traded on another venue, the swap execution facility shall demonstrate that it monitors the continued appropriateness of the index or instrument.

§ 37.404 Ability to obtain information.

(a) A swap execution facility shall demonstrate that it has access to sufficient information to assess whether trading in swaps listed on its market, in the index or instrument used as a reference price, or in the underlying commodity for its listed swaps is being used to affect prices on its market.

(b) A swap execution facility shall have rules that require its market participants to keep records of their trading, including records of their activity in the index or instrument used as a reference price, the underlying commodity, and related derivatives markets, and make such records available, upon request, to the swap execution facility or, if applicable, to its regulatory service provider, and the Commission.

§ 37.405 Risk controls for trading.

The swap execution facility shall establish and maintain risk control mechanisms to prevent and reduce the potential risk of market disruptions, including, but not limited to, market restrictions that pause or halt trading under market conditions prescribed by the swap execution facility.

§ 37.406 Trade reconstruction.

The swap execution facility shall have the ability to comprehensively and accurately reconstruct all trading on its facility. All audit-trail data and reconstructions shall be made available to the Commission in a form, manner, and time that is acceptable to the Commission.

§ 37.407 Regulatory service provider.

A swap execution facility shall comply with the regulations in this subpart through a dedicated regulatory department or by contracting with a regulatory service provider pursuant to § 37.204.

§ 37.408 Additional sources for compliance.

A swap execution facility may refer to the guidance and/or acceptable practices in Appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.400.

Subpart F—Ability to Obtain Information

§ 37.500 Core Principle 5—Ability to obtain information.

The swap execution facility shall:

(a) Establish and enforce rules that will allow the facility to obtain any necessary information to perform any of the functions described in section 5h of the Act;

(b) Provide the information to the Commission on request; and

(c) Have the capacity to carry out such international information-sharing agreements as the Commission may require.

§ 37.501 Establish and enforce rules.

A swap execution facility shall establish and enforce rules that will allow the swap execution facility to have the ability and authority to obtain sufficient information to allow it to fully perform its operational, risk management, governance, and regulatory functions and any requirements under this part, including the capacity to carry out international information-sharing agreements as the Commission may require.

§ 37.502 Collection of information.

A swap execution facility shall have rules that allow it to collect information on a routine basis, allow for the collection of non-routine data from its market participants, and allow for its examination of books and records kept by the market participants on its facility.

§ 37.503 Provide information to the Commission.

A swap execution facility shall provide information in its possession to the Commission upon request, in a form and manner that the Commission approves.

§ 37.504 Information-sharing agreements.

A swap execution facility shall share information with other regulatory organizations, data repositories, and third-party data reporting services as required by the Commission or as otherwise necessary and appropriate to fulfill its self-regulatory and reporting responsibilities. Appropriate information-sharing agreements can be established with such entities or the Commission can act in conjunction with the swap execution facility to carry out such information sharing.

Subpart G—Position Limits or Accountability

§ 37.600 Core Principle 6—Position limits or accountability.

(a) *In general.* To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month, a swap execution facility that is a trading facility shall adopt for each of the contracts of the facility, as is necessary and appropriate, position limitations or position accountability for speculators.

(b) *Position limits.* For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a) of the Act, the swap execution facility shall:

(1) Set its position limitation at a level no higher than the Commission limitation; and

(2) Monitor positions established on or through the swap execution facility for compliance with the limit set by the Commission and the limit, if any, set by the swap execution facility.

§ 37.601 Additional sources for compliance.

Until such time that compliance is required under part 151 of this chapter, a swap execution facility may refer to the guidance and/or acceptable practices in Appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.600.

Subpart H—Financial Integrity of Transactions

§ 37.700 Core Principle 7—Financial integrity of transactions.

The swap execution facility shall establish and enforce rules and procedures for ensuring the financial integrity of swaps entered on or through the facilities of the swap execution facility, including the clearance and settlement of the swaps pursuant to section 2(h)(1) of the Act.

§ 37.701 Required clearing.

Transactions executed on or through the swap execution facility that are required to be cleared under section 2(h)(1)(A) of the Act or are voluntarily cleared by the counterparties shall be cleared through a Commission-registered derivatives clearing organization, or a derivatives clearing organization that the Commission has determined is exempt from registration.

§ 37.702 General financial integrity.

A swap execution facility shall provide for the financial integrity of its transactions:

(a) By establishing minimum financial standards for its members, which shall, at a minimum, require that members qualify as an eligible contract participant as defined in section 1a(18) of the Act;

(b) [Reserved]

§ 37.703 Monitoring for financial soundness.

A swap execution facility shall monitor its members to ensure that they continue to qualify as eligible contract participants as defined in section 1a(18) of the Act.

Subpart I—Emergency Authority

§ 37.800 Core Principle 8—Emergency authority.

The swap execution facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority to liquidate or transfer open positions in any swap or to suspend or curtail trading in a swap.

§ 37.801 Additional sources for compliance.

A swap execution facility may refer to the guidance and/or acceptable practices in Appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.800.

Subpart J—Timely Publication of Trading Information

§ 37.900 Core Principle 9—Timely publication of trading information.

(a) *In general.* The swap execution facility shall make public timely information on price, trading volume, and other trading data on swaps to the extent prescribed by the Commission.

(b) *Capacity of swap execution facility.* The swap execution facility shall be required to have the capacity to electronically capture and transmit trade information with respect to transactions executed on the facility.

§ 37.901 General requirements.

With respect to swaps traded on or through a swap execution facility, each swap execution facility shall:

(a) Report specified swap data as provided under part 43 and part 45 of this chapter; and

(b) Meet the requirements of part 16 of this chapter.

Subpart K—Recordkeeping and Reporting

§ 37.1000 Core Principle 10—Recordkeeping and reporting.

(a) *In general.* A swap execution facility shall:

(1) Maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of five years;

(2) Report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the Act; and

(3) Keep any such records relating to swaps defined in section 1a(47)(A)(v) of the Act open to inspection and examination by the Securities and Exchange Commission.

(b) *Requirements.* The Commission shall adopt data collection and reporting requirements for swap execution facilities that are comparable to corresponding requirements for derivatives clearing organizations and swap data repositories.

§ 37.1001 Recordkeeping.

A swap execution facility shall maintain records of all activities relating to the business of the facility, in a form and manner acceptable to the Commission, for a period of at least five years. A swap execution facility shall maintain such records, including a complete audit trail for all swaps executed on or subject to the rules of the swap execution facility, investigatory

files, and disciplinary files, in accordance with the requirements of § 1.31 and part 45 of this chapter.

Subpart L—Antitrust Considerations

§ 37.1100 Core Principle 11—Antitrust considerations.

Unless necessary or appropriate to achieve the purposes of the Act, the swap execution facility shall not:

(a) Adopt any rules or take any actions that result in any unreasonable restraint of trade; or

(b) Impose any material anticompetitive burden on trading or clearing.

§ 37.1101 Additional sources for compliance.

A swap execution facility may refer to the guidance and/or acceptable practices in Appendix B of this part to demonstrate to the Commission compliance with the requirements of § 37.1100.

Subpart M—Conflicts of Interest

§ 37.1200 Core Principle 12—Conflicts of interest.

The swap execution facility shall:

(a) Establish and enforce rules to minimize conflicts of interest in its decision-making process; and

(b) Establish a process for resolving the conflicts of interest.

Subpart N—Financial Resources

§ 37.1300 Core Principle 13—Financial resources.

(a) *In general.* The swap execution facility shall have adequate financial, operational, and managerial resources to discharge each responsibility of the swap execution facility.

(b) *Determination of resource adequacy.* The financial resources of a swap execution facility shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the swap execution facility to cover the operating costs of the swap execution facility for a one-year period, as calculated on a rolling basis.

§ 37.1301 General requirements.

(a) A swap execution facility shall maintain financial resources sufficient to enable it to perform its functions in compliance with the core principles set forth in section 5h of the Act.

(b) An entity that operates as both a swap execution facility and a derivatives clearing organization shall also comply with the financial resource requirements of § 39.11 of this chapter.

(c) Financial resources shall be considered sufficient if their value is at least equal to a total amount that would enable the swap execution facility to cover its operating costs for a period of at least one year, calculated on a rolling basis.

§ 37.1302 Types of financial resources.

Financial resources available to satisfy the requirements of § 37.1301 may include:

(a) The swap execution facility's own capital, meaning its assets minus its liabilities calculated in accordance with U.S. generally accepted accounting principles; and

(b) Any other financial resource deemed acceptable by the Commission.

§ 37.1303 Computation of projected operating costs to meet financial resource requirement.

A swap execution facility shall, each fiscal quarter, make a reasonable calculation of its projected operating costs over a twelve-month period in order to determine the amount needed to meet the requirements of § 37.1301. The swap execution facility shall have reasonable discretion in determining the methodology used to compute such projected operating costs. The Commission may review the methodology and require changes as appropriate.

§ 37.1304 Valuation of financial resources.

No less than each fiscal quarter, a swap execution facility shall compute the current market value of each financial resource used to meet its obligations under § 37.1301. Reductions in value to reflect market and credit risk (''haircuts'') shall be applied as appropriate.

§ 37.1305 Liquidity of financial resources.

The financial resources allocated by the swap execution facility to meet the requirements of § 37.1301 shall include unencumbered, liquid financial assets (*i.e.,* cash and/or highly liquid securities) equal to at least six months' operating costs. If any portion of such financial resources is not sufficiently liquid, the swap execution facility may take into account a committed line of credit or similar facility for the purpose of meeting this requirement.

§ 37.1306 Reporting to the Commission.

(a) Each fiscal quarter, or at any time upon Commission request, a swap execution facility shall:

(1) Report to the Commission:

(i) The amount of financial resources necessary to meet the requirements of § 37.1301; and

(ii) The value of each financial resource available, computed in accordance with the requirements of § 37.1304;

(2) Provide the Commission with a financial statement, including the balance sheet, income statement, and statement of cash flows of the swap execution facility or of its parent company;

(b) The calculations required by paragraph (a) of this section shall be made as of the last business day of the swap execution facility's fiscal quarter.

(c) The swap execution facility shall provide the Commission with:

(1) Sufficient documentation explaining the methodology used to compute its financial requirements under § 37.1301;

(2) Sufficient documentation explaining the basis for its determinations regarding the valuation and liquidity requirements set forth in §§ 37.1304 and 37.1305; and

(3) Copies of any agreements establishing or amending a credit facility, insurance coverage, or other arrangement evidencing or otherwise supporting the swap execution facility's conclusions.

(d) The reports required by this section shall be filed not later than 40 calendar days after the end of the swap execution facility's first three fiscal quarters, and not later than 60 calendar days after the end of the swap execution facility's fourth fiscal quarter, or at such later time as the Commission may permit, in its discretion, upon request by the swap execution facility.

§ 37.1307 Delegation of authority.

(a) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, authority to:

(1) Determine whether a particular financial resource under § 37.1302 may be used to satisfy the requirements of § 37.1301;

(2) Review and make changes to the methodology used to compute projected operating costs under § 37.1303;

(3) Request reports, in addition to fiscal quarter reports, under § 37.1306(a); and

(4) Grant an extension of time to file fiscal quarter reports under § 37.1306(d).

(b) The Director may submit to the Commission for its consideration any matter that has been delegated in this section. Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

Subpart O—System Safeguards

§ 37.1400 Core Principle 14—System safeguards.

The swap execution facility shall:

(a) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and automated systems, that:

(1) Are reliable and secure; and

(2) Have adequate scalable capacity;

(b) Establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for:

(1) The timely recovery and resumption of operations; and

(2) The fulfillment of the responsibilities and obligations of the swap execution facility; and

(c) Periodically conduct tests to verify that the backup resources of the swap execution facility are sufficient to ensure continued:

(1) Order processing and trade matching;

(2) Price reporting;

(3) Market surveillance; and

(4) Maintenance of a comprehensive and accurate audit trail.

§ 37.1401 Requirements.

(a) A swap execution facility's program of risk analysis and oversight with respect to its operations and automated systems shall address each of the following categories of risk analysis and oversight:

(1) Information security;

(2) Business continuity-disaster recovery planning and resources;

(3) Capacity and performance planning;

(4) Systems operations;

(5) Systems development and quality assurance; and

(6) Physical security and environmental controls.

(b) A swap execution facility shall maintain a business continuity-disaster recovery plan and resources, emergency procedures, and backup facilities sufficient to enable timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a swap execution facility following any disruption of its operations. Such responsibilities and obligations include, without limitation, order processing and trade matching; transmission of matched orders to a designated clearing organization for clearing, where appropriate; price reporting; market surveillance; and maintenance of a comprehensive audit trail. The swap execution facility's business continuity-disaster recovery plan and resources generally should enable resumption of trading and clearing of swaps executed on the swap execution facility during the next business day following the disruption. Swap execution facilities determined by the Commission to be critical financial markets pursuant to Appendix E to part 40 of this chapter are subject to more stringent requirements in this regard, set forth in § 40.9 of this chapter.

(c) A swap execution facility that is not determined by the Commission to be a critical financial market satisfies the requirement to be able to resume its operations and resume its ongoing fulfillment of its responsibilities and obligations during the next business day following any disruption of its operations by maintaining either:

(1) Infrastructure and personnel resources of its own that are sufficient to ensure timely recovery and resumption of its operations and resumption of its ongoing fulfillment of its responsibilities and obligations as a swap execution facility following any disruption of its operations; or

(2) Contractual arrangements with other swap execution facilities or disaster recovery service providers, as appropriate, that are sufficient to ensure continued trading and clearing of swaps executed on the swap execution facility, and ongoing fulfillment of all of the swap execution facility's responsibilities and obligations with respect to such swaps, in the event that a disruption renders the swap execution facility temporarily or permanently unable to satisfy this requirement on its own behalf.

(d) A swap execution facility shall notify Commission staff promptly of all:

(1) Electronic trading halts and material system malfunctions;

(2) Cyber security incidents or targeted threats that actually or potentially jeopardize automated system operation, reliability, security, or capacity; and

(3) Activations of the swap execution facility's business continuity-disaster recovery plan.

(e) A swap execution facility shall provide Commission staff timely advance notice of all material:

(1) Planned changes to automated systems that may impact the reliability, security, or adequate scalable capacity of such systems; and

(2) Planned changes to the swap execution facility's program of risk analysis and oversight.

(f) A swap execution facility shall provide to the Commission, upon request, current copies of its business continuity-disaster recovery plan and other emergency procedures, its assessments of its operational risks, and other documents requested by Commission staff for the purpose of maintaining a current profile of the swap execution facility's automated systems.

(g) A swap execution facility shall conduct regular, periodic, objective testing and review of its automated systems to ensure that they are reliable, secure, and have adequate scalable capacity. A swap execution facility shall also conduct regular, periodic testing and review of its business continuity-disaster recovery capabilities. Pursuant to Core Principle 10 under section 5h of the Act (Recordkeeping and Reporting) and §§ 37.1000 through 37.1001, the swap execution facility shall keep records of all such tests, and make all test results available to the Commission upon request.

(h) Part 40 of this chapter governs the obligations of those registered entities that the Commission has determined to be critical financial markets, with respect to maintenance and geographic dispersal of disaster recovery resources sufficient to meet a same-day recovery time objective in the event of a wide-scale disruption. Section 40.9 establishes the requirements for core principle compliance in that respect.

Subpart P—Designation of Chief Compliance Officer

§ 37.1500 Core Principle 15—Designation of chief compliance officer.

(a) *In general.* Each swap execution facility shall designate an individual to serve as a chief compliance officer.

(b) *Duties.* The chief compliance officer shall:

(1) Report directly to the board or to the senior officer of the facility;

(2) Review compliance with the core principles in this subsection;

(3) In consultation with the board of the facility, a body performing a function similar to that of a board, or the senior officer of the facility, resolve any conflicts of interest that may arise;

(4) Be responsible for establishing and administering the policies and procedures required to be established pursuant to this section;

(5) Ensure compliance with the Act and the rules and regulations issued under the Act, including rules prescribed by the Commission pursuant to section 5h of the Act; and

(6) Establish procedures for the remediation of noncompliance issues found during compliance office reviews, look backs, internal or external audit findings, self-reported errors, or through validated complaints.

(c) *Requirements for procedures.* In establishing procedures under

paragraph (b)(6) of this section, the chief compliance officer shall design the procedures to establish the handling, management response, remediation, retesting, and closing of noncompliance issues.

(d) *Annual reports*—(1) *In general.* In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of:

(i) The compliance of the swap execution facility with the Act; and

(ii) The policies and procedures, including the code of ethics and conflict of interest policies, of the swap execution facility.

(2) *Requirements.* The chief compliance officer shall:

(i) Submit each report described in paragraph (d)(1) of this section with the appropriate financial report of the swap execution facility that is required to be submitted to the Commission pursuant to section 5h of the Act; and

(ii) Include in the report a certification that, under penalty of law, the report is accurate and complete.

§ 37.1501 Chief compliance officer.

(a) *Definition of board of directors.* For purposes of this part, the term ''board of directors'' means the board of directors of a swap execution facility, or for those swap execution facilities whose organizational structure does not include a board of directors, a body performing a function similar to a board of directors.

(b) *Designation and qualifications of chief compliance officer*—(1) *Chief compliance officer required.* Each swap execution facility shall establish the position of chief compliance officer and designate an individual to serve in that capacity.

(i) The position of chief compliance officer shall carry with it the authority and resources to develop and enforce policies and procedures necessary to fulfill the duties set forth for chief compliance officers in the Act and Commission regulations.

(ii) The chief compliance officer shall have supervisory authority over all staff acting at the direction of the chief compliance officer.

(2) *Qualifications of chief compliance officer.* The individual designated to serve as chief compliance officer shall have the background and skills appropriate for fulfilling the responsibilities of the position. No individual disqualified from registration pursuant to sections 8a(2) or 8a(3) of the Act may serve as a chief compliance officer.

(c) *Appointment, supervision, and removal of chief compliance office*—(1) *Appointment and compensation of chief compliance officer.* (i) A swap execution facility's chief compliance officer shall be appointed by its board of directors or senior officer. A swap execution facility shall notify the Commission within two business days of appointing any new chief compliance officer, whether interim or permanent.

(ii) The board of directors or the senior officer shall approve the compensation of the chief compliance officer.

(iii) The chief compliance officer shall meet with the board of directors at least annually and the regulatory oversight committee at least quarterly.

(iv) The chief compliance officer shall provide any information regarding the swap execution facility's self-regulatory program that is requested by the board of directors or the regulatory oversight committee.

(2) *Supervision of chief compliance officer.* A swap execution facility's chief compliance officer shall report directly to the board of directors or to the senior officer of the swap execution facility, at the swap execution facility's discretion.

(3) *Removal of chief compliance officer.* (i) Removal of a swap execution facility's chief compliance officer shall require the approval of a majority of the swap execution facility's board of directors. If the swap execution facility does not have a board of directors, then the chief compliance officer may be removed by the senior officer of the swap execution facility.

(ii) The swap execution facility shall notify the Commission of such removal within two business days.

(d) *Duties of chief compliance officer.* The chief compliance officer's duties shall include, but are not limited to, the following:

(1) Overseeing and reviewing the swap execution facility's compliance with section 5h of the Act and any related rules adopted by the Commission;

(2) In consultation with the board of directors, a body performing a function similar to the board of directors, or the senior officer of the swap execution facility, resolving any conflicts of interest that may arise, including:

(i) Conflicts between business considerations and compliance requirements;

(ii) Conflicts between business considerations and the requirement that the swap execution facility provide fair, open, and impartial access as set forth in § 37.202; and;

(iii) Conflicts between a swap execution facility's management and members of the board of directors;

(3) Establishing and administering written policies and procedures reasonably designed to prevent violations of the Act and the rules of the Commission;

(4) Taking reasonable steps to ensure compliance with the Act and the rules of the Commission;

(5) Establishing procedures for the remediation of noncompliance issues identified by the chief compliance officer through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint;

(6) Establishing and following appropriate procedures for the handling, management response, remediation, retesting, and closing of noncompliance issues;

(7) Establishing and administering a compliance manual designed to promote compliance with the applicable laws, rules, and regulations and a written code of ethics designed to prevent ethical violations and to promote honesty and ethical conduct;

(8) Supervising the swap execution facility's self-regulatory program with respect to trade practice surveillance; market surveillance; real-time market monitoring; compliance with audit trail requirements; enforcement and disciplinary proceedings; audits, examinations, and other regulatory responsibilities with respect to members and market participants (including ensuring compliance with, if applicable, financial integrity, financial reporting, sales practice, recordkeeping, and other requirements); and

(9) Supervising the effectiveness and sufficiency of any regulatory services provided to the swap execution facility by a regulatory service provider in accordance with § 37.204.

(e) *Preparation of annual compliance report.* The chief compliance officer shall, not less than annually, prepare and sign an annual compliance report that, at a minimum, contains the following information covering the time period since the date on which the swap execution facility became registered with the Commission or since the end of the period covered by a previously filed annual compliance report, as applicable:

(1) A description of the swap execution facility's written policies and procedures, including the code of ethics and conflict of interest policies;

(2) A review of applicable Commission regulations and each subsection and core principle of section 5h of the Act, that, with respect to each:

(i) Identifies the policies and procedures that are designed to ensure compliance with each subsection and

core principle, including each duty specified in section 5h(f)(15)(B) of the Act;

(ii) Provides a self-assessment as to the effectiveness of these policies and procedures; and

(iii) Discusses areas for improvement and recommends potential or prospective changes or improvements to its compliance program and resources;

(3) A list of any material changes to compliance policies and procedures since the last annual compliance report;

(4) A description of the financial, managerial, and operational resources set aside for compliance with respect to the Act and Commission regulations, including a description of the swap execution facility's self-regulatory program's staffing and structure, a catalogue of investigations and disciplinary actions taken since the last annual compliance report, and a review of the performance of disciplinary committees and panels;

(5) A description of any material compliance matters, including noncompliance issues identified through a compliance office review, look-back, internal or external audit finding, self-reported error, or validated complaint, and an explanation of how they were resolved; and

(6) A certification by the chief compliance officer that, to the best of his or her knowledge and reasonable belief, and under penalty of law, the annual compliance report is accurate and complete.

(f) *Submission of annual compliance report.* (1) Prior to submission to the Commission, the chief compliance officer shall provide the annual compliance report to the board of directors of the swap execution facility for its review. If the swap execution facility does not have a board of directors, then the annual compliance report shall be provided to the senior officer for his or her review. Members of the board of directors and the senior officer shall not require the chief compliance officer to make any changes to the report. Submission of the report to the board of directors or the senior officer, and any subsequent discussion of the report, shall be recorded in board minutes or a similar written record, as evidence of compliance with this requirement.

(2) The annual compliance report shall be submitted electronically to the Commission not later than 60 calendar days after the end of the swap execution facility's fiscal year, concurrently with the filing of the fourth fiscal quarter financial report pursuant to § 37.1306.

(3) Promptly upon discovery of any material error or omission made in a previously filed annual compliance report, the chief compliance officer shall file an amendment with the Commission to correct the material error or omission. An amendment shall contain the certification required under paragraph (e)(6) of this section.

(4) A swap execution facility may request from the Commission an extension of time to file its annual compliance report based on substantial, undue hardship. Extensions of the filing deadline may be granted at the discretion of the Commission.

(g) *Recordkeeping.* (1) The swap execution facility shall maintain:

(i) A copy of the written policies and procedures, including the code of ethics and conflicts of interest policies adopted in furtherance of compliance with the Act and Commission regulations;

(ii) Copies of all materials created in furtherance of the chief compliance officer's duties listed in paragraphs (d)(8) and (d)(9) of this section, including records of any investigations or disciplinary actions taken by the swap execution facility;

(iii) Copies of all materials, including written reports provided to the board of directors or senior officer in connection with the review of the annual compliance report under paragraph (f)(1) of this section and the board minutes or a similar written record that documents the review of the annual compliance report by the board of directors or senior officer; and

(iv) Any records relevant to the swap execution facility's annual compliance report, including, but not limited to, work papers and other documents that form the basis of the report, and memoranda, correspondence, other documents, and records that are

(A) Created, sent, or received in connection with the annual compliance report and

(B) Contain conclusions, opinions, analyses, or financial data related to the annual compliance report.

(2) The swap execution facility shall maintain records in accordance with § 1.31 and part 45 of this chapter.

(h) *Delegation of authority.* The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, authority to grant or deny a swap execution facility's request for an extension of time to file its annual compliance report under paragraph (f)(4) of this section.

Appendix A to Part 37—Form SEF

COMMODITY FUTURES TRADING COMMISSION

FORM SEF

SWAP EXECUTION FACILITY APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION

Registration Instructions

Intentional misstatements or omissions of material fact may constitute federal criminal violations (7 U.S.C. § 13 and 18 U.S.C. § 1001) or grounds for disqualification from registration.

DEFINITIONS

Unless the context requires otherwise, all terms used in this Form SEF have the same meaning as in the Commodity Exchange Act, as amended (''Act''), and in the General Rules and Regulations of the Commodity Futures Trading Commission (''Commission'') thereunder.

For the purposes of this Form SEF, the term ''Applicant'' shall include any applicant for registration as a swap execution facility, any applicant amending a pending application, or any registered swap execution facility that is applying for an amendment to its order of registration.

GENERAL INSTRUCTIONS

1. This Form SEF, which includes instructions, a Cover Sheet, and required Exhibits (together, ''Form SEF''), is to be filed with the Commission by all Applicants, pursuant to section 5h of the Act and the Commission's regulations thereunder. Applicants may prepare their own Form SEF but must follow the format prescribed herein. Upon the filing of an application for registration or a registration amendment in accordance with the instructions provided herein, the Commission will publish notice of the filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application. No application for registration or registration amendment shall be effective unless the Commission, by order, grants such registration or amended registration.

2. Individuals' names, except the executing signature, shall be given in full (Last Name, First Name, Middle Name).

3. Signatures on all copies of the Form SEF filed with the Commission can be executed electronically. If this Form SEF is filed by a corporation, it shall be signed in the name of the corporation by a principal officer duly authorized; if filed by a limited liability company, it shall be signed in the name of the limited liability company by a manager or member duly authorized to sign on the limited liability company's behalf; if filed by a partnership, it shall be signed in the name of the partnership by a general partner duly authorized; if filed by an unincorporated organization or association which is not a partnership, it shall be signed in the name of such organization or association by the managing agent, i.e., a duly authorized person who directs or manages or who participates in the directing or managing of its affairs.

4. If this Form SEF is being filed as an application for registration, all applicable

items must be answered in full. If any item is inapplicable, indicate by ''none,'' ''not applicable,'' or ''N/A,'' as appropriate.

5. Under section 5h of the Act and the Commission's regulations thereunder, the Commission is authorized to solicit the information required to be supplied by this Form SEF from any Applicant seeking registration as a swap execution facility and from any registered swap execution facility. Disclosure by the Applicant of the information specified on this Form SEF is mandatory prior to the start of the processing of an application for, or an amendment to, registration as a swap execution facility. The information provided in this Form SEF will be used for the principal purpose of determining whether the Commission should grant or deny registration to an Applicant. The Commission may determine that additional information is required from the Applicant in order to process its application. A Form SEF which is not prepared and executed in compliance with applicable requirements and instructions may be returned as not acceptable for filing. Acceptance of this Form SEF, however, shall not constitute a finding that the Form SEF has been filed as required or that the information submitted is true, current, or complete.

6. Except in cases where confidential treatment is requested by the Applicant and granted by the Commission pursuant to the Freedom of Information Act and the rules of the Commission thereunder, information supplied on this Form SEF will be included routinely in the public files of the Commission and will be available for inspection by any interested person.

APPLICATION AMENDMENTS

1. An Applicant amending a pending application for registration as a swap execution facility or requesting an amendment to an order of registration shall file an amended Form SEF electronically with the Secretary of the Commission in the manner specified by the Commission. Otherwise, a swap execution facility shall file any amendment to this Form SEF as a submission under part 40 of the Commission's regulations or as specified by the Commission.

2. When filing this Form SEF for purposes of amending a pending application or requesting an amendment to an order of registration, Applicants must re-file the Cover Sheet, amended if necessary and including an executing signature, and attach thereto revised Exhibits or other materials marked to show changes, as applicable. The submission of an amendment represents that the remaining items and Exhibits that are not amended remain true, current, and complete as previously filed.

WHERE TO FILE

This Form SEF must be filed electronically with the Secretary of the Commission in the manner specified by the Commission.

COMMODITY FUTURES TRADING COMMISSION

FORM SEF

SWAP EXECUTION FACILITY APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION

Cover Sheet

Exact name of Applicant as specified in charter

Address of principal executive offices

☐ If this is an APPLICATION for registration, complete in full and check here.

☐ If this is an AMENDMENT to an application, or to an existing order of registration, list all items that are amended and check here.

GENERAL INFORMATION

1. Name under which the business of the swap execution facility is or will be conducted, if different than name specified above (include acronyms, if any):

2. If name of swap execution facility is being amended, state previous swap execution facility name:

3. Contact information, including mailing address if different than address specified above:

Number and Street

City State Country Zip Code

Main Phone Number Fax

Web site URL Email Address

4. List of principal office(s) and address(es) where swap execution facility activities are/will be conducted:

Office

Address

5. If the Applicant is a successor to a previously registered swap execution facility, please complete the following:

a. Date of succession

b. Full name and address of predecessor registrant

Name

Number and Street

City State Country Zip Code

Main Phone Number Web site URL

BUSINESS ORGANIZATION

6. Applicant is a:

☐ Corporation
☐ Partnership
☐ Limited Liability Company
☐ Other form of organization (specify)

7. Date of incorporation or formation:

8. State of incorporation or jurisdiction of organization:

9. The Applicant agrees and consents that the notice of any proceeding before the Commission in connection with this application may be given by sending such notice by certified mail to the person named below at the address given.

Print Name and Title

Name of Applicant

Number and Street

City State Zip Code

SIGNATURES

10. The Applicant has duly caused this application or amendment to be signed on its behalf by the undersigned, hereunto duly authorized, this _____ day of _____, 20____. The Applicant and the undersigned represent hereby that all information contained herein is true, current, and complete. It is understood that all required items and Exhibits are considered integral parts of this Form SEF and that the submission of any amendment represents that all unamended items and Exhibits remain true, current, and complete as previously filed.

Name of Applicant

Signature of Duly Authorized Person

Print Name and Title of Signatory

COMMODITY FUTURES TRADING COMMISSION

FORM SEF

SWAP EXECUTION FACILITY APPLICATION OR AMENDMENT TO APPLICATION FOR REGISTRATION

Exhibits Instructions

The following Exhibits must be filed with the Commission by each Applicant applying for registration as a swap execution facility, or by a registered

swap execution facility amending its registration, pursuant to section 5h of the Act and the Commission's regulations thereunder. The Exhibits must be labeled according to the items specified in this Form SEF.

The application must include a Table of Contents listing each Exhibit required by this Form SEF and indicating which, if any, Exhibits are inapplicable. For any Exhibit that is inapplicable, next to the Exhibit letter specify ''none,'' ''not applicable,'' or ''N/A,'' as appropriate.

If the Applicant is a newly formed enterprise and does not have the financial statements required pursuant to Items 9 and 10 (Exhibits I and J) of this Form SEF, the Applicant should provide *pro forma* financial statements for the most recent six months or since inception, whichever is less.

List of Exhibits

EXHIBITS—BUSINESS ORGANIZATION

1. Attach as Exhibit A, the name of any person who owns ten percent (10%) or more of the Applicant's stock or who, either directly or indirectly, through agreement or otherwise, in any other manner, may control or direct the management or policies of the Applicant.

Provide as part of Exhibit A the full name and address of each such person and attach a copy of the agreement or, if there is none written, describe the agreement or basis upon which such person exercises or may exercise such control or direction.

2. Attach as Exhibit B, a list of the present officers, directors, governors (and, in the case of an Applicant that is not a corporation, the members of all standing committees, grouped by committee), or persons performing functions similar to any of the foregoing, of the swap execution facility or of any entity that performs the regulatory activities of the Applicant, indicating for each:

a. Name
b. Title
c. Dates of commencement and termination of present term of office or position
d. Length of time each present officer, director, or governor has held the same office or position
e. Brief account of the business experience of each officer and director over the last five (5) years
f. Any other business affiliations in the derivatives and securities industry
g. For directors, list any committees on which they serve and any compensation received by virtue of their directorship
h. A description of:

(1) Any order of the Commission with respect to such person pursuant to section 5e of the Act;

(2) Any conviction or injunction against such person within the past ten (10) years;

(3) Any disciplinary action with respect to such person within the last five (5) years;

(4) Any disqualification under sections 8b and 8d of the Act;

(5) Any disciplinary action under section 8c of the Act; and

(6) Any violation pursuant to section 9 of the Act.

3. Attach as Exhibit C, a narrative that sets forth the fitness standards for the Board of Directors and its composition including the number and percentage of public directors.

4. Attach as Exhibit D, a narrative or graphic description of the organizational structure of the Applicant. Include a list of all affiliates of the Applicant and indicate the general nature of the affiliation. Note: If the swap execution facility activities of the Applicant are or will be conducted primarily by a division, subdivision, or other separate entity within the Applicant, corporation, or organization, describe the relationship of such entity within the overall organizational structure and attach as Exhibit D a description only as it applies to the division, subdivision, or separate entity, as applicable. Additionally, provide any relevant jurisdictional information, including any and all jurisdictions in which the Applicant or any affiliated entity are doing business, and registration status, including pending applications (*e.g.,* country, regulator, registration category, date of registration). Provide the address for legal service of process for each jurisdiction, which cannot be a post office box.

5. Attach as Exhibit E, a description of the personnel qualifications for each category of professional employees employed by the Applicant or the division, subdivision, or other separate entity within the Applicant as described in Item 4.

6. Attach as Exhibit F, an analysis of staffing requirements necessary to carry out the operations of the Applicant as a swap execution facility and the name and qualifications of each key staff person.

7. Attach as Exhibit G, a copy of the constitution, articles of incorporation, formation, or association with all amendments thereto, partnership or limited liability agreements, and existing by-laws, operating agreement, rules or instruments corresponding thereto, of the Applicant. Include any additional governance fitness information not included in Exhibit C. Provide a certificate of good standing dated within one week of the date of this Form SEF.

8. Attach as Exhibit H, a brief description of any material pending legal proceeding(s), other than ordinary and routine litigation incidental to the business, to which the Applicant or any of its affiliates is a party or to which any of its or their property is the subject. Include the name of the court or agency where the proceeding(s) are pending, the date(s) instituted, the principal parties involved, a description of the factual basis alleged to underlie the proceeding(s), and the relief sought. Include similar information as to any proceeding(s) known to be contemplated by the governmental agencies.

EXHIBITS—FINANCIAL INFORMATION

9. Attach as Exhibit I:

a. (i) Balance sheet, (ii) Statement of income and expenses, (iii) Statement of cash flows, and (iv) Statement of sources and application of revenues and all notes or schedules thereto, as of the most recent fiscal year of the Applicant, or of its parent company, if applicable. If a balance sheet and any statement(s) certified by an independent public accountant are available, that balance sheet and statement(s) should be submitted as Exhibit I.

b. Provide a narrative of how the value of the financial resources of the Applicant is at least equal to a total amount that would enable the Applicant to cover its operating costs for a period of at least one year, calculated on a rolling basis, and whether such financial resources include unencumbered, liquid financial assets (*i.e.,* cash and/or highly liquid securities) equal to at least six months' operating costs.

c. Attach copies of any agreements establishing or amending a credit facility, insurance coverage, or other arrangement evidencing or otherwise supporting the Applicant's conclusions regarding the liquidity of its financial assets.

d. Representations regarding sources and estimates for future ongoing operational resources.

10. Attach as Exhibit J, a balance sheet and an income and expense statement for each affiliate of the swap execution facility that also engages in swap execution facility activities or that engages in designated contract market activities as of the end of the most recent fiscal year of each such affiliate.

11. Attach as Exhibit K, the following:

a. A complete list of all dues, fees, and other charges imposed, or to be imposed, by or on behalf of the Applicant for its swap execution facility services that are provided on an exclusive basis and identify the service or services provided for each such due, fee, or other charge.

b. A description of the basis and methods used in determining the level and structure of the dues, fees, and other charges listed in paragraph (a) of this item.

c. If the Applicant differentiates, or proposes to differentiate, among its customers or classes of customers in the amount of any dues, fees, or other charges imposed for the same or similar exclusive services, describe and indicate the amount of each differential. In addition, identify and describe any differences in the cost of providing such services and any other factors that account for such differentiations.

EXHIBITS—COMPLIANCE

12. Attach as Exhibit L, a narrative and any other form of documentation that may be provided under other Exhibits herein, that describes the manner in which the Applicant is able to comply with each core principle. Such documentation must include a regulatory compliance chart setting forth each core principle and providing citations to the Applicant's relevant rules, policies, and procedures that address each core principle. To the extent that the application raises issues that are novel or for which compliance with a core principle is not self-evident,

include an explanation of how that item and the application satisfy the core principles.

13. Attach as Exhibit M, a copy of the Applicant's rules (as defined in § 40.1 of the Commission's regulations) and any technical manuals, other guides, or instructions for users of, or participants in, the market, including minimum financial standards for members or market participants. Include rules citing applicable federal position limits and aggregation standards in part 151 of the Commission's regulations and any facility set position limit rules. Include rules on publication of daily trading information with regards to the requirements of part 16 of the Commission's regulations. The Applicant should include an explanation and any other form of documentation that the Applicant thinks will be helpful to its explanation, demonstrating how its rules, technical manuals, other guides, or instructions for users of, or participants in, the market, or minimum financial standards for members or market participants as provided in this Exhibit M help support the swap execution facility's compliance with the core principles.

14. Attach as Exhibit N, executed or executable copies of any agreements or contracts entered into or to be entered into by the Applicant, including third party regulatory service provider or member or user agreements that enable or empower the Applicant to comply with applicable core principles. Identify: (1) the services that will be provided; and (2) the core principles addressed by such agreement.

15. Attach as Exhibit O, a copy of any compliance manual and any other documents that describe with specificity the manner in which the Applicant will conduct trade practice, market, and financial surveillance.

16. Attach as Exhibit P, a description of the Applicant's disciplinary and enforcement protocols, tools, and procedures and, if applicable, the arrangements for alternative dispute resolution.

17. Attach as Exhibit Q, an explanation regarding the operation of the Applicant's trading system(s) or platform(s) and the manner in which the system(s) or platform(s) satisfy any Commission rules, interpretations, or guidelines regarding a swap execution facility's execution methods, including the minimum trading functionality requirement in § 37.3(a)(2) of the Commission's regulations. This explanation should include, as applicable, the following:

a. For trading systems or platforms that enable market participants to engage in transactions through an order book:

(1) How the trading system or platform displays all orders and trades in an electronic or other form, and the timeliness in which the trading system or platform does so;

(2) How all market participants have the ability to see and have the ability to transact on all bids and offers; and

(3) An explanation of the trade matching algorithm, if applicable, and examples of how that algorithm works in various trading scenarios involving various types of orders.

b. For trading systems or platforms that enable market participants to engage in transactions through a request for quote system:

(1) How a market participant transmits a request for a quote to buy or sell a specific instrument to no less than three market participants in the trading system or platform, to which all such market participants may respond;

(2) How resting bids or offers from the Applicant's Order Book are communicated to the requester; and

(3) How a requester may transact on resting bids or offers along with the responsive orders.

c. How the timing delay described under § 37.9 of the Commission's regulations is incorporated into the trading system or platform.

18. Attach as Exhibit R, a list of rules prohibiting specific trade practice violations.

19. Attach as Exhibit S, a discussion of how trading data will be maintained by the swap execution facility.

20. Attach as Exhibit T, a list of the name of the clearing organization(s) that will be clearing the Applicant's trades, and a representation that clearing members of that organization will be guaranteeing such trades.

21. Attach as Exhibit U, any information (described with particularity) included in the application that will be subject to a request for confidential treatment pursuant to § 145.9 of the Commission's regulations.

EXHIBITS—OPERATIONAL CAPABILITY

22. Attach as Exhibit V, information responsive to the Technology Questionnaire. This questionnaire focuses on information pertaining to the Applicant's program of risk analysis and oversight. Main topic areas include: information security; business continuity-disaster recovery planning and resources; capacity and performance planning; systems operations; systems development and quality assurance; and physical security and environmental controls. The questionnaire will be provided to Applicants on the Commission's Web site.

Appendix B to Part 37—Guidance on, and Acceptable Practices in, Compliance with Core Principles

1. This appendix provides guidance on complying with core principles, both initially and on an ongoing basis, to maintain registration under section 5h of the Act and this part 37. Where provided, guidance is set forth in paragraph (a) following the relevant heading and can be used to demonstrate to the Commission compliance with the selected requirements of a core principle of this part 37. The guidance for the core principle is illustrative only of the types of matters a swap execution facility may address, as applicable, and is not intended to be used as a mandatory checklist. Addressing the issues set forth in this appendix would help the Commission in its consideration of whether the swap execution facility is in compliance with the selected requirements of a core principle; provided however, that the guidance is not intended to diminish or replace, in any event, the obligations and requirements of applicants and swap execution facilities to comply with the regulations provided under this part 37.

2. Where provided, acceptable practices meeting selected requirements of core principles are set forth in paragraph (b) following the guidance. Swap execution facilities that follow specific practices outlined in the acceptable practices for a core principle in this appendix will meet the selected requirements of the applicable core principle; provided however, that the acceptable practice is not intended to diminish or replace, in any event, the obligations and requirements of applicants and swap execution facilities to comply with the regulations provided under this part 37. The acceptable practices are for illustrative purposes only and do not state the exclusive means for satisfying a core principle.

Core Principle 1 of Section 5h of the Act—Compliance With Core Principles

(A) *In general.* To be registered, and maintain registration, as a swap execution facility, the swap execution facility shall comply with—the core principles described in section 5h of the Act; and any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the Act.

(B) *Reasonable discretion of swap execution facility.* Unless otherwise determined by the Commission by rule or regulation, a swap execution facility described in paragraph (A) shall have reasonable discretion in establishing the manner in which the swap execution facility complies with the core principles described in section 5h of the Act.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

Core Principle 2 of Section 5h of the Act—Compliance With Rules

A swap execution facility shall:

(A) Establish and enforce compliance with any rule of the swap execution facility, including the terms and conditions of the swaps traded or processed on or through the swap execution facility and any limitation on access to the swap execution facility;

(B) Establish and enforce trading, trade processing, and participation rules that will deter abuses and have the capacity to detect, investigate, and enforce those rules, including means to provide market participants with impartial access to the market and to capture information that may be used in establishing whether rule violations have occurred;

(C) Establish rules governing the operation of the facility, including rules specifying trading procedures to be used in entering and executing orders traded or posted on the facility, including block trades; and

(D) Provide by its rules that when a swap dealer or major swap participant enters into or facilitates a swap that is subject to the mandatory clearing requirement of section 2(h) of the Act, the swap dealer or major swap participant shall be responsible for compliance with the mandatory trading requirement under section 2(h)(8) of the Act.

(a) *Guidance.*

(1) *Investigations and investigation reports—Warning letters.* The rules of a swap execution facility may authorize its compliance staff to issue a warning letter to a person or entity under investigation or to recommend that a disciplinary panel take such an action.

(2) *Additional rules required.* A swap execution facility should adopt and enforce any additional rules that it believes are necessary to comply with the requirements of § 37.203.

(3) *Enforcement staff.* A swap execution facility's enforcement staff should not include either members of the swap execution facility or persons whose interests conflict with their enforcement duties. A member of the enforcement staff should not operate under the direction or control of any person or persons with trading privileges at the swap execution facility. A swap execution facility's enforcement staff may operate as part of the swap execution facility's compliance department.

(4) *Notice of charges.* If compliance staff authorized by a swap execution facility or a swap execution facility disciplinary panel determines, based upon reviewing an investigation report pursuant to § 37.203(f)(3), that a reasonable basis exists for finding a violation and adjudication is warranted, it should direct that the person or entity alleged to have committed the violation be served with a notice of charges and should proceed in accordance with this guidance. A notice of charges should adequately state the acts, conduct, or practices in which the respondent is alleged to have engaged; state the rule, or rules, alleged to have been violated (or about to be violated); advise the respondent that it is entitled, upon request, to a hearing on the charges; and prescribe the period within which a hearing on the charges may be requested. If the rules of the swap execution facility so provide, a notice may also advise:

(i) That failure to request a hearing within the period prescribed in the notice, except for good cause, may be deemed a waiver of the right to a hearing; and

(ii) That failure to answer or to deny expressly a charge may be deemed to be an admission of such charge.

(5) *Right to representation.* Upon being served with a notice of charges, a respondent should have the right to be represented by legal counsel or any other representative of its choosing in all succeeding stages of the disciplinary process, except by any member of the swap execution facility's board of directors or disciplinary panel, any employee of the swap execution facility, or any person substantially related to the underlying investigations, such as a material witness or respondent.

(6) *Answer to charges.* A respondent should be given a reasonable period of time to file an answer to a notice of charges. The rules of a swap execution facility governing the requirements and timeliness of a respondent's answer to a notice of charges should be fair, equitable, and publicly available.

(7) *Admission or failure to deny charges.* The rules of a swap execution facility may provide that if a respondent admits or fails to deny any of the charges, a disciplinary panel may find that the violations alleged in the notice of charges for which the respondent admitted or failed to deny any of the charges have been committed. If the swap execution facility's rules so provide, then:

(i) The disciplinary panel should impose a sanction for each violation found to have been committed;

(ii) The disciplinary panel should promptly notify the respondent in writing of any sanction to be imposed pursuant to paragraph (7)(i) of this guidance and shall advise the respondent that it may request a hearing on such sanction within the period of time, which shall be stated in the notice;

(iii) The rules of a swap execution facility may provide that if a respondent fails to request a hearing within the period of time stated in the notice, the respondent will be deemed to have accepted the sanction.

(8) *Denial of charges and right to hearing.* In every instance where a respondent has requested a hearing on a charge that is denied, or on a sanction set by the disciplinary panel, the respondent should be given an opportunity for a hearing in accordance with the rules of the swap execution facility.

(9) *Settlement offers.* (i) The rules of a swap execution facility may permit a respondent to submit a written offer of settlement at any time after an investigation report is completed. The disciplinary panel presiding over the matter may accept the offer of settlement, but may not alter the terms of a settlement offer unless the respondent agrees.

(ii) The rules of a swap execution facility may provide that, in its discretion, a disciplinary panel may permit the respondent to accept a sanction without either admitting or denying the rule violations upon which the sanction is based.

(iii) If an offer of settlement is accepted, the panel accepting the offer should issue a written decision specifying the rule violations it has reason to believe were committed, including the basis or reasons for the panel's conclusions, and any sanction to be imposed, which should include full customer restitution where customer harm is demonstrated, except where the amount of restitution or to whom it should be provided cannot be reasonably determined. If an offer of settlement is accepted without the agreement of the enforcement staff, the decision should adequately support the disciplinary panel's acceptance of the settlement. Where applicable, the decision should also include a statement that the respondent has accepted the sanctions imposed without either admitting or denying the rule violations.

(iv) The respondent may withdraw his or her offer of settlement at any time before final acceptance by a disciplinary panel. If an offer is withdrawn after submission, or is rejected by a disciplinary panel, the respondent should not be deemed to have made any admissions by reason of the offer of settlement and should not be otherwise prejudiced by having submitted the offer of settlement.

(10) *Hearings.* (i) The swap execution facility need not apply the formal rules of evidence for a hearing; nevertheless, the procedures for the hearing may not be so informal as to deny a fair hearing. No member of the disciplinary panel for the matter may have a financial, personal, or other direct interest in the matter under consideration.

(ii) In advance of the hearing, the respondent should be entitled to examine all books, documents, or other evidence in the possession or under the control of the swap execution facility. The swap execution facility may withhold documents that: Are privileged or constitute attorney work product; were prepared by an employee of the swap execution facility but will not be offered in evidence in the disciplinary proceedings; may disclose a technique or guideline used in examinations, investigations, or enforcement proceedings; or disclose the identity of a confidential source.

(iii) The swap execution facility's enforcement and compliance staffs should be parties to the hearing, and the enforcement staff should present their case on those charges and sanctions that are the subject of the hearing.

(iv) The respondent should be entitled to appear personally at the hearing, should be entitled to cross-examine any persons appearing as witnesses at the hearing, and should be entitled to call witnesses and to present such evidence as may be relevant to the charges.

(v) The swap execution facility should require persons within its jurisdiction who are called as witnesses to participate in the hearing and produce evidence. The swap execution facility should make reasonable efforts to secure the presence of all other persons called as witnesses whose testimony would be relevant.

(vi) The rules of a swap execution facility may provide that a sanction may be summarily imposed upon any person within its jurisdiction whose actions impede the progress of a hearing.

(11) *Right to appeal.* The rules of a swap execution facility may permit the parties to a proceeding to appeal promptly an adverse decision of a disciplinary panel in all or in certain classes of cases. Such rules may require a party's notice of appeal to be in writing and to specify the findings, conclusions, or sanctions to which objection are taken. If the rules of a swap execution facility permit appeals, then both the respondent and the enforcement staff should have the opportunity to appeal and the swap execution facility should provide for the following:

(i) The swap execution facility should establish an appellate panel that should be authorized to hear appeals of respondents. In addition, the rules of a swap execution facility may provide that the appellate panel may, on its own initiative, order review of a decision by a disciplinary panel within a reasonable period of time after the decision has been rendered.

(ii) The composition of the appellate panel should be consistent with part 40 of this chapter, and should not include any members of the swap execution facility's compliance staff or any person involved in adjudicating any other stage of the same proceeding. The rules of a swap execution facility should provide for the appeal proceeding to be conducted before all of the members of the appellate panel or a panel thereof.

(iii) Except for good cause shown, the appeal or review should be conducted solely

on the record before the disciplinary panel, the written exceptions filed by the parties, and the oral or written arguments of the parties.

(iv) Promptly following the appeal or review proceeding, the appellate panel should issue a written decision and should provide a copy to the respondent. The decision issued by the appellate panel should adhere to all the requirements of § 37.206(d) to the extent that a different conclusion is reached from that issued by the disciplinary panel.

(12) *Final decisions.* Each swap execution facility should establish rules setting forth when a decision rendered pursuant to its rules will become the final decision of such swap execution facility.

(13) *Summary fines for violations of rules regarding timely submission of records.* A swap execution facility may adopt a summary fine schedule for violations of rules relating to the failure to timely submit accurate records required for clearing or verifying each day's transactions. A swap execution facility may permit its compliance staff, or a designated panel of swap execution facility officials, to summarily impose minor sanctions against persons within the swap execution facility's jurisdiction for violating such rules. A swap execution facility's summary fine schedule may allow for warning letters to be issued for first-time violations or violators. If adopted, a summary fine schedule should provide for progressively larger fines for recurring violations.

(14) *Emergency disciplinary actions.* (i) A swap execution facility may impose a sanction, including suspension, or take other summary action against a person or entity subject to its jurisdiction upon a reasonable belief that such immediate action is necessary to protect the best interest of the marketplace.

(ii) Any emergency disciplinary action should be taken in accordance with a swap execution facility's procedures that provide for the following:

(A) If practicable, a respondent should be served with a notice before the action is taken, or otherwise at the earliest possible opportunity. The notice should state the action, briefly state the reasons for the action, and state the effective time and date, and the duration of the action.

(B) The respondent should have the right to be represented by legal counsel or any other representative of its choosing in all proceedings subsequent to the emergency action taken. The respondent should be given the opportunity for a hearing as soon as reasonably practicable and the hearing should be conducted before the disciplinary panel pursuant to the rules of the swap execution facility.

(C) Promptly following the hearing provided for in paragraph (14)(ii)(B) of this guidance, the swap execution facility should render a written decision based upon the weight of the evidence contained in the record of the proceeding and should provide a copy to the respondent. The decision should include a description of the summary action taken; the reasons for the summary action; a summary of the evidence produced at the hearing; a statement of findings and conclusions; a determination that the summary action should be affirmed, modified, or reversed; and a declaration of any action to be taken pursuant to the determination, and the effective date and duration of such action.

(b) *Acceptable Practices.* [Reserved]

Core Principle 3 of Section 5h of the Act—Swaps Not Readily Susceptible to Manipulation

The swap execution facility shall permit trading only in swaps that are not readily susceptible to manipulation.

(a) *Guidance.*

(1) In general, a swap contract is an agreement to exchange a series of cash flows over a period of time based on some reference price, which could be a single price, such as an absolute level or a differential, or a price index calculated based on multiple observations. Moreover, such a reference price may be reported by the swap execution facility itself or by an independent third party. When listing a swap for trading, a swap execution facility shall ensure a swap's compliance with Core Principle 3, paying special attention to the reference price used to determine the cash flow exchanges. Specifically, Core Principle 3 requires that the reference price used by a swap not be readily susceptible to manipulation. As a result, when identifying a reference price, a swap execution facility should either: Calculate its own reference price using suitable and well-established acceptable methods or carefully select a reliable third-party index.

(2) The importance of the reference price's suitability for a given swap is similar to that of the final settlement price for a cash-settled futures contract. If the final settlement price is manipulated, then the futures contract does not serve its intended price discovery and risk management functions. Similarly, inappropriate reference prices cause the cash flows between the buyer and seller to differ from the proper amounts, thus benefitting one party and disadvantaging the other. Thus, careful consideration should be given to the potential for manipulation or distortion of the reference price.

(3) For swaps that are settled by physical delivery or by cash settlement refer to the guidance in appendix C to part 38 of this chapter—Demonstration of Compliance That a Contract is not Readily Susceptible to Manipulation, section b(2) and section c(5), respectively.

(b) *Acceptable Practices.* [Reserved]

Core Principle 4 of Section 5h of the Act—Monitoring of Trading and Trade Processing

The swap execution facility shall:

(A) Establish and enforce rules or terms and conditions defining, or specifications detailing:

(1) Trading procedures to be used in entering and executing orders traded on or through the facilities of the swap execution facility; and

(2) Procedures for trade processing of swaps on or through the facilities of the swap execution facility; and

(B) Monitor trading in swaps to prevent manipulation, price distortion, and disruptions of the delivery or cash settlement process through surveillance, compliance, and disciplinary practices and procedures, including methods for conducting real-time monitoring of trading and comprehensive and accurate trade reconstructions.

(a) *Guidance.* The monitoring of trading activity in listed swaps should be designed to prevent manipulation, price distortion, and disruptions of the physical-delivery and cash settlement processes. The swap execution facility should have rules in place that allow it to intervene to prevent or reduce such market disruptions. Once a threatened or actual disruption is detected, the swap execution facility should take steps to prevent the market disruption or reduce its severity.

(1) *General requirements.* Real-time monitoring for market anomalies is the most effective, but the swap execution facility may also demonstrate that it has an acceptable program if some of the monitoring is accomplished on a T+1 basis. The monitoring of trading should use automated alerts to detect abnormal price movements and unusual trading volumes in real-time and instances or threats of manipulation, price distortion, and disruptions on at least a T+1 basis. The T+1 detection and analysis should incorporate any additional data that becomes available on a T+1 basis, including the trade reconstruction data. In some cases, a swap execution facility may demonstrate that its manual processes are effective. The swap execution facility should continually monitor the appropriateness of its swaps' terms and conditions, including the physical-delivery requirements or reference prices used to determine cash flows or settlement. The swap execution facility should act promptly to address the conditions that are causing price distortions or market disruptions, including, when appropriate, changes to contract terms. The swap execution facility should be mindful that changes to contract terms may affect whether a product is subject to the trade execution and clearing requirements of the Act.

(2) *Physical-delivery swaps.* For physical-delivery swaps, the swap execution facility should monitor for conditions that may cause the swap to become susceptible to price manipulation or distortion, including: The general availability of the commodity specified by the swap, the commodity's characteristics, and the delivery locations; and if available, information related to the size and ownership of deliverable supplies.

(3) *Cash-settled swaps.* For cash-settled swaps, the swap execution facility should monitor for pricing abnormalities in the index or instrument used to calculate the reference price. If the swap execution facility computes its own reference price used for cash flows or settlement, it should promptly amend any methodologies that result, or are likely to result, in manipulation, price distortions, or market disruptions, or impose new methodologies to resolve the threat of disruptions or distortions. If the swap execution facility relies upon a third-party index or instrument, including an index or instrument traded on another venue for the swap reference price, it should conduct due diligence to ensure that the reference price is

not susceptible to manipulation and that the terms and conditions of the swap continue to comply with § 37.300.

(4) *Ability to obtain information.* The swap execution facility shall demonstrate that it has access to sufficient information to assess whether trading in swaps listed on its market, in the index or instrument used as a reference price, or the underlying commodity for its listed swaps is being used to affect prices on its market. The swap execution facility should demonstrate that it can obtain position and trading information directly from the market participants that conduct substantial trading on its facility or through an information sharing agreement with other venues or a third-party regulatory service provider. If the position and trading information is not available directly from the market participants in its markets, but is available through information sharing agreements with other trading venues or a third-party regulatory service provider, the swap execution facility should cooperate in such information sharing agreements. The swap execution facility may limit the application of the requirement for market participants to keep and provide records of their activity in the index or instrument used as a reference price, the underlying commodity, and related derivatives markets, to only those market participants that conduct substantial trading on its facility.

(5) *Risk controls for trading.* An acceptable program for preventing market disruptions shall demonstrate appropriate trading risk controls, in addition to pauses and halts. Risk controls should be adapted to the unique characteristics of the trading platform and of the markets to which they apply and should be designed to avoid market disruptions without unduly interfering with that market's price discovery function. The swap execution facility may choose from among controls that include: pre-trade limits on order size, price collars or bands around the current price, message throttles, daily price limits, and intraday position limits related to financial risk to the clearing member, or design other types of controls, as well as clear error-trade and order-cancellation policies. Within the specific array of controls that are selected, the swap execution facility should set the parameters for those controls, so that the specific parameters are reasonably likely to serve the purpose of preventing market disruptions and price distortions. If a swap is fungible with, linked to, or a substitute for other swaps on the swap execution facility or on other trading venues, such risk controls should, to the extent practicable, be coordinated with any similar controls placed on those other swaps. If a swap is based on the level of an equity index, such risk controls should, to the extent practicable, be coordinated with any similar controls placed on national security exchanges.

(b) *Acceptable practices.* [Reserved]

Core Principle 5 of Section 5h of the Act—Ability To Obtain Information

The swap execution facility shall:

(A) Establish and enforce rules that will allow the facility to obtain any necessary information to perform any of the functions described in section 5h of the Act;

(B) Provide the information to the Commission on request; and

(C) Have the capacity to carry out such international information-sharing agreements as the Commission may require.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

Core Principle 6 of Section 5h of the Act—Position Limits or Accountability

(A) *In general.* To reduce the potential threat of market manipulation or congestion, especially during trading in the delivery month, a swap execution facility that is a trading facility shall adopt for each of the contracts of the facility, as is necessary and appropriate, position limitations or position accountability for speculators.

(B) *Position limits.* For any contract that is subject to a position limitation established by the Commission pursuant to section 4a(a) of the Act, the swap execution facility shall:

(1) Set its position limitation at a level no higher than the Commission limitation; and

(2) Monitor positions established on or through the swap execution facility for compliance with the limit set by the Commission and the limit, if any, set by the swap execution facility.

(a) *Guidance.* Until such time that compliance is required under part 151 of this chapter, a swap execution facility should have reasonable discretion to comply with § 37.600, including considering part 150 of this chapter. For Required Transactions as defined in § 37.9, a swap execution facility may demonstrate compliance with § 37.600 by setting and enforcing position limitations or position accountability levels only with respect to trading on the swap execution facility's own market. For Permitted Transactions as defined in § 37.9, a swap execution facility may demonstrate compliance with § 37.600 by setting and enforcing position accountability levels or sending the Commission a list of Permitted Transactions traded on the swap execution facility.

(b) *Acceptable Practices.* [Reserved]

Core Principle 7 of Section 5h of the Act—Financial Integrity of Transactions

The swap execution facility shall establish and enforce rules and procedures for ensuring the financial integrity of swaps entered on or through the facilities of the swap execution facility, including the clearance and settlement of the swaps pursuant to section 2(h)(1) of the Act.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

Core Principle 8 of Section 5h of the Act—Emergency Authority

The swap execution facility shall adopt rules to provide for the exercise of emergency authority, in consultation or cooperation with the Commission, as is necessary and appropriate, including the authority to liquidate or transfer open positions in any swap or to suspend or curtail trading in a swap.

(a) *Guidance.*

(1) A swap execution facility should have rules that authorize it to take certain actions in the event of an emergency, as defined in § 40.1(h) of this chapter. A swap execution facility should have the authority to intervene as necessary to maintain markets with fair and orderly trading and to prevent or address manipulation or disruptive trading practices, whether the need for intervention arises exclusively from the swap execution facility's market or as part of a coordinated, cross-market intervention. A swap execution facility should have the flexibility and independence to address market emergencies in an effective and timely manner consistent with the nature of the emergency, as long as all such actions taken by the swap execution facility are made in good faith to protect the integrity of the markets. However, the swap execution facility should also have rules that allow it to take market actions as may be directed by the Commission. Additionally, in situations where a swap is traded on more than one platform, emergency action to liquidate or transfer open interest shall be as directed, or agreed to, by the Commission or the Commission's staff. Swap execution facility rules should include procedures and guidelines for decision-making and implementation of emergency intervention that avoid conflicts of interest in accordance with the provisions of section 40.9 of this chapter, and include alternate lines of communication and approval procedures to address emergencies associated with real time events. To address perceived market threats, the swap execution facility should have rules that allow it to take emergency actions, including imposing or modifying position limits, imposing or modifying price limits, imposing or modifying intraday market restrictions, imposing special margin requirements, ordering the liquidation or transfer of open positions in any contract, ordering the fixing of a settlement price, extending or shortening the expiration date or the trading hours, suspending or curtailing trading in any contract, transferring customer contracts and the margin, or altering any contract's settlement terms or conditions, or, if applicable, providing for the carrying out of such actions through its agreements with its third-party provider of clearing or regulatory services.

(2) A swap execution facility should promptly notify the Commission of its exercise of emergency action, explaining its decision-making process, the reasons for using its emergency authority, and how conflicts of interest were minimized, including the extent to which the swap execution facility considered the effect of its emergency action on the underlying markets and on markets that are linked or referenced to the contracts traded on its facility, including similar markets on other trading venues. Information on all regulatory actions carried out pursuant to a swap execution facility's emergency authority should be included in a timely submission of a certified rule pursuant to part 40 of this chapter.

(b) *Acceptable Practices.* [Reserved]

Core Principle 9 of Section 5h of the Act—Timely Publication of Trading Information

(A) *In general.* The swap execution facility shall make public timely information on price, trading volume, and other trading data on swaps to the extent prescribed by the Commission.

(B) *Capacity of swap execution facility.* The swap execution facility shall be required to have the capacity to electronically capture and transmit trade information with respect to transactions executed on the facility.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

Core Principle 10 of Section 5h of the Act—Recordkeeping and Reporting

(A) *In general.* A swap execution facility shall:

(1) Maintain records of all activities relating to the business of the facility, including a complete audit trail, in a form and manner acceptable to the Commission for a period of five years;

(2) Report to the Commission, in a form and manner acceptable to the Commission, such information as the Commission determines to be necessary or appropriate for the Commission to perform the duties of the Commission under the Act; and

(3) Keep any such records relating to swaps defined in section 1a(47)(A)(v) of the Act open to inspection and examination by the Securities and Exchange Commission.

(B) *Requirements.* The Commission shall adopt data collection and reporting requirements for swap execution facilities that are comparable to corresponding requirements for derivatives clearing organizations and swap data repositories.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

Core Principle 11 of Section 5h of the Act—Antitrust Considerations

Unless necessary or appropriate to achieve the purposes of the Act, the swap execution facility shall not:

(A) Adopt any rules or take any actions that result in any unreasonable restraint of trade; or

(B) Impose any material anticompetitive burden on trading or clearing.

(a) *Guidance.* An entity seeking registration as a swap execution facility may request that the Commission consider under the provisions of section 15(b) of the Act, any of the entity's rules, including trading protocols or policies, and including both operational rules and the terms or conditions of products listed for trading, at the time of registration or thereafter. The Commission intends to apply section 15(b) of the Act to its consideration of issues under this core principle in a manner consistent with that previously applied to contract markets.

(b) *Acceptable Practices.* [Reserved]

Core Principle 12 of Section 5h of the Act—Conflicts of Interest:

The swap execution facility shall:

(A) Establish and enforce rules to minimize conflicts of interest in its decision-making process; and

(B) Establish a process for resolving the conflicts of interest.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

Core Principle 13 of Section 5h of the Act—Financial Resources

(A) *In general.* The swap execution facility shall have adequate financial, operational, and managerial resources to discharge each responsibility of the swap execution facility.

(B) *Determination of resource adequacy.* The financial resources of a swap execution facility shall be considered to be adequate if the value of the financial resources exceeds the total amount that would enable the swap execution facility to cover the operating costs of the swap execution facility for a one-year period, as calculated on a rolling basis.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

Core Principle 14 of Section 5h of the Act—System Safeguards

The swap execution facility shall:

(A) Establish and maintain a program of risk analysis and oversight to identify and minimize sources of operational risk, through the development of appropriate controls and procedures, and automated systems, that:

(1) Are reliable and secure; and

(2) Have adequate scalable capacity;

(B) Establish and maintain emergency procedures, backup facilities, and a plan for disaster recovery that allow for:

(1) The timely recovery and resumption of operations; and

(2) The fulfillment of the responsibilities and obligations of the swap execution facility; and

(C) Periodically conduct tests to verify that the backup resources of the swap execution facility are sufficient to ensure continued:

(1) Order processing and trade matching;

(2) Price reporting;

(3) Market surveillance; and

(4) Maintenance of a comprehensive and accurate audit trail.

(a) *Guidance.*

(1) *Risk analysis and oversight program.* In addressing the categories of its risk analysis and oversight program, a swap execution facility should follow generally accepted standards and best practices with respect to the development, operation, reliability, security, and capacity of automated systems.

(2) *Testing.* A swap execution facility's testing of its automated systems and business continuity-disaster recovery capabilities should be conducted by qualified, independent professionals. Such qualified independent professionals may be independent contractors or employees of the swap execution facility, but should not be persons responsible for development or operation of the systems or capabilities being tested.

(3) *Coordination.* To the extent practicable, a swap execution facility should:

(i) Coordinate its business continuity-disaster recovery plan with those of the market participants it depends upon to provide liquidity, in a manner adequate to enable effective resumption of activity in its markets following a disruption causing activation of the swap execution facility's business continuity-disaster recovery plan;

(ii) Initiate and coordinate periodic, synchronized testing of its business continuity-disaster recovery plan with those of the market participants it depends upon to provide liquidity; and

(iii) Ensure that its business continuity-disaster recovery plan takes into account such plans of its telecommunications, power, water, and other essential service providers.

(b) *Acceptable Practices.* [Reserved]

Core Principle 15 of Section 5h of the Act—Designation of Chief Compliance Officer

(A) *In general.* Each swap execution facility shall designate an individual to serve as a chief compliance officer.

(B) *Duties.* The chief compliance officer shall:

(1) Report directly to the board or to the senior officer of the facility;

(2) Review compliance with the core principles in this subsection;

(3) In consultation with the board of the facility, a body performing a function similar to that of a board, or the senior officer of the facility, resolve any conflicts of interest that may arise;

(4) Be responsible for establishing and administering the policies and procedures required to be established pursuant to this section;

(5) Ensure compliance with the Act and the rules and regulations issued under the Act, including rules prescribed by the Commission pursuant to section 5h of the Act; and

(6) Establish procedures for the remediation of noncompliance issues found during compliance office reviews, look backs, internal or external audit findings, self-reported errors, or through validated complaints.

(C) *Requirements for procedures.* In establishing procedures under paragraph (B)(6) of this section, the chief compliance officer shall design the procedures to establish the handling, management response, remediation, retesting, and closing of noncompliance issues.

(D) *Annual reports.*

(1) *In general.* In accordance with rules prescribed by the Commission, the chief compliance officer shall annually prepare and sign a report that contains a description of:

(i) The compliance of the swap execution facility with the Act; and

(ii) The policies and procedures, including the code of ethics and conflict of interest policies, of the swap execution facility.

(2) *Requirements.* The chief compliance officer shall:

(i) Submit each report described in clause (1) with the appropriate financial report of the swap execution facility that is required to be submitted to the Commission pursuant to section 5h of the Act; and

(ii) Include in the report a certification that, under penalty of law, the report is accurate and complete.

(a) *Guidance.* [Reserved]

(b) *Acceptable Practices.* [Reserved]

Issued in Washington, DC, on May 17, 2013, by the Commission.

Melissa D. Jurgens,

Secretary of the Commission.

Appendices to Core Principles and Other Requirements for Swap Execution Facilities

NOTE: The following appendices will not appear in the Code of Federal Regulations.

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Chilton, O'Malia and Wetjen voted in the affirmative; Commissioner Sommers voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the final rulemaking on swap execution facilities (SEFs). This rule is key to fulfilling transparency reforms that Congress mandated in the Dodd-Frank Wall Street Reform and Consumer Protection Act.

Congress included a trade execution requirement in the law. This means that swaps subject to mandatory clearing and made available to trade would move to transparent trading platforms. Market participants would benefit from the price competition that comes from trading platforms where multiple participants have the ability to trade swaps by accepting bids and offers made by multiple participants. Congress also said that the market participants must have impartial access to these platforms.

Farmers, ranchers, producers and commercial companies that want to hedge a risk by locking in a future price or rate would get the benefit of the competition and transparency that trading platforms, both SEFs and designated contract markets (DCMs), will provide.

These transparent platforms will give everyone looking to compete in the marketplace the ability to see the prices of available bids and offers prior to making a decision on a transaction. By the end of this year, a significant portion of interest rate and credit derivative index swaps would be in full view to the marketplace before transactions occur. This is a significant shift toward market transparency from the status quo.

Such common-sense transparency has existed in the securities and futures markets since the historic reforms of the 1930s. Transparency lowers costs for investors, businesses and consumers, as it shifts information from dealers to the broader public. It promotes competition and increases liquidity.

As Congress made clear in the law, trading on SEFs and DCMs would be required only when financial institutions transact with financial institutions. End-users would benefit from access to the information on these platforms, but would not be required to use them.

Further, companies would be able to continue relying on customized transactions—those not required to be cleared—to meet their particular needs, as well as to enter into large block trades.

Consistent with Congress' directive that multiple parties have the ability to trade with multiple parties on these transparent platforms, these reforms require that market participants trade through an order book, and provide the flexibility as well to seek requests for quotes.

To be a registered SEF, the trading platform will be required to provide an order book to all its market participants. This is significant, as for the first time, the broad public will be able to gain access and compete in this market with the assurance that their bids or offers will be communicated to the rest of the market. This provision alone will significantly enhance transparency and competition in the market.

SEFs also will have the flexibility to offer trading through requests for quotes. The rule provides that such requests would have to go out to a minimum of three unaffiliated market participants before a swap that is cleared, made available to trade and less than a block could be executed. There will be an initial phase-in period with a minimum of two participants to smooth the transition.

As long as the minimum functionality is met, as detailed in the rule, and the SEF complies with these rules and the core principles, the SEF can conduct business through any means of interstate commerce, such as the Internet, telephone or even the mail. Thus, today's rule is technology neutral.

Under these transparency reforms coupled with the Commission's rule on making swaps available for trading, the trade execution requirement will be phased in for market participants, giving them time to comply.

These reforms benefited from extensive public comments. Moving forward, the CFTC will work with SEF applicants on implementation.

Appendix 3—Concurring Statement of Commissioner Scott D. O'Malia

Today, the Commission votes to establish a new trading venue, a Swap Execution Facility (SEF) that will allow market participants to access a more transparent market and offer innovative trading opportunities. Unlike the futures exchanges which are tied to a single clearinghouse, trades executed on SEFs can be cleared at different clearinghouses, which will provide a new competitive execution space. For these reasons, I have always had high hopes for SEFs.

I am pleased that the final rule has been revised to soften many of the proposed rough edges and should allow for a smooth transition to this new trading environment.

The final rule allows for a streamlined temporary registration process to ensure that SEF platforms are not disadvantaged by regulatory delays that could stifle competition or provide a first-mover advantage. However, instead of ''rubberstamping'' SEFs' applications, a better approach would have been to conduct a more substantive, but limited review of applications by coming up with a Checklist that contains specific requirements and that takes into account work already done by the National Futures Association in reviewing the SEFs' systems and rulebooks.

I am also cautiously optimistic about the Commission's commitment to revisit the SEF rule and other Commission's rules to address regulatory conflicts with foreign jurisdictions. Such regulatory disparities will discourage U.S. and foreign traders from doing business in the United States and prompt them to move their businesses to foreign jurisdictions with a less restrictive trading environment. I am pleased to have the commitment of Chairman Gensler who stated his intention to revisit the SEF rule if it proves to conflict with international regulatory requirements making U.S. platforms uncompetitive or disadvantaged as a result of this rulemaking.

For SEFs to be successful, the Commission must be faithful to the express directives of Dodd-Frank and implement rules that are clear and promote efficient and fair trading.

As I explain below, the Commission's rules have fallen short of these objectives.

The Rule's Requirement To Send a Request for Quote to Three Market Participants Is Not Supported by Law

Dodd-Frank seeks to ''promote the trading on SEFs and to promote pre-trade price transparency in the swaps market.'' [1] To advance these objectives, the rule must permit SEFs to offer flexible execution platforms that ensure pre-trade price transparency, but at the same time, allow participants (buy-side, sell-side, commercial firms) to execute various products with different levels of trading liquidity at the price acceptable to them.

Thus, the success of a SEF is determined by whether it will be able to meet the liquidity needs of various market participants. Although the rules allow a Request for Quote (RFQ) to accommodate transactions in less liquid products to the extent that such products are determined to be made available to trade as provided in the Made Available to Trade rule,[2] I am concerned that the requirement to broadcast a quote to at least three market participants is not supported by the statute and is not based on data analysis.[3]

One way for the Commission to assess trading liquidity on a SEF and make necessary adjustments to the RFQ requirement is to analyze transaction data that the Commission now receives from Swap Data Repositories (SDRs). Over time, as liquidity increases and the market feels more confident about SEFs, there will be a natural progression for market participants to migrate to more centralized execution platforms and the role of the RFQ may be significantly reduced. But again, the Commission should not come up with an unsubstantiated number and declare it to be the law. Instead, the Commission must make such determination based on an evaluation of the SDR transaction data.

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[1] CEA section 5h(e).

[2] Commissioner Scott D. O'Malia Dissenting Statement, Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade under Section 2(h)(8) of the Commodity Exchange Act; Swap Transaction Compliance and Implementation Schedule; Trade Execution Requirement Under Section 2(h) of the Commodity Exchange Act (May 16, 2013).

[3] A SEF is defined as a ''trading system . . . in which multiple participants have the ability to . . . trade swaps by accepting bids and offers made by multiple participants in the . . . system, through any means of interstate commerce.'' CEA section 1(a)(50).

The Rule Should Have Provided Further Clarity Regarding Voice Execution.

SEFs, by definition, may execute swaps ''through any means of interstate commerce.'' [4] As I mentioned before, I strongly support the use of various methods of execution, including voice, to foster a competitive trading environment on a SEF. I am pleased that the final rule acknowledges the ''any means of interstate commerce'' clause and provides for a role of voice and other means of execution. However, I remain concerned that although the preamble to the rule provides an example of a voice-based method of execution, the rule text does not expressly allow for voice and other execution methods.[5] A better approach would have been to add voice to the rule text as the third method of execution on a SEF.

The Rule Should Have Provided Clarity Regarding Exchange of Swaps for Related Position Transactions

For some unknown reason, the draft rule prohibited trades involving an Exchange of Swaps for Related Positions (ESRPs). Yet again, such ban would have caused the pendulum of the Commission's regulations to continue its swing toward futures trading as the Commodity Exchange Act (CEA) expressly allows for *bone fide* Exchange of Futures for Related Positions transactions.

The Commission sought to ban ESRPs transactions because they were not expressly allowed by the CEA. Just because these transactions are not mentioned in the statute, they don't have to be banned by the Commission's rules.

I am glad that in the final rule, the Commission took a more reasonable approach and now has committed to entertaining requests from market participants to permit off-exchange trades where swaps are components of exchanges of swaps for physicals transactions.

Conclusion

For the reasons stated above, I reluctantly concur with the decision of the Commission to approve this final rule.

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[4] CEA section 1(a) (50).

[5] Commission Regulation § 37.9.

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Part III

Commodity Futures Trading Commission

17 CFR Parts 37 and 38
Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act; Final Rule

COMMODITY FUTURES TRADING COMMISSION

17 CFR Parts 37 and 38

RIN 3038–AD18

Process for a Designated Contract Market or Swap Execution Facility To Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act

AGENCY: Commodity Futures Trading Commission.

ACTION: Final rule.

SUMMARY: The Commodity Futures Trading Commission (''Commission'') is adopting regulations that establish a process for a designated contract market (''DCM'') or swap execution facility (''SEF'') to make a swap subject to the trade execution requirement pursuant to the Commodity Exchange Act (''CEA''). The Commission is also adopting regulations to establish a schedule to phase in compliance with the trade execution requirement. The schedule will provide additional time for compliance with this requirement.

DATES: The rules will become effective August 5, 2013.

FOR FURTHER INFORMATION CONTACT: Nhan Nguyen, Special Counsel, Division of Market Oversight (''DMO'', 202–418–5932, *nnguyen@cftc.gov;* Roger Smith, Attorney Advisor, DMO, 202–418–5344, *rsmith@cftc.gov;* or David Van Wagner, Chief Counsel, DMO, 202–418–5119, *dvanwagner@cftc.gov;* Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, NW., Washington, DC 20581.

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I. Background

Section 723(a)(3) of the Dodd-Frank Act added section 2(h)(8) of the Commodity Exchange Act (''CEA'') to require that swap transactions subject to the clearing requirement must be traded on either a designated contract market (''DCM'') or swap execution facility (''SEF''), unless no DCM or SEF ''makes the swap available to trade'' or the transaction is not subject to the clearing requirement under section 2(h)(7) (the ''trade execution requirement'').[1]

On December 14, 2011, the Commodity Futures Trading Commission (''Commission'') proposed regulations to establish a process for a DCM or SEF to notify the Commission that a swap is ''available to trade'' for purposes of the trade execution requirement (''Further Notice of Proposed Rulemaking'' or ''FNPRM'').[2] The proposed regulations would be included in part 37 and part 38 of the Commission's regulations to implement the available-to-trade provision in section 2(h)(8) of the CEA. The comment period for the FNPRM ended on February 13, 2012. The Commission received 32 written comments from members of the public and hosted a public roundtable on this topic. Commission staff also participated in several meetings with market participants.[3] As a result of the written comments received and dialogue with market participants, the Commission in this final rule has revised and/or eliminated certain provisions that were proposed in the FNPRM.

On September 20, 2011, the Commission also proposed regulations to establish a schedule to implement the trade execution requirement.[4] The proposed regulations would be included in part 37 and part 38 of the Commission's regulations. The comment period for the proposed regulations ended on November 4, 2011. The Commission received 33 written comments from members of the public, and after consideration of those comments, is adopting the final implementation schedule for the trade execution requirement as proposed, but with certain clarifications.

The final regulations adopted herein will become effective August 5, 2013.

II. Sections 37.10 and 38.12 of the Commission's Regulations—Final Rules

As proposed in the FNPRM, §§ 37.10 and 38.12 established a process for a SEF or a DCM, respectively, to make a swap available to trade under section 2(h)(8) of the CEA.

- Proposed §§ 37.10(a) and 38.12(a) set forth the filing procedure that SEFs

[1] For example, section 2(h)(7) of the CEA, as amended by section 723 of the Dodd-Frank Act, provides an exception to the CEA section 2(h)(1) clearing requirement (''the end-user exception'') if one of the counterparties to a swap (i) is not a financial entity, (ii) is using swaps to hedge or mitigate commercial risk, and (iii) notifies the Commission how it generally meets its financial obligations associated with entering into non-cleared swaps. 7 U.S.C 2(h)(7). Under the authority given by section 2(h)(7)(C)(ii) of the CEA, the Commission has also adopted regulations to exempt certain small banks, saving associations, farm credit system institutions, and credit unions from the definition of ''financial entity,'' thus potentially allowing the transactions of those entities to qualify for an exemption from the clearing requirement. 17 CFR 50.5(d). The Commission may determine that swap transactions exempted from the clearing requirement pursuant to other statutory authority would also not be subject to the section 2(h)(8) trade execution requirement. For example, on April 11, 2013, the Commission published final rules issued under section 4(c) of the CEA to exempt swaps between certain affiliated entities (''inter-affiliates'') within a corporate group from the clearing requirement. The Commission determines that such swaps would not be subject to the trade execution requirement.

[2] Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade, 76 FR 77728 (Dec. 14, 2011). Sections 5(d)(1) and 5h(f)(1) of the CEA require DCMs and SEFs, respectively, to comply with any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the CEA, 7 U.S.C. 12a(5), which authorizes the Commission to promulgate such regulations as, in the judgment of the Commission, that are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA. In addition, section 721(b) of the Dodd-Frank Act provides the Commission with authority to adopt rules to define ''[any] term included in an amendment to the Commodity Exchange Act . . . made by [the Dodd-Frank Act].'' 15 U.S.C. 8321, as enacted by section 721 of the Dodd-Frank Act.

[3] Meeting summaries are available through the Commission's Web site at *http://comments.cftc.gov/PublicComments/CommentList.aspx?id=1125.*

[4] Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA, 76 FR 58186 (Sep. 20, 2011).

and DCMs would utilize to demonstrate that a swap is available to trade. Under the proposal, a SEF or DCM would be required to submit an available-to-trade determination with the Commission under the rule approval and self-certification procedures in part 40 of the Commission's regulations.

- Proposed §§ 37.10(b) and 38.12(b) set forth eight factors that a DCM or SEF may consider, as appropriate, to determine that a swap is available to trade.[5]
- Proposed §§ 37.10(c) and 38.12(c) required that upon a determination that a swap is available to trade by a SEF or DCM, all other DCMs and SEFs listing or offering that swap or an economically equivalent swap for trading must also make those swaps available to trade.
- Proposed §§ 37.10(d) and 38.12(d) required DCMs and SEFs to perform an annual review and assessment of their determinations.

A. Sections 37.10(a) and 38.12(a)—Procedure To Make a Swap Available to Trade

1. Sections 37.10(a)(1) and 38.12(a)(1)—Required Submission

Under proposed §§ 37.10(a) and 38.12(a), a SEF or DCM would initially determine that a swap is available to trade and submit that determination to the Commission, either for approval or self-certification, pursuant to the rule filing procedures of part 40 of the Commission's regulations.[6]

Under § 40.5, a registered entity may request Commission approval of a new rule prior to its implementation.[7] The Commission has a 45-day review period to review the request and may extend the review period for an additional 45 days in specified circumstances.[8] The Commission may also extend the review period beyond an additional 45 days, based on a written agreement with the registered entity.[9] Under § 40.6, a registered entity may submit a new rule to the Commission under self-certification procedures. The Commission has 10 business days to review the rule before it is deemed certified and can be made effective. The Commission, however, may stay the certification for an additional 90 days, during which time it must provide a 30-day public comment period.[10] Under either procedure, the registered entity must initially provide an explanation and analysis of the rule and its compliance with the applicable provisions of the CEA, including the core principles, and the Commission's regulations thereunder.[11]

In the case of an available-to-trade determination, the accompanying explanation and analysis in the submission would detail the manner in which the SEF or DCM considered the factors in proposed § 37.10(b) or § 38.12(b).[12] At any time during its review under § 40.5 or during the 90-day review period under § 40.6, the Commission may notify the registered entity that it objects to the proposed certification because it is inconsistent or appears to be inconsistent with the CEA or the Commission's regulations.[13]

Upon the Commission approving a SEF's or DCM's available-to-trade determination or permitting a SEF's or DCM's available-to-trade determination certification to become effective, the swap involved would be deemed available to trade. If that swap also is subject to the clearing requirement, then the swap must be executed on a SEF as a Required Transaction (as defined in part 37 of the Commission's regulations) or on a DCM in order to satisfy the trade execution requirement under section 2(h)(8) of the CEA. The Commission notes that the trade execution requirement does not apply to swaps that are not subject to the clearing requirement under section 2(h)(1) of the CEA.[14]

Summary of Comments

With respect to the filing procedures set forth in proposed §§ 37.10(a) and 38.12(a), several commenters opposed the procedures and recommended that all swaps subject to the clearing requirement under section 2(h)(1) of the CEA should be subject to the trade execution requirement because the Dodd-Frank Act does not specify a separate process to make a swap available to trade.[15] In this regard, some commenters stated that under section 2(h)(8)(B) of the CEA, swaps subject to the clearing requirement are automatically subject to mandatory trade execution unless a SEF or DCM does not list the swap for trading.[16] Some commenters viewed the proposed procedure as duplicative of the mandatory clearing determination process and accordingly stated that the Commission should rely on the clearing determination process to also determine whether a swap is available to trade.[17] The commenters further stated that utilizing the clearing determination as the exclusive basis for finding that a swap is available to trade would subject more swaps to the trade execution

[5] *See infra* note 90 and accompanying text.

[6] *See* Sections 40.5 and 40.6 and Provisions Common to Registered Entities, 76 FR 44776 (Jul. 27, 2011). The Commission views a DCM or SEF's determination that a swap is available to trade as a ''trading protocol'' that falls under the definition of a ''rule'' under § 40.1 of the Commission's regulations. Section 40.1(i) defines a rule as ''any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, interpretation, stated policy, advisory, terms and conditions, trading protocol, agreement or instrument corresponding thereto, including those that authorize a response or establish standards for responding to a specific emergency, and any amendment or addition thereto or repeal thereof, made or issued by a registered entity or by the governing board thereof or any committee thereof, in whatever form adopted.'' Therefore, SEFs and DCMs would be required to submit a determination to the Commission for approval or self-certification under part 40 of the Commission's regulations.

[7] 17 CFR 40.5(a).

[8] 17 CFR 40.5(c) and (d). In determining whether to extend the review period, the Commission will consider whether the proposed rule raises novel or complex issues, the submission is incomplete, or the requestor does not respond completely to Commission questions in a timely manner. 17 CFR 40.5(d)(1).

[9] 17 CFR 40.5(d)(2).

[10] 17 CFR 40.6(b) and (c). In determining whether to stay a self-certification, the Commission will consider whether the rule presents novel or complex issues; is accompanied by inadequate explanation; or is potentially inconsistent with the CEA. 17 CFR 40.6(c)(1).

[11] *See* 17 CFR 40.5(a)(5), 40.6(a)(7)(v).

[12] *See infra* note 90 and accompanying text for a list of the proposed determination factors in the FNPRM.

[13] *See* 17 CFR 40.5(e), 40.6(c)(3).

[14] *See supra* note 1. The Commission addresses the methods by which swaps that are subject to the trade execution requirement must be executed on a SEF or DCM. Swaps that are subject to the trade execution requirement (and are not block trades as defined under § 43.2 of the Commission's regulations) and that are traded on a SEF are defined as Required Transactions under part 37 of the Commission's regulations governing SEFs. Under § 37.9(a)(2), Required Transactions must be executed by either (1) an Order Book, as defined in § 37.3(a)(3); or (2) a Request for Quote System, as defined in § 37.9(a)(3), that operates in conjunction with an Order Book. *See* Core Principles and Other Requirements for Swap Execution Facilities (May 17, 2013). Swaps that are subject to the trade execution requirement and traded on a DCM must be executed pursuant to subpart J of part 38 of the Commission's regulations, which implements revised DCM Core Principle 9 under section 5(d)(9) of the CEA, as amended by section 735(b) of the Dodd-Frank Act. 7 U.S.C. 7(d)(9).

[15] MarketAxess Comment Letter at 3; WMBAA Comment Letter at 3; AFR Comment Letter at 3; SDMA Comment Letter at 3; ODEX Comment Letter at 1.

[16] MarketAxess Comment Letter at 2; AFR Comment Letter at 4; ODEX Comment Letter at 1. Section 2(h)(8)(B) of the CEA states that mandatory trade execution does not apply ''*if no* [DCM or SEF] *makes the swap available to trade''* (emphasis added). 7 U.S.C. 2(h)(8)(B).

[17] SDMA Comment Letter at 4–5; WMBAA Comment Letter at 3; MarketAxess Comment Letter at 3–5; AFR Comment Letter at 4. *See infra* note 90 and accompanying text for a description of the proposed determination factors. Under § 39.5(a)(3)(ii)(A) of the Commission's regulations, a mandatory clearing submission must include information regarding the ''existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data'' of a subject swap.

requirement and further the objectives of the Dodd-Frank Act.[18]

In contrast, some commenters stated that the process for determining whether a swap is available to trade is separate from the process for determining whether a swap is subject to the clearing requirement. Some of the commenters relied on the statutory language [19] and legislative history [20] of the Dodd-Frank Act to support this view, with some commenters arguing that ''available for trading'' should mean more than mere listing.[21] As statutory support, several commenters stated that section 2(h)(8) of the CEA specifies two distinct prerequisites for subjecting a swap to mandatory trade execution: (1) The swap must be subject to mandatory clearing and (2) the swap must be made available to trade.[22] Markit also noted that the language of the clearing requirement under section 2(h)(1)–(2) of the CEA, as enacted by the Dodd-Frank Act, does not address making a swap available to trade.[23] Further, AIMA noted that the clearing determination factors differ from the proposed factors in an available-to-trade determination.[24]

Some commenters also asserted that the mandatory clearing determination and the proposed available-to-trade determination differ from one another in practical respects.[25] For example, SIFMA AMG stated that whether a swap should be mandatorily cleared depends on whether the swap (1) can be priced for a derivatives clearing organization's (''DCO'') risk management purposes; and (2) is standardized; therefore, unlike the available-to-trade determination, liquidity is not a primary consideration.[26] AIMA and Morgan Stanley similarly commented that stated liquidity is considered in a clearing determination to make certain that a DCO could adequately price the swap to calculate margin requirements and fulfill risk management requirements. They further stated that the minimum liquidity needed to clear a swap is lower than the minimum liquidity needed to support mandatory trade execution on a DCM or a SEF.[27] Markit and FXall also stated that differing tenors of a given swap would be clearable if any tenor of that swap is cleared, but different tenors would have significantly different liquidity characteristics.[28]

Therefore, commenters stated that only the more liquid swaps should be available to trade [29] to avoid negatively affecting swap pricing and liquidity.[30] Morgan Stanley and FXall stated that subjecting illiquid swaps to the trade execution requirement would further reduce liquidity in those swaps, as market participants would be reluctant to reveal their trading interest in low volume markets; such premature imposition of the trade execution requirement upon illiquid swaps would likely result in increasing bid-ask spreads and trading costs.[31] ICI commented that the risks of low trading volume would drive market participants to other markets.[32]

MFA also commented that separate processes, with adequate Commission oversight and public comment, would mitigate potential ''first-mover advantage'' issues.[33]

Of the commenters who supported separate processes, some commenters supported the proposed filing procedures.[34] CBOE stated that §§ 40.5 and 40.6 allow for timely Commission review and have been successfully utilized in other areas.[35]

Other commenters, however, opposed the proposed filing procedures.[36] ISDA stated that neither § 40.5 nor § 40.6 should be used because an available-to-trade determination is neither a trading protocol nor a rule.[37] Some opposing commenters stated that the Commission, not SEFs and DCMs, should determine whether a swap is available to trade.[38] Some commenters asserted that the Commission is more qualified to make the determination based on its access to market data.[39] Several commenters also stated that SEFs and DCMs should not make the determination because they may have a financial incentive-based conflict of interest to maximize the number of swaps subject to mandatory trade execution.[40] Commenters expressed a related concern that a SEF's or DCM's determination would be influenced by a desire to gain a ''first-mover advantage,'' (*i.e.,* acquiring market share in the trading of a particular swap before other venues can list and develop trading activity in that swap), which would lead to premature or ill-advised mandatory trading of illiquid swaps on a SEF or DCM.[41] Further, several commenters stated that neither § 40.5 nor § 40.6 would provide the Commission with adequate time to review rule filings and to solicit public comment, which would allow SEFs and DCMs to acquire this advantage [42] and

[18] WMBAA Comment Letter at 2; MarketAxess Comment Letter at 9.

[19] Markit Comment Letter at 2; ICI Comment Letter at 3–4; SIFMA AMG Comment Letter at 3; CEWG Comment Letter at 2; AIMA Comment Letter at 1.

[20] Some commenters cited the July 2010 Senate floor remarks of U.S. Senator Blanche Lincoln, in which she stated that determining whether a swap is available to trade should consist of more than conducting a listing inquiry. According to Senator Lincoln, ''[t]he [Commission] could consider, for example, whether there is a minimum amount of liquidity such that the swap can actually be traded on the facility. The mere 'listing' of the swap by a [SEF], in and of itself . . . should not be sufficient to trigger the Trade Execution Requirement.'' Markit Comment Letter at 2 n.6; Chatham Comment Letter at 2–3; ICI Comment Letter at 3–4.

[21] Morgan Stanley Comment Letter at 3; Bloomberg Comment Letter at 4; Sunguard Kiodex Comment Letter at 2; Spring Trading Comment Letter at 3 (Jan. 12, 2012); ICI Comment Letter at 3–4.

[22] SIFMA AMG Comment Letter at 3; ICI Comment Letter at 3; CEWG Comment Letter at 2.

[23] Markit Comment Letter at 2.

[24] AIMA Comment Letter at 1.

[25] MFA Comment Letter at 3; SIFMA AMG Comment Letter at 4; Morgan Stanley Comment Letter at 4; AIMA Comment Letter at 1–2; FHLB Comment Letter at 4 n.2; ICI Comment Letter at 3–4; Markit Comment Letter at 3; FXall Comment Letter at 5.

[26] SIFMA AMG Comment Letter at 4.

[27] AIMA Comment Letter at 1–2; Morgan Stanley Comment Letter at 4.

[28] Markit Comment Letter at 3; FXall Comment Letter at 5.

[29] MFA Comment Letter at 3; Markit Comment Letter at 2; FXall Comment Letter at 2–3, CEWG Comment Letter at 2; JPMorgan Comment Letter at 2; FHLB Comment Letter at 4 n.2; Morgan Stanley Comment Letter at 3; Vanguard Comment Letter at 4; ICI Comment Letter at 3–4; Chatham Comment Letter at 2.

[30] Vanguard Comment Letter at 4; FXall Comment Letter at 5; ICI Comment Letter at 4; Morgan Stanley Comment Letter at 3–4.

[31] Morgan Stanley Comment Letter at 3; FXall Comment Letter at 5.

[32] ICI Comment Letter at 4.

[33] MFA Comment Letter at 2. *See infra* discussion at note 41.

[34] CBOE Comment Letter at 1–2; Spring Trading Comment Letter at 2 (Jan. 12, 2012); AIMA Comment Letter at 3 (supporting use of the § 40.5 rule approval process only).

[35] CBOE Comment Letter at 1–2.

[36] Markit Comment Letter at 5; ISDA Comment Letter at 4–5; Bloomberg Comment Letter at 3; CEWG Comment Letter at 2–3; Morgan Stanley Comment Letter at 5–6; AIMA Comment Letter at 2–3 (opposing use of § 40.6 certification process).

[37] ISDA Comment Letter at 6.

[38] Markit Comment Letter at 5–6; Vanguard Comment Letter at 5; Geneva Energy Markets Comment Letter at 2; JPMorgan Comment Letter at 1; CME Comment Letter at 4–5; FHLB Comment Letter at 3; FSR Comment Letter at 4; FXall Comment Letter at 5–6; Morgan Stanley Comment Letter at 5–6; CEWG Comment Letter at 6; ISDA Comment Letter at 3–4, 6; Tradeweb Comment Letter at 4–5.

[39] FHLB Comment Letter at 3–4; ISDA Comment Letter at 3; Markit Comment Letter at 5; FXall Comment Letter at 6.

[40] Bloomberg Comment Letter at 2; CME Comment Letter at 4–5; FHLB Comment Letter at 3; Markit Comment Letter at 5; CEWG Comment Letter at 2; ISDA Comment Letter at 3; Morgan Stanley Comment Letter at 5–6; AIMA Comment Letter at 2; Vanguard Comment Letter at 5; Geneva Energy Markets Comment Letter at 2; JPMorgan Comment Letter at 2.

[41] FXall Comment Letter at 6–7; Bloomberg Comment Letter at 2; Tradeweb Comment Letter at 2–3; FSR Comment Letter at 2; ISDA Comment Letter at 3; CME Comment Letter at 4; Morgan Stanley Comment Letter at 5–6.

[42] UBS Comment Letter at 1; Chatham Comment Letter at 3; AIMA Comment Letter at 2; ISDA Comment Letter at 3–5; CEWG Comment Letter at 3; Markit Comment Letter at 5–6; Morgan Stanley Comment Letter at 5.

make it hard for the Commission to reject a determination.[43]

Several commenters offered alternative approaches to the proposed process. Bloomberg recommended a separate standalone rule.[44] Several commenters, however, recommended that the Commission establish a ''pilot program'' to phase in the available-to-trade process by initially deeming certain highly liquid swaps as available to trade (and therefore making them subject to the trade execution requirement) for a fixed time period. Commenters stated that this approach would provide market participants and trading venues with time to adjust to the trade execution requirement[45] and minimize market disruptions caused during implementation.[46]

MarketAxess and CME recommended that only swaps that have been determined to be subject to the clearing requirement should be subject to an available-to-trade determination.[47] Both commenters argued that determining whether a swap is available to trade, for purposes of the trade execution requirement, would be legally insignificant unless a swap is required to be cleared first, and thus believe that the Commission should first determine which swaps will be subject to the clearing requirement.[48]

Bloomberg also noted that the Commission has the authority under § 5c(c) of the CEA to deny an available-to-trade determination only if it is ''inconsistent with'' the CEA or the Commission's regulations and requested clarification on how the Commission would interpret this term in this context.[49]

Commission Determination

The Commission is adopting the proposed available-to-trade process, subject to modifications discussed herein. The Commission agrees with commenters who assert that the CEA's statutory language supports an available-to-trade determination that is separate from a mandatory clearing determination.[50] In response to comments, the Commission has determined that at this time, it will only review available-to-trade submissions for swaps that it has first determined to be subject to the clearing requirement under § 39.5 of the Commission's regulations.[51] The Commission believes that adopting a sequenced approach in such a manner is consistent with the trade execution requirement under section 2(h)(8) of the CEA because the trade execution mandate only applies if a swap is (1) subject to mandatory clearing and (2) made available to trade by a SEF or DCM.[52]

The clearing determination process, which the Commission notes is not initiated by a SEF or DCM, primarily focuses on the ability to mitigate risk through clearing by a DCO and the five statutory factors under section 2(h)(2)(D) of the CEA.[53] In particular with respect to risk management, the Commission considers whether imposing the clearing requirement would mitigate systemic risk through the collateralization of risk exposures, which includes counterparty credit risk that arises between two counterparties to an uncleared swap.[54] In this regard, the Commission assesses whether a particular class of swaps has sufficient liquidity for risk management purposes, *i.e.,* pricing and margining of the cleared swaps.[55] The Commission has noted in the context of clearing for interest rate swaps, for example, that DCOs do not focus on the liquidity of specific individual swaps from a risk management perspective, but rather on a portfolio basis.[56] In contrast, the available-to-trade determination process will be initiated by a SEF or DCM and may focus primarily on whether a swap has sufficient trading liquidity to be subject to mandatory trade execution.

With respect to the proposed procedure to determine that a swap is available to trade, the Commission is adopting the rule as proposed and codifying the proposed rule text to §§ 37.10(a)(1) and 38.12(a)(1).[57] The part

[43] Markit Comment Letter at 6; ISDA Comment Letter at 3; ICI Comment Letter at 5.

[44] Bloomberg Comment Letter at 3 n.10.

[45] Vanguard Comment Letter at 4; FSR Comment Letter at 5; JPMorgan Comment Letter at 2.

[46] Markit Comment Letter at 3; Tradeweb Comment Letter at 3–4.

[47] CME Comment Letter at 3; MarketAxess Comment Letter at 7–8.

[48] *Id.*

[49] Bloomberg Comment Letter at 3 n.10.

[50] In response to comments that the Dodd-Frank Act does not condition mandatory trade execution of a swap on an affirmative Commission determination, the Commission further notes that section 8a(5) of the CEA authorizes the Commission to promulgate such regulations as, in its judgment, are reasonably necessary to effectuate any of the provisions or to accomplish any of the purposes of the CEA. 7 U.S.C. 12a(8). Further, section 721(b) of the Dodd-Frank Act provides the Commission with authority to adopt rules to define ''[any] term included in an amendment to the Commodity Exchange Act . . . made by [the Dodd-Frank Act].'' 15 U.S.C. 8321, as enacted by section 721 of the Dodd-Frank Act. Additionally, sections 5(d)(1) and 5h(f)(1) of the CEA require DCMs and SEFs, respectively, to comply with any requirement that the Commission may impose by rule or regulation pursuant to section 8a(5) of the CEA.

[51] Section 39.5 of the Commission's regulations sets forth a process under which the Commission will review swaps to determine whether the swaps are required to be cleared.

[52] Section 50.25 of the Commission's regulations establishes a schedule to phase in compliance with the clearing requirement by category of market participant. Category 1 entities, which include a swap dealer, a security-based swap dealer, a major swap participant, a major security-based swap participant, or an active fund, have 90 days to comply with the clearing requirement. Category 2 entities, which include a commodity pool, private fund, or person predominantly engaged in activities that are in the business of banking or that are financial in nature, have 180 days to comply with the clearing requirement. Certain third-party subaccounts and all other swap transactions receive 270 days to comply with the clearing requirement. *See* Swap Transaction Compliance and Implementation Schedule: Clearing Requirement under Section 2(h) of the CEA, 77 FR 44441 (July 20, 2012). The Commission notes that it will accept for review available-to-trade determinations for swaps determined to be subject to the clearing requirement, prior to the applicable date for compliance.

[53] To make a clearing determination, the Commission must consider five factors: (1) The existence of significant outstanding notional exposures, trading liquidity, and adequate pricing data; (2) the availability of rule framework, capacity, operational expertise and resources, and credit support infrastructures to clear the contract on terms that are consistent with the material terms and trading conventions on which the contract is then traded; (3) the effect on the mitigation of systemic risk, taking into account the size of the market for such contract and the resources of the DCO available to clear the contract; (4) the effect on competition, including appropriate fees and charges applied to clearing; and (5) the existence of reasonable legal certainty in the event of the insolvency of the relevant derivatives clearing organization or one or more of its clearing members with regard to the treatment of customer and swap counterparty positions, funds, and property. 7 U.S.C. 2(h)(2)(D)(ii)(I)–(IV), as enacted by section 723 of the Dodd-Frank Act.

[54] 77 FR 74285. In the Commission's clearing requirement final rule, certain classes of credit default swaps (CDS) and interest rate swaps (IRS) would become subject to the clearing requirement, *i.e.,* cleared by a registered DCO. Per section 2(h)(2)(D)(ii) of the CEA, the Commission considered the effect of clearing those classes of swaps on mitigating systemic risk. With respect to the proposed CDS indices, the Commission believes that mandatory clearing would (1) mitigate counterparty credit risk by allowing a DCO to become the buyer to every seller of those indices, and vice versa; and (2) collateralize risk exposures by allowing a DCO to calculate and collect initial margin and guaranty fund contributions. 77 FR 74297–98. With respect to the IRS proposed to be cleared, the Commission believes that the three DCOs that have submitted clearing determinations—CME, LCH, and IDCH—would (1) mitigate counterparty credit risk by establishing themselves as a central counterparty to reduce the number of open bilateral contracts; and (2) facilitate collateral efficiency through a central counterparty clearing approach. 77 FR 74312.

[55] For example, the Commission has noted that higher trading liquidity in swaps would assist DCOs in end-of-day settlement procedures, as well as in managing the risk of CDS portfolios, particularly in mitigating the liquidity risk associated with unwinding a portfolio of a defaulting clearing member. 77 FR 47176.

[56] Specifically, liquidity is viewed by a DCO as a function of whether a portfolio of swaps has common specifications that are determinative of their economic characteristics, such that a DCO can price and risk manage the portfolio in a default situation. 77 FR 74301.

[57] In response to ISDA's comment that neither 17 CFR 40.5 nor § 40.6 should apply because an available-to-trade determination is neither a trading

Continued

40 procedures provide a reasonable approach by allowing DCMs and SEFs—the entities responsible for listing or offering the swaps for trading and supporting related trading activity—to initially determine whether a swap is available to trade, and therefore, subject to the trade execution requirement. The Commission notes that although it will have access to market data, SEFs and DCMs will have sufficient expertise and experience with respect to swaps trading to make an initial determination and to submit that determination to the Commission under the part 40 procedures. Accordingly, the part 40 procedures provide SEFs and DCMs with the flexibility to make an initial available-to-trade determination while allowing for appropriate Commission review and regulatory oversight, as well as an opportunity for public comment.

The Commission also believes that the part 40 procedures should afford sufficient time for market participants to offer public comment on available-to-trade submissions and for the Commission to review such submissions and any related comments. In this regard, for swaps submitted by a SEF or DCM under the § 40.5 rule approval process or the § 40.6 rule certification process, initial available-to-trade determinations may present novel and complex issues that will warrant retention for an additional review.[58] Under § 40.6(c)(2) of the Commission's regulations, interested parties would have sufficient opportunity to comment on the certification during a 30-day mandatory public comment period. Therefore, swaps self-certified as available to trade may initially be subject to a review period of up to 100 days.[59] Similarly, for swaps submitted under the § 40.5 rule approval process that present novel or complex issues, the review period for initial rule approval submissions may be extended for at least additional 45 days for the same reason.[60] The Commission notes that it routinely solicits public comments for § 40.5 rule approval submissions and anticipates that market participants would be similarly able to provide the Commission with comments on available-to-trade filings.

The Commission expects that over time, available-to-trade filings should present fewer novel or complex issues, thereby not warranting extensions of the applicable review period; SEFs and DCMs would likely submit swap determinations that are similar to previous submissions and the Commission would become more experienced with the process. The Commission, however, will continue to consider whether to stay rule certifications or rule approval submissions on a case-by-case basis.

In response to Bloomberg's request for clarification, the Commission notes that whether a SEF's or DCM's initial determination is ''inconsistent'' with the CEA and the Commission's rules and regulations would depend upon the SEF's or DCM's analysis and application of the determination factors to the swap submitted as available to trade, as discussed further below. The Commission also notes that a determination could also be deemed inconsistent if it does not consider one or more of the required factors, or the swap otherwise does not meet other prerequisites established in the submission process, discussed further below.

2. Sections 37.10(a)(2) and 38.12(a)(2)—Listing Requirement

The FNPRM requested comment on (1) whether the Commission should allow a SEF or DCM to submit an available-to-trade determination for a swap under proposed §§ 37.10(a) and 38.12(a) if the SEF or DCM making the submission does not itself list that swap for trading; and (2) if so, whether the Commission would allow that SEF or DCM to consider the same swap or an economically equivalent swap that trades on another SEF, DCM, or primarily or solely in bilateral transactions.[61]

Summary of Comments

Several commenters recommended that a SEF or DCM must list the swap that it submits for an available-to-trade determination.[62] For example, Spring Trading and SIFMA AMG recommended that a SEF or DCM must list a swap for at least 90 days before submitting its determination.[63] ISDA recommended that a SEF or DCM must list the swap during the 6-month period that it proposed for Commission review of the available-to-trade determination.[64] ISDA noted that the lack of a listing requirement would incentivize SEFs and DCMs to try to submit as many determinations as possible merely to promote centralized trading.[65] According to some commenters, the Commission or the trading facility could evaluate the data gathered [66] and obtain experience [67] during the listing period to determine whether the swap should be made available to trade. SDMA, however, recommended that a SEF or DCM should be allowed to submit a determination for a swap that it does not list.[68]

Commission Determination

The Commission agrees with commenters who support a listing requirement and is amending the proposed rule text to adopt new §§ 37.10(a)(2) and 38.12(a)(2), which requires a SEF or DCM to certify that it is listing the swap for which it submits an available-to-trade determination.[69] The Commission believes that an initial determination that a swap is available to trade should be made by a SEF or a DCM that offers the swap for trading.[70]

protocol nor a rule, the Commission notes that the definition of ''rule'' under 17 CFR 40.1(h) of the Commission's regulations would encompass an available-to-trade determination. Section 40.1(h) defines ''rule'' as ''any constitutional provision, article of incorporation, bylaw, rule, regulation, resolution, interpretation, stated policy, term and condition, trading protocol, agreement or instrument corresponding thereto, in whatever form adopted, and any amendment or addition thereto or repeal thereof, made or issued by a registered entity . . . .'' The Commission views an available-to-trade determination as a ''trading protocol.''

[58] Under §§ 40.5(d)(1) and 40.6(c) of the Commission's regulations, the Commission may stay the certification of a new rule or rule amendment that, among other things, presents ''novel or complex issues that require additional time'' to review or analyze.

[59] Under 17 CFR 40.6(c)(3), a new rule subject to a stay would become effective, pursuant to its certification, at the expiration of the 90-day review period unless the Commission withdraws the stay prior to that time, or the Commission notifies the registered entity during the 90-day period that it objects to the proposed certification on the grounds that the proposed rule or rule amendment is inconsistent with the CEA or the Commission's regulations.

[60] As noted, under 17 CFR 40.5(d)(2), the Commission may extend the review period beyond an additional 45 days based on written agreement with the submitting SEF or DCM.

[61] 76 FR 77733.

[62] Eaton Vance Management Comment Letter at 3; SIFMA AMG Comment Letter at 10; UBS Comment Letter at 2; Morgan Stanley Comment Letter at 6 n.6; ISDA Comment Letter at 7; Tradeweb Comment Letter at 5.

[63] SIFMA AMG Comment Letter at 10; Spring Trading Comment Letter at 3 (Jan. 12, 2012).

[64] ISDA Comment Letter at 7. ISDA proposed eliminating the proposed § 40.6 certification process and stated that the Commission should establish a minimum 6-month review period for determinations submitted by a SEF or DCM.

[65] ISDA Comment Letter at 6.

[66] ISDA Comment Letter at 7; SIFMA AMG Comment Letter at 10; Spring Trading Comment Letter at 3.

[67] Tradeweb Comment Letter at 5; UBS Comment Letter at 2; Morgan Stanley Comment Letter at 6 n.6.

[68] SDMA Comment Letter at 9.

[69] The Commission notes that such swap would be certified or approved under § 40.2 or § 40.3 of the Commission's regulations prior to listing the swap for trading.

[70] Bloomberg requested that a SEF submitting an available-to-trade determination for a particular swap would be able to incorporate by reference, in its submission, information and analysis already completed by a DCO and the Commission as part of the mandatory clearing determination process

The Commission, however, is not adopting a minimum listing period so as to avoid delaying the determination process, and hence implementation of the trade execution requirement as discussed below. The Commission also notes, as discussed further below, that a SEF or DCM is allowed to consider activity in the same swap listed on another SEF or DCM as well as the amount of off-exchange activity in the same swap.

3. Submission of a Group, Category, Type or Class of Swaps

The FNPRM requested comment on (1) whether the Commission should allow a SEF or DCM to submit its available-to-trade determination for a ''group, category, type or class of swaps'' based on the factors proposed in §§ 37.10(b) and 38.12(b) of the FNPRM; and (2) how ''group, category, type or class of swaps'' should be defined.[71]

Summary of Comments

Some commenters stated that the Commission should allow SEFs and DCMs to submit determinations for a group, category, type, or class of swap.[72] In defining ''group, category, type, or class'' of swap, AIMA stated that the Commission should take into account specific characteristics of certain swaps to avoid subjecting certain illiquid swaps to mandatory trade execution.[73]

Other commenters, however, expressed concern about making determinations based on group, category, type or class of swap.[74] SIFMA AMG and CEWG commented that swaps within a potential ''group'' may feature different liquidity and trading patterns,[75] while Markit and ISDA stated that liquidity may differ significantly even among different tenors of a given swap.[76] ISDA and Morgan Stanley also highlighted the difficulty at the outset of defining ''group, category, type or class of swap.'' [77] Markit stated that determinations should be allowed for individual swaps and then applied to ''buckets'' of maturities and tenors.[78]

Commission Determination

The Commission is allowing SEFs and DCMs to submit determinations for a group, category, type or class of swap to provide greater efficiency to the available-to-trade determination process. To address commenters' concerns that swaps within a group, category, type or class may have different liquidity and trading characteristics, a SEF or DCM must address, in its submission, the applicable determination factor or factors apply to all of the swaps within that group, category, type or class. Further, a SEF and DCM will be allowed to define the scope of the group, category, type or class of swap that it determines is available to trade.[79] To the extent that a SEF or DCM possesses flexibility to define that scope, however, the Commission still may approve or deem only part or some of the swaps within that group, category, type or class as available to trade, based on its review.[80]

4. Consideration of Swaps on Another SEF or DCM, or Bilateral Transactions

The FNPRM requested comment on whether the Commission should allow a SEF or DCM, in evaluating the factors under proposed §§ 37.10(b) and 38.12(b), to consider (1) the same swap or an economically equivalent swap on another SEF or DCM; and (2) the amount of activity in the same swap or an economically equivalent swap available primarily or solely in bilateral transactions.[81]

Summary of Comments

Several commenters stated that a SEF or DCM should be able to consider relevant swap activity on other SEFs and DCMs when making an available-to-trade determination.[82] Vanguard commented that determining whether a ''meaningful'' portion of trading in the swap occurs on a SEF or DCM is important in determining that a swap is available to trade.[83] SIFMA AMG stated that the existence of a liquid trading environment on SEFs and DCMs could indicate that a swap could be made available to trade without harm to liquidity.[84] FXall stated that determinations should be based on a swap's marketwide trading patterns, so as to avoid unintended effects on liquidity.[85]

Some commenters also stated that a SEF or DCM should be able to consider swaps executed on a bilateral basis.[86] CBOE stated that considering a swap's trading activity only on a SEF or DCM would otherwise incentivize market participants to minimize centralized trading in order to limit the number of swaps made available to trade.[87] SIFMA AMG stated that examining the bilateral market could reveal a liquid trading environment, but could then raise questions as to whether a swap should be made available to trade.[88] MFA and Vanguard recommended that the Commission utilize data for on- and off-

with respect to that swap. Bloomberg Comment Letter at 4–5. In response to Bloomberg's request, the Commission views the part 40 process as flexible and would allow relevant information from a clearing determination to be referenced in an available-to-trade submission. The Commission, however, emphasizes that such information leading to an affirmative clearing determination would not automatically indicate that a swap is available to trade.

[71] 76 FR 77733.

[72] Spring Trading Comment Letter at 5 (Jan. 12, 2012); AIMA Comment Letter at 2; SDMA Comment Letter at 7; AFR Comment Letter at 2 (inferring that mandatory trade execution should be determined for a ''class'' of swaps).

[73] AIMA Comment Letter at 2.

[74] Markit Comment Letter at 2–3; SIFMA AMG Comment Letter at 11; CEWG Comment Letter at 3–4; ISDA Comment Letter at 10; UBS Comment Letter at 2; Morgan Stanley Comment Letter at 9.

[75] SIFMA AMG Comment Letter at 11; CEWG Comment Letter at 4. With respect to energy commodities, CEWG provided Henry Financial LD1 Fixed Swap, Henry Financial LD4 Fixed Swap, and ICE's Physical Basis LD1, which differ in contract size and term, as examples of swaps within a potential group or class that each possess different liquidity characteristics, thereby warranting individual determinations. SIFMA AMG also noted that the liquidity of interest rate swaps differs significantly depending on time to maturity.

[76] Markit Comment letter at 2; ISDA Comment Letter at 11. ISDA offered the Federal Reserve Bank of New York's analysis of trade data as a demonstration of varying trading volumes for different tenors of credit default swaps.

[77] Morgan Stanley Comment Letter at 9.

[78] Markit Comment Letter at 2. Markit defines ''buckets'' as groups of maturities and tenors for a given swap that have similar liquidity measures.

[79] The Commission notes that for clearing determinations under § 39.5, it may define a particular group, category, type or class of swaps for purposes of a clearing determination based on several considerations. 76 FR 44468. To the extent that such a determination is informative as to whether a proposed group, category, type or class of swap that is defined by a SEF or DCM is available to trade, the Commission may take those considerations into account. For example, a SEF or a DCM could define a group, category, type or class of interest rate swaps based on characteristics that include the nature of the payments streams (*e.g.,* fixed-to-floating, floating-to-floating, forward rate agreement (FRA), or overnight indexed swap (OIS)); currency (*e.g.,* U.S. dollar, euro, British pound, Japanese yen); floating rate index referenced (*e.g.,* LIBOR, EURIBOR); and stated termination date (*e.g.,* 1-year, 2-year, 5-year, 10-year).

[80] Where the Commission does not approve or deem all of the swaps within a group, category, type or class submitted by a SEF or DCM as available to trade, DMO would notify the SEF or DCM of such an action.

[81] 76 FR 77733.

[82] MFA Comment Letter at 3; Spring Trading Comment Letter at 6 (Jan. 12, 2012); Markit Comment Letter at 3 (discussing importance of marketwide data); Vanguard Comment Letter at 5; SIFMA AMG Comment Letter at 6; AIMA Comment Letter at 2; Morgan Stanley Comment Letter at 6 n.6; FXall Comment Letter at 6 n.18; CBOE Comment Letter at 3.

[83] Vanguard Comment Letter at 5.

[84] SIFMA AMG Comment Letter at 6.

[85] FXall Comment Letter at 6 n.18.

[86] MFA Comment Letter at 3; SIFMA AMG Comment Letter at 6; Markit Comment Letter at 3; FXall Comment Letter at 6; Vanguard Comment Letter at 5; Spring Trading Comment Letter (Jan. 12, 2012) at 6; CBOE Comment Letter at 3; AIMA Comment Letter at 2; Morgan Stanley Comment Letter at 6; SDMA Comment Letter at 7.

[87] CBOE Comment Letter at 3.

[88] SIFMA AMG Comment Letter at 6.

exchange trading to make the available-to-trade process more objective.[89]

Commission Determination

The Commission will allow a SEF or DCM to consider activity in the same swap listed on another SEF or DCM and the amount of off-exchange activity in the same swap when determining whether a swap is available to trade. The Commission agrees with commenters that since the available-to-trade determination applies marketwide, a SEF or DCM should be able to consider activity on other SEFs and DCMs, as well as activity that takes place off-exchange, to the extent that such information becomes available. Information about trading activity in the entire swaps marketplace would better inform market participants about how the swap trades in the overall market and provide interested parties with additional information and analysis to comment upon. More comprehensive information would also better inform the Commission in its evaluation of the available-to-trade submission. The Commission also believes that consideration of off-exchange trading could provide additional data and insight about a swap's trading patterns, *e.g.,* trading volume or numbers and types of market participants, that would help a SEF or a DCM address one or more of the determination factors under §§ 37.10(b) and 38.12(b).

B. Sections 37.10(b) and 38.12(b)—Factors To Consider To Make a Swap Available To Trade

Proposed §§ 37.10(b) and 38.12(b) required a SEF or DCM to consider, as appropriate, the following factors with respect to a swap that it determines is available to trade: (1) Whether there are ready and willing buyers and sellers; (2) the frequency or size of transactions on SEFs, DCMs, or of bilateral transactions; (3) the trading volume on SEFs, DCMs, or of bilateral transactions; (4) the number and types of market participants; (5) the bid/ask spread; (6) the usual number of resting firm or indicative bids and offers; (7) whether a SEF's trading system or platform or a DCM's trading facility will support trading in the swap; or (8) any other factor that the SEF or DCM may consider relevant.[90] Under the proposed rule, no single factor would be dispositive, as the DCM or SEF could consider any one factor or any combination of factors in its determination that a swap is available to trade.

Summary of Comments

Commenters expressed general support for the first seven proposed factors.[91] Some commenters stated, however, that SEFs and DCMs should be required to consider specific factors.[92] Some commenters also offered additional factors to consider, such as the ability to establish connectivity with new market participants without imposing undue burden; [93] the level of pre-trade transparency in the existing market; [94] and market depth and market breadth.[95]

Other commenters opposed the proposed factors.[96] In particular, several commenters objected to the use of ''any other factor'' in a determination.[97] Eaton Vance Management and ISDA, for example, considered ''any other factor'' to be too broad and subjective and thought that it would incentivize SEFs and DCMs to make illiquid swaps available to trade.[98] ICI stated that the Commission would effectively delegate its authority to establish available-to-trade standards by allowing a SEF or DCM to use this factor alone.[99] CEWG similarly stated that use of non-enumerated factors by a SEF or DCM would create ''uncertainty and variability'' in the process.[100]

Some commenters also objected to allowing a SEF or DCM to make an available-to-trade determination based on any one proposed factor and some recommended that SEFs and DCMs be required to consider all of the factors.[101] Vanguard and SIFMA AMG asserted that all of the factors are relevant [102] and that consideration of all factors would be consistent with the mandatory clearing determination process.[103] CBOE, however, contended that required consideration of all the factors would frustrate Congress's intent for greater transparency, competition, and oversight of the swaps market.[104]

Several commenters requested that the Commission set objective threshold criteria for the proposed factors.[105] Commenters stated that without objective criteria, a SEF or DCM would otherwise have unlimited discretion [106] to act in its financial self-interest [107] by determining that a swap is available to trade. Some commenters, however, acknowledged the difficulty of developing objective liquidity measurements.[108]

[89] MFA Comment Letter at 3; Vanguard Comment Letter at 5.

[90] As noted above, the Commission believes that the mere listing or offering for trading of a swap on a DCM or SEF does not mean that the swap is available to trade.

[91] MFA Comment Letter at 2; Markit Comment Letter at 3; Tradeweb Comment Letter at 3 (proposing a pilot program based on the proposed factors); Bloomberg Comment Letter at 4; ICI Comment Letter at 4–5; Vanguard Comment Letter at 4; SIFMA AMG Comment Letter at 5; Geneva Energy Markets Comment Letter at 2; Spring Trading Comment Letter at 4 (Jan. 12, 2012); AIMA Comment Letter at 1; CME Comment Letter at 6; FHLB Comment Letter at 4.

[92] For example, ISDA recommended that whether a SEF lists and supports trading in a swap should be a prerequisite. ISDA Comment Letter at 8. FSR emphasized that broad market participation must be shown. FSR Comment Letter at 7. Some commenters requested that SEFs and DCMs be required to consider both the size and frequency of swap transactions on SEFs, DCMs, and in bilateral transactions. AIMA Comment Letter at 2; ICI Comment Letter at 5 n.13; SIFMA AMG Comment Letter at 6.

[93] FSR Comment Letter at 4.

[94] Geneva Energy Markets Comment Letter at 2.

[95] SDMA Comment Letter at 7. According to SDMA, a market depth test consists of calculating the sum of available bids and offers at or near the current price for a swap at a particular time, while a market breadth test consists of calculating the sum of market depth for a particular swap or class of swaps.

[96] For example, SDMA considered the factors to be duplicative of the mandatory clearing determination factors set forth in section 2(h)(2)(D) of the CEA, and therefore burdensome and costly. SDMA Comment Letter at 5.

[97] Eaton Vance Management Comment Letter at 2; ISDA Comment Letter at 8; ICI Comment Letter at 5; CEWG Comment Letter at 3.

[98] Eaton Vance Management Comment Letter at 2; ISDA Comment Letter at 8.

[99] ICI Comment Letter at 5.

[100] CEWG Comment Letter at 3.

[101] FHLB Comment Letter at 3; CEWG Comment Letter at 3; Eaton Vance Management Comment Letter at 3 (adopting ICI's recommendation); ICI Comment Letter at 2, 5; Vanguard Comment Letter at 4; Bloomberg Comment Letter at 4; SIFMA AMG Comment Letter at 5; Chatham Comment Letter at 3; AIMA Comment Letter at 2. Markit stated that this approach would grant ''unfettered discretion'' to SEFs and DCMs to disregard a swap's actual liquidity, Markit Comment Letter at 3. MarketAxess stated that the Commission would lack any basis to reject a determination. MarketAxess Comment Letter at 8.

[102] Vanguard Comment Letter at 4; SIFMA AMG Comment Letter at 5.

[103] SIFMA AMG Comment Letter at 5.

[104] CBOE Comment Letter at 2.

[105] Markit Comment Letter at 3; Spring Trading Comment Letter at 4; AIMA Comment Letter at 4; Bloomberg Comment Letter at 4; FXall Comment Letter at 6; Eaton Vance Management Comment Letter at 3; ICI Comment Letter at 5–6; FSR Comment Letter at 3, 6–7. Some commenters recommended that the swap must (1) trade a minimum number of times each day; (2) feature a minimum number of market participants trading it; and (3) meet an overall notional trading volume over a set period of time. Vanguard Comment Letter at 5; ISDA Comment Letter at 7; SIFMA AMG Comment Letter at 5, 7. Morgan Stanley recommended that the swap must (1) have resting bids and offers on the applicable SEF or DCM for at least half of the relevant trading hours for the 90-day period prior to a determination; and (2) have been traded an average of at least 5 times per day during the same period. Morgan Stanley Comment Letter at 4, 6. JPMorgan recommended that the swap must show an actual level of liquidity on the applicable DCM or SEF during a sample period of at least 180 days prior to the submission. JPMorgan Comment Letter at 1.

[106] Morgan Stanley Comment Letter at 4.

[107] FSR Comment Letter at 3; Morgan Stanley Comment Letter at 5; ICI Comment Letter at 6.

[108] ICI Comment Letter at 6; Markit Comment Letter at 3; SIFMA AMG Comment Letter at 5–6.

Some commenters recommended imposing additional requirements on SEFs and DCMs with respect to considering the proposed factors. For example, SIFMA AMG recommended that a SEF or DCM must provide detailed reasoning and supporting evidence for the factors that it has considered.[109] CEWG recommended that a SEF or DCM should provide an explanation to the Commission, subject to public comment, when it believes that certain factors do not apply.[110]

Commission Determination

The Commission is adopting the rule as proposed under final §§ 37.10(b) and 38.12(b), subject to two modifications and minor technical corrections. The Commission acknowledges commenters' concerns regarding the consideration of ''any other factor'' and thus is removing that factor from the final rule. The Commission believes that removing this factor will provide market participants with a more precise set of factors from which a swap may be made available to trade, thereby improving clarity, lessening uncertainty regarding how a determination may be made, and promoting a more consistent determination process. Further, given the adoption of a listing requirement, the Commission is removing an additional factor—whether a SEF's or DCM's trading facility or platform will support trading in the swap. This factor contemplated, among other things, whether the SEF or DCM lists the swap for trading on its trading facility or platform. Therefore, in light of the listing requirement, this factor is redundant.

As discussed above, the Commission has determined in this final rule that a SEF or DCM may consider activity in the same swap listed on another SEF or DCM and the amount of off-exchange activity in the same swap.[111] Therefore, the Commission is amending the second and third determination factors in proposed §§ 37.10(b)(2) and (3) and 38.12(b)(2) and (3) to remove duplicative language related to this matter.

The Commission believes that the remaining enumerated factors provide a sufficient framework from which SEFs, DCMs, the Commission and market participants may evaluate whether a swap is subject to the trade execution requirement. While each of the enumerated factors is an indicator of trading activity and may be relevant in a determination, the Commission believes that no single factor must always be considered, nor must a SEF or DCM consider more than one factor in a determination. Therefore, the Commission believes that satisfying any one of the determination factors would sufficiently indicate that the contract is available to trade. By adopting a more flexible approach, SEFs and DCMs will be able to accommodate swaps with different trading characteristics that can be supported in a centralized trading environment. The Commission does not believe that it is necessary for a SEF or DCM to analyze and demonstrate compliance with every factor in a submission.

In response to SIFMA AMG's recommendation that a SEF or DCM should be required to provide detailed reasoning and supporting evidence for the factors considered, the Commission notes that §§ 40.5(a)(5) and 40.6(a)(7) each requires submissions to contain an explanation and analysis of the determination, including the factors considered and its compliance with the CEA and Commission regulations. The Commission expects such an explanation and analysis to be clear and informative as to how the factor or factors apply to the swap.

The Commission declines to adopt additional factors in the final rule as suggested by several commenters. The Commission believes that the enumerated factors provide a sufficient framework to allow: (1) A SEF or DCM to consider whether a swap should be subject to the trade execution requirement; (2) market participants to evaluate a determination and provide public comment; and (3) the Commission to evaluate a SEF's or DCM's determination that a swap is available to trade. Further, the Commission believes that the enumerated factors are broad in nature and incorporate many of the concepts recommended by commenters.

The Commission acknowledges commenters' request for establishing objective criteria associated with the factors and reiterates the view expressed in the FNPRM that as centralized trading develops and the Commission gains experience in oversight of swap markets, the Commission could then consider adopting objective criteria in a future rulemaking based upon an empirical analysis of swap trading data.

C. Sections 37.10(c) and 38.12(c)—Applicability

Proposed §§ 37.10(c)(1) and 38.12(c)(1) required that upon the Commission deeming that a swap is available to trade based on a SEF or DCM submission, all other SEFs and DCMs listing or offering for trading such swap and/or any economically equivalent swap must make those swaps available to trade for purposes of the trade execution requirement under section 2(h)(8) of the CEA. The Commission defined ''economically equivalent swap'' under proposed §§ 37.10(c)(2) and 38.12(c)(2) as a swap that the SEF or DCM determines to be economically equivalent with another swap after consideration of each swap's material pricing terms. The Commission also noted that if a DCM or SEF makes a swap available to trade, then the proposed rule would not require other DCMs and SEFs to list or offer that swap, or an economically equivalent swap, for trading.

Summary of Comments

Some commenters expressed general support for the economic equivalence requirement because it would enforce marketwide compliance with the trade execution requirement,[112] increase liquidity, and promote a more efficient available-to-trade process by allowing SEFs and DCMs to rely on existing determinations.[113] Many commenters, however, viewed the proposed definition of ''economically equivalent swap'' as excessively broad [114] and vague.[115] Some commenters stated that the proposed definition would create uncertainty about which swaps are available to trade.[116] Other commenters stated that the vagueness of the proposed definition would allow SEFs and DCMs to subject more swaps to mandatory trade execution,[117] thereby allowing illiquid swaps to be available to trade.[118] In addition, MarketAxess and CEWG commented that the proposed requirement is not prescribed

[109] SIFMA AMG Comment Letter at 2.

[110] CEWG Comment Letter at 3.

[111] *See supra* Section II.A.4—Consideration of Swaps on Another SEF or DCM, or Bilateral Transactions for the Commission's discussion.

[112] Tradeweb Comment Letter at 5.

[113] SDMA Comment Letter at 7.

[114] Eaton Vance Management Comment Letter at 3; CEWG Comment Letter at 5; Chatham Comment Letter at 4.

[115] FXall Comment Letter at 7; ICI Comment Letter at 8; ISDA Comment Letter at 9; Morgan Stanley Comment Letter at 8–9; Spring Trading Comment Letter at 1 (Feb. 13, 2012); UBS Comment Letter at 2; Chatham Comment Letter at 4–5.

[116] MFA Comment Letter at 5; ICI Comment Letter at 8; AIMA Comment Letter at 3.

[117] MFA Comment Letter at 5; FXall Comment Letter at 7; ICI Comment Letter at 8; FHLB Comment Letter at 3; Morgan Stanley Comment Letter at 8; CEWG Comment Letter at 5–6; SIFMA AMG Comment Letter at 9; ISDA Comment Letter at 9; AIMA Comment Letter at 4; MarketAxess Comment Letter at 8–9.

[118] CEWG Comment Letter at 5; FXall Comment Letter at 7; JPMorgan Comment Letter at 3; Chatham Comment Letter at 4.

by statute.[119] Morgan Stanley and AIMA stated that the concept itself is inherently ''elusive and subjective.'' [120] Other commenters thought that the process would create uncertainty as to which swaps are subject to mandatory trade execution.[121] SIFMA AMG stated that swaps with slightly different characteristics, *e.g.,* time to maturity, could differ in the requisite liquidity, yet both be determined to be available to trade based on economic equivalence.[122]

To prevent evasion of the trade execution requirement through slight modification of a swap's terms, some commenters recommended that the Commission should rely on its anti-evasion authority under section 6(e) of the CEA.[123]

Commission Determination

At this time, the Commission is adopting the rule as proposed with certain modifications under a new subsection titled, ''Applicability,'' for SEFs or DCMs that list or offer the same swap for trading. The Commission, however, is not adopting the proposed definition of economically equivalent swaps. The Commission intended the economic equivalence requirement as a means to avoid knowing or reckless evasion of the trade execution requirement, which could potentially occur if a SEF or DCM, acting in concert with a market participant, lists and allows trading of swaps with slightly amended terms to a swap previously determined to be available to trade. Given that the factors that could be considered may vary across different asset classes and products, the Commission recognizes the complexity of determining economic equivalence between swaps. Further, based on the comments received, the Commission has determined that it is not feasible, for purposes of determining which swaps are available to trade, to define ''economic equivalent'' with sufficient precision and clarity.

The Commission is also amending the rule text to clarify that once a swap is determined to be available to trade under part 40 of the Commission's regulations (*i.e.,* the Commission approves a SEF's or DCM's available-to-trade submission under § 40.5 or the submission is deemed as certified under § 40.6), then all other SEFs and DCMs that choose to list or offer the swap for trading must do so in accordance with the trade execution requirement.[124] Subsequent SEFs and DCMs will not be required to submit separate available-to-trade determinations to the Commission for a particular swap after it has been determined to be available to trade. Importantly, no SEF or DCM is required to list or offer a swap for trading even if another SEF or DCM has determined it is available to trade. Once a swap is available for trade for purposes of section 2(h)(8), however, that swap may only be executed on a SEF or DCM.

In response to commenters who recommended that the Commission rely on its existing anti-evasion authority, the Commission notes that its anti-evasion authority as constituted under section 6(e) of the CEA would not apply to SEFs and DCMs.[125] Section 6(e)(5), however, would apply to the actions of certain market participants—swap dealers and major swap participants in particular—that are carried out to evade the trade execution requirement.

D. Sections 37.10(d) and 38.12(d)—Removal

The proposed rule requested comment on (1) whether the Commission should specify a process where a swap may be determined to be no longer available to trade; and (2) if so, whether the part 40 processes should be used for this process. The proposed rule also requested comment on whether such a determination should apply only to the SEF or DCM that seeks to make the swap no longer available to trade.[126]

Summary of Comments

Several commenters responded to the Commission's request for comments related to whether the Commission should specify a process whereby a swap that has been determined to be available to trade may no longer be available to trade. Several commenters supported the development of a process under which a swap could be determined to be no longer available to trade for the purposes of the trade execution requirement. Commenters recommended that the Commission retain the authority to make such a determination [127] based on the Commission's access to data demonstrating a swap's overall liquidity [128] and the desire to prevent a SEF or DCM from making conflicting determinations with respect to the same swap.[129] ISDA, however, recommended that market participants should be able to submit to the Commission that a swap is no longer available to trade because they would have experience and relevant knowledge of market trends and changes.[130]

Some commenters recommended use of the same factors as those used when making a determination that a swap is available to trade, albeit with objective thresholds.[131] FXall asserted that using objective criteria would render the removal process ''transparent and impartial.'' [132]

Some commenters recommended that a determination that a swap is no longer available to trade should be subject to public notice and comment.[133] Accordingly, ICI recommended against using the procedures under §§ 40.5 and 40.6 because they lack adequate opportunity for public comment.[134] MFA also recommended that the Commission provide public notice after a swap is determined to be no longer available to trade.[135]

Some commenters stated that a determination that a swap is no longer available to trade should only apply to the petitioning SEF or DCM.[136] Spring Trading and SDMA stated that to apply the determination on a marketwide

[119] MarketAxess Comment Letter at 9; CEWG Comment Letter at 5.

[120] Morgan Stanley Comment Letter at 8; AIMA Comment Letter at 3 (based on the multitude of factors that affect the economic terms of a swap).

[121] AIMA Comment Letter at 3; Morgan Stanley Comment Letter at 8; ICI Comment Letter at 8; MFA Comment Letter at 5; SIFMA AMG Comment Letter at 10; ISDA Comment Letter at 9; Sunguard Kiodex Comment Letter at 2; FXall Comment Letter at 7.

[122] SIFMA AMG Comment Letter at 9. Several other commenters, though not all in support of eliminating the proposed requirement, also acknowledged that two otherwise identical swaps would also possess different liquidity characteristics if cleared at different clearinghouses. FSR Comment Letter at 3; Morgan Stanley Comment Letter at 9; Spring Trading Comment Letter at 2 (Feb. 13, 2012).

[123] SIFMA AMG Comment Letter at 10; CEWG Comment Letter at 5; ISDA Comment Letter at 9; AIMA Comment Letter at 4; Morgan Stanley Comment Letter at 9.

[124] *See supra* note 14 for a discussion of the methods by which swaps that are subject to the trade execution requirement must be executed on a SEF or DCM.

[125] Section 6(e)(5) of the CEA, as amended by section 741(b)(11) of the Dodd-Frank Act, prescribes that ''[a]ny *swap dealer* or *major swap participant* that knowing or recklessly evades or participates in or facilitates evasion of the requirements of section 2(h) [of the CEA] shall be liable . . .'' (emphasis added). 7 U.S.C. 9a.

[126] 76 FR 77734.

[127] MFA Comment Letter at 4; FXall Comment Letter at 7–8; ICI Comment Letter at 7; SIFMA AMG Comment Letter at 11–12; Spring Trading Comment Letter at 7 (Jan. 12, 2012); ISDA Comment Letter at 8–9; JPMorgan Comment Letter at 2.

[128] ISDA Comment Letter at 8–9; MFA Comment Letter at 4.

[129] FXall Comment Letter at 8; MFA Comment Letter at 4.

[130] ISDA Comment Letter at 8–9.

[131] MFA Comment Letter at 4; ICI Comment Letter at 7–8; FXall Comment Letter at 7–8.

[132] FXall Comment Letter at 8.

[133] FXall Comment Letter at 8; ICI Comment Letter at 7; Spring Trading Comment Letter at 7.

[134] ICI Comment Letter at 7.

[135] MFA Comment Letter at 5.

[136] Spring Trading Comment Letter at 7–8 (Jan. 12, 2012); SDMA Comment Letter at 10.

basis would otherwise unfairly penalize other non-petitioning SEFs or DCMs.[137] ICI and MFA, however, stated that the determination should apply to all SEFs and DCMs that list or offer the swap for trading.[138] ICI stated that applying the determination to only one SEF or DCM would be inconsistent with the trade execution requirement.[139]

Commission Determination

The Commission is not adopting a separate process for a SEF or DCM to submit a determination that a swap is no longer available to trade. Rather, the Commission believes that where all SEFs and DCMs that had listed a swap for trading, including the SEF or DCM that submitted the initial available-to-trade determination under part 40, no longer list that swap for trading on their respective facility or platform, (*i.e.,* all such SEFs and DCMs have ''de-listed'' the swap),[140] then the Commission would deem the swap to be no longer available to trade. In such a case, trading in the swap would no longer be subject to the trade execution requirement. The Commission believes that this approach is consistent with section 2(h)(8) of the CEA, which states a swap would otherwise not be subject to the trade execution requirement if, among other things, no SEF or DCM makes it available to trade.

Where all SEFs and DCMs no longer list that swap for trading—denoting that open interest in that swap does not exist on any facility or platform [141]—the Commission would deem the swap as no longer available to trade because that swap would no longer meet any of the determination factors. The Commission, which will maintain and update a list of the SEFs and DCMs that list those available-to-trade swaps, will have access to the information and the ability to make the determination, without requiring a separate process. In response to FXall, the Commission believes that this approach would be transparent and impartial. In response to MFA's recommendation, the Commission will inform the public that a swap is no longer available to trade via notice pursuant to new §§ 37.10(d) and 38.12(d) (''Removal''). The Commission is also delegating authority to the Director of the Division of Market Oversight to issue notice in this instance.

E. Annual Review

Proposed §§ 37.10(d) and 38.12(d) required that a SEF or DCM perform an annual review and assessment of each swap that it has made available to trade. The proposed rule envisioned that an annual review would ensure that SEFs and DCMs evaluate on a regular basis whether swaps previously determined to be available to trade should continue to be ''available to trade'' for the purposes of the trade execution requirement. In the annual review and assessment, SEFs and DCMs would be required to consider the proposed factors in §§ 37.10(b) and 38.12(b), respectively. Upon completion of the annual review, a SEF or DCM would be required to provide the Commission with an electronic report of the review and assessment, including any supporting information or data, no later than 30 days after its fiscal year end. The proposed rule requested comment on whether SEFs and DCMs should conduct the review and assessment.

Summary of Comments

Several commenters supported the proposed annual review requirement.[142] Tradeweb, however, requested that the Commission clarify the effect of the proposed annual review process.[143] Some commenters stated that additional reviews were necessary because swaps could become illiquid between scheduled annual reviews, yet still be subject to the trade execution requirement. Thus, they recommended more frequent reviews, such as on a quarterly basis.[144] Several commenters, however, stated that the Commission, rather than SEFs, should conduct the review and assessment for similar reasons as those offered in support of allowing the Commission to exclusively determine whether a swap is available to trade.[145] CME, for example, recommended that the Commission conduct the review by obtaining data from SDRs in order to minimize overall costs.[146]

Some commenters further recommended that market participants have the opportunity to participate in the process. Tradeweb recommended that reviews and assessments be subject to public comment because of their market impact.[147]

Other commenters opposed the proposed requirement. WMBAA stated that an annual review and assessment would be arbitrary, time-consuming, and offers insufficient regulatory value.[148] Sunguard Kiodex asserted that periodic reviews would cause swaps' available-to-trade status to fluctuate, therefore negating the benefit of an initial determination.[149] WMBAA and SDMA recommended that a SEF or DCM be able to rely solely on the clearing determination review instead and annually renew its self-certification without submitting a report.[150]

With respect to the factors to be considered in an annual review, some commenters supported use of the proposed determination factors in §§ 37.10(b) and 38.12(b).[151] Eaton Vance Management recommended that a SEF or DCM must affirmatively report each factor that a swap meets to continue to

[137] *Id.*

[138] MFA Comment Letter at 4–5; ICI Comment Letter at 8.

[139] ICI Comment Letter at 8.

[140] In some instances, a swap that is available to trade potentially should no longer be subject to the trade execution requirement, but not all SEFs and DCMs have de-listed the swap. In such a case, the Commission may choose to review the available-to-trade status of such a swap, under § 40.2(b) or § 40.3(a)(10) of the Commission's regulations, which authorizes Commission staff to request, on an ongoing basis, additional information, evidence, or data that meets the requirements of the CEA or the Commission's regulations or policies thereunder. Further, market participants may request that the Commission, under section 8a(7) of the CEA, designate a swap to be no longer available to trade. Under section 8a(7), the Commission could initiate a proceeding to amend a SEF or DCM's available-to-trade designation of a swap if such a change is necessary for . . . the protection of traders'' with respect to ''other trading requirements.'' First, however, the Commission must request in writing that the change be made and provide for appropriate notice and opportunity for hearing. The Commission, however, acknowledges that the section 8a(7) process is complex and emphasizes that the process should only be invoked where a swap clearly should not remain available to trade, but a SEF or DCM has declined a request to initiate a new assessment.

[141] Under § 40.6(a) of the Commission's regulations, the Commission would receive notice that a SEF or DCM has de-listed a swap through a submission, submitted in compliance with §§ 40.6(a)(1) and (2) and 40.6(a)(7).

[142] Tradeweb Comment Letter at 5; CME Comment Letter at 7; Spring Trading Comment Letter at 7 (Jan. 12, 2012).

[143] Tradeweb Comment Letter at 5.

[144] Morgan Stanley Comment Letter at 8; MFA Comment Letter at 4–5; ISDA Comment Letter at 8; AIMA Comment Letter at 2–3; Eaton Vance Management Comment Letter at 4; ICI Comment Letter at 7; Markit Comment Letter at 4; Vanguard Comment Letter at 6; JPMorgan Comment Letter at 2; SIFMA AMG Comment Letter at 11; FSR Comment Letter at 3–4.

[145] Markit Comment Letter at 4; MFA Comment Letter at 4; Vanguard Comment Letter at 6; SIFMA AMG Comment Letter at 11. CME recommended that the Commission conduct the review of all existing available-to-trade determinations within 30 days of December 31 of each year to minimize costs and administrative burdens. For determinations submitted after June 30 of a given year, the annual review would occur within 30 days of December 31 of the following year. CME Comment Letter at 7.

[146] CME Comment Letter at 7.

[147] Tradeweb Comment Letter at 5.

[148] WMBAA Comment Letter at 4.

[149] Sunguard Kiodex Comment Letter at 2.

[150] SDMA Comment Letter at 10; WMBAA Comment Letter at 4.

[151] Spring Trading Comment Letter at 7 (Jan. 12, 2012); Eaton Vance Management Comment Letter at 4; Tradeweb Comment Letter at 5; SIFMA AMG Comment Letter at 11; MFA Comment Letter at 4; Markit Comment Letter at 4.

be available to trade.[152] Other commenters stated that the Commission should establish objective review and assessment criteria.[153]

ICI and Eaton Vance Management requested that the electronic reports to be submitted to the Commission also be made available to the public.[154]

Commission Determination

The Commission is not adopting the proposed annual review requirement. The Commission intended the requirement to ensure that a SEF or DCM would regularly evaluate trading for the swaps that it has determined to be available to trade for purposes of the trade execution requirement. Based on the approach adopted for determining that a swap is no longer available to trade, however, the Commission believes that requiring SEFs and DCMs to submit a review or assessment is not necessary. A SEF or DCM will likely review, on an ongoing basis, whether swaps listed or offered for trading on its system or platform should continue to be listed or offered for trading. Such a review would likely consider one or more factors that are similar to those that can be used to determine if a swap is available to trade. Further, if the Commission believes that a review of a swap's available-to-trade status is warranted, then it may request that SEFs and DCMs submit relevant information to conduct that review under §§ 40.2(b) and 40.3(a)(10) of the Commission's regulations, respectively.[155]

F. Notice to the Public of Available To Trade Determinations

The Commission noted in the FNPRM that §§ 40.5 and 40.6 provide a process for notifying the public that a SEF or DCM has made an available-to-trade determination—SEFs and DCMs are required to post a notice and a copy of the rule submission on their respective Web sites concurrent with their filings at the Commission. The Commission stated that it would also post the filings on its Web site. The Commission also stated that it would assess the feasibility of posting notices of all swaps that are determined to be available to trade on an easily accessible page on its Web site. Commenters supported the proposal to provide notice to market participants through a central location on the Commission's Web site.[156] SIFMA AMG stated that a list would help market participants comply with the rules.[157]

The Commission agrees with commenters that a centralized list would help market participants, as well as SEFs and DCMs, comply with the Commission's rules and regulations related to the trade execution requirement. Therefore, the Commission will post such determinations on its Web site where market participants can readily ascertain which swaps have been determined to be available to trade, and therefore subject to the trade execution requirement, including the SEFs and DCMs that list or offer those swaps for trading.

III. Sections 37.12 and 38.11 of the Commission's Regulations—Trade Execution Compliance Schedule

Proposed §§ 37.12(a) and 38.11(a) required market participants to comply with the trade execution requirement under section 2(h)(8) of the CEA upon the later of (1) the applicable deadline established under the compliance schedule for the clearing requirement for a swap,[158] or (2) 30 days after the swap is first made available to trade on either a SEF or DCM.[159] In the proposed rule, the Commission noted that while the available-to-trade determination could precede the clearing requirement and vice versa, the trade execution requirement would not be in effect until the clearing requirement takes effect.[160] The Commission sought comment as to whether 30 days would be sufficient for necessary technological linkages to be established between (1) DCOs, DCMs, and SEFs; and (2) DCMs, SEFs, and market participants.[161]

Summary of Comments

Some commenters generally supported the proposed compliance schedule for the trade execution requirement,[162] but Tradeweb commented that a 30-day implementation period may not be sufficient for a class of swaps that is available to trade for the first time and recommended that the Commission maintain the authority to set an appropriate implementation period on a case-by-case basis for a class of swaps, with input from SEFs, DCMs, and market participants.[163]

Several commenters recommended that the trade execution requirement should become effective only after the clearing requirement is fully implemented.[164] MFA commented that allowing mandatory trade execution to become effective simultaneously with mandatory clearing would potentially dilute market participants' resources to comply with both requirements.[165] MFA also recommended that all market participants be required to comply with

[152] Eaton Vance Management Comment Letter at 4.

[153] SIFMA AMG Comment Letter at 11; MFA Comment Letter at 4; Markit Comment Letter at 4; AIMA Comment Letter at 3.

[154] ICI Comment Letter at 7; Eaton Vance Management Comment Letter at 2.

[155] *See supra* note 140. Under 17 CFR 40.2(b) and 40.3(a)(10), when requested by Commission staff, a SEF or DCM is required to submit additional evidence, information, or data that demonstrates that a swap listed for trading meets the CEA's requirements or the Commission's regulations. Under §§ 37.5 and 38.5 of the Commission's regulations, respectively, the Commission may also request a SEF or DCM to file information related to its business as a SEF or DCM, including trading information, in a particular form, manner, and time as specified.

[156] ICI Comment Letter at 10; Bloomberg Comment Letter at 3 n.9; SIFMA AMG Comment Letter at 12–13; AIMA Comment Letter at 4. SIFMA AMG and AIMA also recommended that such a centralized location could be operated by an independent third party.

[157] SIFMA AMG Comment Letter at 13. SIFMA AMG requested that the Commission establish the Web site location prior to designating any swaps as available to trade. *Id.* In response to SIFMA AMG's comment, the Commission anticipates that this Web page will be established as soon as technologically feasible, and may or may not occur prior to the effective date of this rule. CME also requested that the Commission publish a list, on its Web site and in the **Federal Register**, of all swaps under current assessment. CME Comment Letter at 7. The Commission notes that §§ 40.5 and 40.6 filings will already be posted on its Web site.

[158] The Commission proposed to phase in compliance with the clearing requirement, and the trade execution requirement thereof, by category of market participant. As proposed, Category 1 entities, which included a swap dealer, a security-based swap dealer, a major swap participant, a major security-based swap participant, or an active fund, would have 90 days to comply with the clearing requirement. Category 2 entities, which include a commodity pool, private fund, employee benefit plan, or person predominantly engaged in activities that are in the business of banking or are financial in nature, would have 180 days to comply with the clearing requirement. Certain third-party subaccounts and all other swap transactions would receive 270 days to comply with the clearing requirement. With the exception of removing employee benefit plans from Category 2 and allowing such plans 270 days to comply with the clearing requirement, the Commission adopted this compliance schedule generally as proposed. *See* Swap Transaction Compliance and Implementation Schedule: Clearing Requirement under Section 2(h) of the CEA, 77 FR 44441 (July 20, 2012).

[159] *See* Swap Transaction Compliance and Implementation Schedule: Clearing and Trade Execution Requirements under Section 2(h) of the CEA, 76 FR 58186 (Sep. 20, 2011). In this final rule, the Commission is finalizing the compliance and implementation schedule for the trade execution requirement, and therefore, addresses the relevant comments submitted in response to this proposed rule.

[160] 76 FR 77731 n.38.

[161] 76 FR 58192.

[162] Chris Barnard Comment Letter at 2 (Sep. 23, 2011); Tradeweb Comment Letter at 2–4 (Nov. 4, 2011); Better Markets Comment Letter at 2 (Nov. 4, 2011).

[163] Tradeweb Comment Letter at 4.

[164] AIMA Comment Letter at 3 (Nov. 3, 2011); MarkitSERV Comment Letter at 5 (Nov. 2011); Citadel Comment Letter at 5 (Nov. 4, 2011); MFA Comment Letter at 7 (Nov. 4, 2011); Vanguard Comment Letter at 5 (Nov. 4, 2011) (recommending 180-day compliance period between the effective date of the clearing requirement and the trade execution requirement).

[165] MFA Comment Letter at 10–11.

the trade execution requirement at the same time, rather than through a phased-in approach, to avoid fragmenting market liquidity.[166]

Other commenters stated that the proposed schedule does not afford adequate time for market participants to comply with the trade execution requirement, particularly with regards to the proposed 30-day post-determination implementation period.[167] JPMorgan and UBS stated that where a SEF or DCM submits a swap as available to trade using § 40.6, market participants could be required to transfer their existing trading in that swap onto a SEF or DCM within only 40 days of the submission.[168]

Some commenters noted that implementing new infrastructure, standards, and procedures necessary to comply with the trade execution requirement would require a longer post-determination period.[169] For example, FHLBanks commented that new infrastructure and procedures are necessary to ensure that swaps are properly submitted to a counterparty's FCM and to a DCO.[170] Some commenters also cited the need for market participants to develop adequate connectivity [171] and to obtain trading access [172] to a SEF or DCM. CME commented that DCOs, DCMs, and SEFs would not likely be able to establish the requisite technological linkages within the proposed 30-day implementation period,[173] while ICI commented that smaller market participants could need more than 30 days to connect to a SEF or DCM offering an actively traded swap.[174] Other commenters noted that market participants would also need time to complete applicable documentation and agreements.[175] Some commenters further stated that a longer implementation period would promote greater competition among trading venues and mitigate a SEF's or DCM's attempt to capture market share.[176]

Commenters provided several suggestions for a longer post-determination period. Several commenters recommended a 90-day period after a swap is made available to trade,[177] while Chatham and FSR recommended at least a 6-month period.[178] SIFMA AMG recommended an implementation period of at least 90 days after the swap becomes subject to the trade execution requirement,[179] while some commenters recommended a similar period of at least 6 months,[180] particularly for market participants who are neither swap dealers or major swap participants.[181] SIFMA AMG and Vanguard stated that the period could be shortened over time as market participants become more experienced with centralized trading.[182]

Commission Determination

The Commission is adopting §§ 37.12(a) and (b) and 38.11(a) and (b) as proposed with minor technical corrections, but is also amending the proposed rule text to clarify that market participants must comply with the trade execution requirement upon the later of (1) the applicable deadline established under the compliance schedule for the clearing requirement for a swap,[183] or (2) 30 days after the available-to-trade determination for that swap is deemed approved under § 40.5 or deemed certified under § 40.6 by the Commission as available to trade. As noted earlier, the Commission anticipates that because of the novel nature of the available-to-trade determinations, the initial determinations would likely be subject to a stay under § 40.6 for an additional 90-day review period or an extension of the 45-day review period under § 40.5 for an additional 45 days. Accordingly, the Commission's part 40 rule review procedures should provide market participants with adequate advance notice of the possible application of the trade execution requirement to a particular swap. The Commission believes that this period, along with the subsequent 30-day post-determination implementation period, is a sufficient amount of time for SEFs, DCMs, and market participants to become familiar and comply with the trade execution requirement. Taken in concert with the implementation schedule adopted for swaps subject to clearing requirement, the Commission also believes that this time is sufficient with respect to mandatory trade execution for an individual swap or a group, type, category, or class of swaps.[184]

To the extent that the phased-in compliance schedule for the clearing requirement previously adopted by the Commission may lead to phased-in compliance with the trade execution requirement, the Commission supports this approach. The Commission believes that the phased-in schedule for the former requirement—which accounts for a market participant's ability to comply based on risk profile, compliance burden, resources, and expertise—also applies with respect to compliance with the latter requirement. The Commission further notes that the concerns about fragmenting market liquidity caused by a phased-in approach are mitigated by (1) the phasing-in of similar entities, who transact similar volumes of swaps, under similar timelines and (2) the relatively compact timeframe in which market participants in all three clearing implementation and compliance categories must comply with the trade execution requirement.[185]

Finally, the Commission notes that a trading facility could still clear and list a swap for trading after it is determined to be subject to the trade execution requirement, but prior to the effective date.

[166] *Id.* at 12.

[167] JPMorgan Comment Letter at 3–4; UBS Comment Letter at 2; ICI Comment Letter at 5 (Nov. 4, 2011); CME Comment Letter at 2 (Nov. 4, 2011); Westpac Comment Letter at 3 (Nov. 4, 2011); Regional Banks Comment Letter at 7 (Nov. 4, 2011); FHLBanks Comment Letter at 5 (Nov. 4, 2011); ICI Comment Letter at 9; ISDA Comment Letter at 11; AIMA Comment Letter at 2–3; UBS Comment Letter at 2; ISDA Comment Letter at 11; ACLI Comment Letter at 2.

[168] JPMorgan Comment Letter at 3; UBS Comment Letter at 2. Based on proposed §§ 37.12(a) and 38.11(a), commenters assumed that 30 days after the swap is made available to trade falls upon the later date than the applicable compliance date for the clearing requirement.

[169] JPMorgan Comment Letter at 3–4; ISDA Comment Letter at 11; FHLBanks Comment Letter at 5 (Nov. 4, 2011); Westpac Comment Letter at 2–3 (Nov. 4, 2011).

[170] FHLBanks Comment Letter at 5 (Nov. 4, 2011).

[171] FSR Comment Letter at 4; Bloomberg Comment Letter at 5; ICI Comment Letter at 8; ISDA Comment Letter at 11; Eaton Vance Management Comment Letter at 3; Chatham Comment Letter at 4; SIFMA AMG Comment Letter at 9; CME Comment Letter at 6–7; Westpac Comment Letter at 3 (Nov. 21, 2011); ICI Comment Letter at 5 (Nov. 4, 2011).

[172] MFA Comment Letter at 4; Vanguard Comment Letter at 6; SIFMA AMG Comment Letter at 9; AIMA Comment Letter at 3; CME Comment Letter at 6–7.

[173] CME Comment Letter at 2 (Nov. 4, 2011).

[174] ICI Comment Letter at 5 (Nov. 4, 2011).

[175] SIFMA AMG Comment Letter at 9; ICI Comment Letter at 9; AIMA Comment Letter at 3; CME Comment Letter at 7; ISDA Comment Letter at 11; Westpac Comment Letter at 3; FIA/ISDA/SIFMA Comment Letter at 8 (Nov. 4, 2011).

[176] Chatham Comment Letter at 4; FXall Comment Letter at 7; ICI Comment Letter at 8; SIFMA AMG Comment Letter at 9.

[177] FXall Comment Letter at 7; ICI Comment Letter at 9; CME Comment Letter at 6–7; Vanguard Comment Letter at 6; Bloomberg Comment Letter at 5; Westpac Comment Letter at 3 (Nov. 4, 2011).

[178] Chatham Comment Letter at 4; FSR Comment Letter at 4.

[179] SIFMA AMG Comment Letter at 9.

[180] Eaton Vance Management Comment Letter at 3; ISDA Comment Letter at 11.

[181] Westpac Comment Letter at 3 (Nov. 4, 2011); FHLBanks Comment Letter at 5 (Nov. 4, 2011).

[182] SIFMA AMG Comment Letter at 9; Vanguard Comment Letter at 6.

[183] *See supra* note 52.

[184] *See id.*

[185] *See id.*

IV. Related Matters

A. Regulatory Flexibility Act

The Regulatory Flexibility Act (''RFA'') requires federal agencies, in promulgating regulations, to consider the impact of those regulations on small entities.[186] The Commission has previously established certain definitions of ''small entities'' to be used by the Commission in evaluating the impact of its regulations on small entities in accordance with the RFA.[187] The Commission has previously determined that DCMs and SEFs are not ''small entities'' for purposes of the RFA.[188] The subject of this rulemaking also provides a compliance schedule for a new statutory requirement, section 2(h)(8) of the CEA, and does not itself impose significant new regulatory requirements.[189] Accordingly, the Commission received no comments on the Chairman's certification of the impact of the rules contained herein on small entities. Therefore, the Chairman, on behalf of the Commission, hereby certifies pursuant to 5 U.S.C. 605(b) that the rule will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

The Paperwork Reduction Act (''PRA'') [190] imposes certain requirements on federal agencies in connection with their conducting or sponsoring any collection of information as defined by the PRA. An agency may not conduct or sponsor, and a registered entity is not required to respond to, a collection of information unless it displays a currently valid control number by the Office of Management and Budget (''OMB''). This final rule contains new collection of information requirements within the meaning of the PRA. Accordingly, in connection with the FNPRM, the Commission submitted an information collection requested, titled ''Parts 37 and 38—Process for a Swap Execution Facility or Designated Contract Market to Make a Swap Available to Trade'' and supporting documentation to OMB for its review and approval in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11, and requested that OMB approve and assign a new control number for the collections of information covered by the FNPRM. Additionally, pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission, in the FNPRM, requested comments from the public on the proposed information collection requirements in order to, among other items, evaluate the necessity of the proposed collections of information and minimize the burden of the information collection requirements on respondents. On September 12, 2012, OMB assigned control number 3038–0099 to this collection of information, but withheld final approval pending the Commission's resubmission of the information collection, which includes a description of the comments received on the collection and the Commission's responses thereto.

With respect to the adoption of §§ 37.12(a) and 38.11(a)—the trade execution compliance schedule—as stated in the prior proposed rule, this requirement will not require a new collection of information from any persons or entities.[191]

The Commission protects proprietary information according to the Freedom of Information Act and 17 CFR part 145, ''Commission Records and Information.'' In addition, section 8(a)(1) of the CEA strictly prohibits the Commission, unless specifically authorized by the CEA, from making public ''data and information that would separately disclose the business transactions or market positions of any person and trade secrets or names of customers.'' [192] The Commission is also required to protect certain information contained in a government system of records according to the Privacy Act of 1974.[193]

1. Proposed Information Provided by Reporting Entities/Persons

In the FNPRM, the Commission estimated that 50 registered entities will be required to file part 40 rule submissions and annual reports.

Based on the previously estimated hours of burden under part 40 and the estimated additional time that a SEF or DCM would require to review applicable factors and data to make a determination, the Commission estimated that the hourly burden for a SEF or DCM under proposed §§ 37.10(a) and 38.12(a) to submit an available-to-trade determination would be 8 hours per submission. The Commission, however, did not provide an average annual hours of burden for each SEF or DCM to submit available-to-trade determinations under proposed §§ 37.10(a) and 38.12(a) because, as stated in the FNPRM, it is not feasible to determine the number of part 40 rule submission filings, on average, that each SEF or DCM would submit, as the number of swap contracts to be traded on a DCM or SEF and the number of those swaps that a SEF or DCM will eventually submit as available to trade is presently unknown.

2. Summary of Comments and Commission Response

Sections 37.10(a) and 38.12(a)—Process To Make a Swap Available To Trade

MarketAxess and SDMA characterized the proposed approach as burdensome and commented that it would require SEFs to expend a significant amount of time and resources.[194] MarketAxess recommended an alternative ''recognition and notification'' process in which a SEF or DCM provides notice to the Commission that a swap is available to trade when it becomes subject to the clearing requirement.[195] MarketAxess stated that this approach would allow SEFs to use their resources in a more efficient manner.[196] SDMA supported the part 40 approach, but stated that a SEF should determine if a swap is available to trade based on whether the swap is required to be cleared, not based on the enumerated factors.[197] Sunguard Kiodex also recommended an alternative approach—a real-time ''illiquidity'' test that would temporarily permit off-facility trading in a swap based on certain market observations—that would require less time and reduce costs.[198] WMBAA and Spring Trading commented that the Commission's estimate of the hours of burden for a SEF or DCM to make an available-to-trade determination are too low based on the different types of personnel that would be involved in a determination.[199] Spring Trading estimated that each rule filing would require at least 15–20 hours.[200]

The Commission notes that the alternative approaches proposed by commenters would eliminate a separate formal determination process. As stated in the preamble, however, the Commission believes that determining whether a swap is available to trade and whether a swap should be mandatorily cleared should remain separate

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[186] 5 U.S.C. 601 *et seq.*

[187] 47 FR 18681–31 (Apr. 30, 1982).

[188] *See* 47 FR 18618, 18619 (Apr. 30, 1982) discussing DCMs; 66 FR 45604, 45609 (Aug. 29, 2001) discussing DTEFs; 76 FR 1214, 1235 discussing SEFs.

[189] 76 FR 58193.

[190] 44 U.S.C. 3501 *et seq.*

[191] 76 FR 58193.

[192] 7 U.S.C. 12(a)(1).

[193] 5 U.S.C. 552a.

[194] MarketAxess Comment Letter at 7–8; SDMA Comment Letter at 4–5.

[195] MarketAxess Comment Letter at 6.

[196] *Id.* at 7.

[197] SDMA Comment Letter at 6–7.

[198] Sunguard Kiodex Comment Letter at 3.

[199] WMBAA Comment Letter at 5; Spring Trading Comment Letter at 5 (Jan. 12, 2012).

[200] *Id.*

processes because each inquiry addresses different concerns. Further, adopting a real-time ''illiquidity'' test would require objective criteria, which the Commission has declined to adopt at this time.

The Commission acknowledges the comments from WMBAA and Spring Trading regarding the resources required to make a determination. Therefore, the Commission is revising its estimate of the hours of burden to reflect the addition of additional personnel that would process and analyze trading data, for which the Commission estimates this hourly burden to be 8 hours per submission. The Commission is also adopting a listing requirement in the final rule under new §§ 37.10(a)(2) and 38.12(a)(2), which requires a SEF or DCM to certify that it is listing the swap for which it submits an available-to-trade determination. The Commission notes that the listing process is governed by §§ 40.2 and 40.3 of the Commission's regulations, for which it has previously estimated the average hourly burden to be 2 hours per submission in a previous rulemaking.[201]

Accordingly, the Commission revises its estimate of the total hourly burden to be 16 hours per submission.

C. Cost-Benefit Considerations

Introduction

Title VII of the Dodd-Frank Act seeks to prevent a repeat of the harm caused by the 2008 financial crisis by establishing a comprehensive new regulatory framework for swaps and security-based swaps.[202] Among other things, the legislation seeks to promote market integrity, reduce risk, and increase transparency within the financial system and swaps markets. Consistent with the view that several weaknesses contributed to the crisis,[203] Title VII establishes a multidimensional regulatory approach designed to ''mitigate costs and risks to taxpayers and the financial system.'' [204] Provisions designed to move the transaction of swaps from primarily opaque, over-the-counter (''OTC'') markets—which traditionally feature bilateral negotiation and execution—to registered swap execution facilities (''SEFs'') and designated contract markets (''DCMs'')—which provide market participants and the public with improved swap market transparency—represent an important element of this approach.

In particular, section 733 of the Dodd-Frank Act amended the CEA to, among other things, move swap trading and execution to SEFs and DCMs.[205] Section 723(a)(3) of the Dodd-Frank Act added a trade execution requirement,[206] which requires that swap transactions subject to the clearing requirement under section 2(h)(1) of the CEA be executed on a SEF or a DCM, unless no SEF or DCM ''makes the swap available to trade'' or the clearing exception under section 2(h)(7) of the CEA applies.[207] Taken together, these provisions are intended to transform the swaps market from one in which prices for bilaterally-negotiated contracts are privately quoted—typically by dealers who, unlike non-dealer market participants (typically the ''buy-side''), enjoy asymmetric information advantages—to one in which bid/offer prices for swap contracts are accessible to multiple market participants to compare, assess, and accept or reject.[208] With this release, in conjunction with the Commission's final rulemaking establishing SEFs[209] and the final rulemaking defining appropriate minimum block sizes for swaps,[210] the Commission is implementing the trade execution requirement.

In this release, the Commission is adopting final rules (1) specifying the process by which a swap is made ''available to trade,'' thereby making it subject to the trade execution requirement under section 2(h)(8) of the CEA (''available-to-trade rule''); and (2) establishing the compliance schedule of the trade execution requirement, following a Commission determination that a swap is both required to be cleared and is available to trade (''trade execution compliance schedule'').[211] More specifically, these rules allow SEFs and DCMs to designate swaps that they list or offer for trading as ''available to trade,'' [212] thereby requiring market participants who transact such swaps (and who are subject to the clearing requirement under section 2(h)(1)(A) of the CEA) to comply with the trade execution requirement in carrying out these transactions. Swaps that are subject to the trade execution requirement (and are not block trades as defined under § 43.2 of the Commission's regulations) must be executed in accordance with other separately promulgated rules that implement the Dodd-Frank Act's swap exchange trading requirements and are intended to provide improved price transparency for swap transactions.[213]

Operating in concert with the statutory requirements and other rules,[214] the rules adopted in this rulemaking are designed to provide a process that fosters swaps becoming available to trade, and therefore subject to the trade execution requirement; this,

[201] 76 FR 77734.

[202] Dodd-Frank Act section 701, *et seq.*

[203] *See, e.g.,* Financial Crisis Inquiry Commission, ''The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States'' at xxiv (Jan. 2011), available at *http://www.gpo.gov/fdsys/pkg/GPO–FCIC/pdf/GPO–FCIC.pdf.* (listing uncontrolled leverage; lack of transparency, capital and collateral requirements; speculation; interconnection among firms; and concentrations of risk in the market as contributing factors).

[204] S. Rep. No. 111–176, at 92 (2010).

[205] SEFs are a new type of regulated marketplace modeled largely on the existing Commission-regulated DCM structure. Section 1a(50) of the CEA, as enacted by section 721 of the Dodd-Frank Act, defines a SEF as ''a trading system or platform in which multiple participants have the ability to execute or trade swaps by accepting bids and offers made by multiple participants in the facility or system, through any means of interstate commerce, including any trading facility, that (A) facilitates the execution of swaps between persons; and (B) is not a designated contract market.'' 7 U.S.C. 1a(50). Section 5h(a)(1) of the CEA, as amended by the section 733 of the Dodd-Frank Act, prohibits any person from operating a facility for the trading and processing of swaps unless the facility is registered as a SEF or a DCM. 7 U.S.C. 7b–3(a)(1).

[206] CEA section 2(h)(8), 7 U.S.C. 2(h)(8).

[207] 7 U.S.C. 2(h)(7).

[208] Asymmetric information exists when one counterparty to a transaction has more or better information than the other counterparty. In some instances, a dealer could have an information advantage over a non-dealer, and vice versa. Abuse of this advantage is likely to contribute to market failure. By definition, bilateral negotiations imply lower levels of transparency of orders, quotes, trades and transaction prices. In the context of swap markets, as dealers are on one side of a large fraction of trades, they are privy to better information on prevailing market conditions and valuations relative to their non-dealer counterparties. *See* ''An Analysis of OTC Interest Rate Derivatives Transactions: Implications for Public Reporting,'' Michael Fleming, John Jackson, Ada Li, Asani Sarkar, and Patricia Zobel, Federal Reserve Bank of New York Staff Reports, no. 557, at 6 n.14 (Mar. 2012). Major derivatives dealer activity accounts for 89 percent of the total interest rate swap activity in notional terms. *Id.*

[209] *See* Core Principles and Other Requirements for Swap Execution Facilities (May 16, 2013).

[210] *See* Procedures to Establish Appropriate Minimum Block Sizes for Large Notional Off-Facility Swaps and Block Trades (May 16, 2013).

[211] CEA section 2(h)(8), 7 U.S.C. 2(h)(8).

[212] *See supra* note 1.

[213] The rules establishing SEFs focus on measures to promote pre-trade transparency and trade execution of swaps. To comply with the trade execution requirement, swaps that are traded on a SEF must be executed as Required Transactions. Under § 37.9(a)(2), Required Transactions must be executed by either (1) an Order Book, as defined in § 37.3(a)(3); or (2) a Request for Quote System, as defined in § 37.9(a)(3). *See* Core Principles and Other Requirements for Swap Execution Facilities (May 16, 2013). Swaps that are subject to the trade execution requirement, under section 2(h)(8) of the CEA, and traded on a DCM must be executed pursuant to subpart J of part 38 of the Commission's regulations, which implements revised DCM Core Principle 9 under section 5(d)(9) of the CEA, as amended by section 735(b) of the Dodd-Frank Act. 7 U.S.C. 7(d)(9).

[214] *See* part 37 and subpart J of part 38 of the Commission's regulations.

indirectly will counter information asymmetry and in turn, the informational advantage enjoyed by dealers to the potential detriment of other market participants. In this way, these rules will promote a competitive market environment with improved price discovery and characterized by narrower spreads and more reliable prices. Ultimately, these rules will benefit the financial system as a whole by creating a more efficient marketplace where market participants will be able to take into account the price at which recent transactions have occurred when determining at what price to quote or place orders.

The Commission believes that some of the costs related to the application of these rules are a consequence of the Congressional trade execution requirement under section 2(h)(8) of the CEA. For example, those market participants who are not eligible for the end-user exception under section 2(h)(7) of the CEA[215] will not have the option to execute swaps made available to trade on a bilateral basis, even if they consider it more costly or less convenient to execute trades on a SEF or a DCM. As described further below, the Commission was cognizant of these costs in adopting these final rules, and has, where appropriate, attempted to mitigate the costs while observing CEA section 2(h)(8).

The Statutory Mandate To Consider the Costs and Benefits of the Commission's Action: Section 15(a) of the CEA

Section 15(a)[216] of the CEA requires the Commission to consider the costs and benefits of its actions before promulgating a regulation under the CEA or issuing certain orders. Section 15(a) further specifies that the costs and benefits shall be evaluated in light of the following five broad areas of market and public concern: (1) Protection of market participants and the public; (2) efficiency, competitiveness, and financial integrity of futures markets; (3) price discovery; (4) sound risk management practices; and (5) other public interest considerations. The Commission considers the costs and benefits resulting from its discretionary determinations with respect to the section 15(a) factors.

In this rulemaking to implement the trade execution requirement, the Commission is exercising its discretion to adopt the available-to-trade rule and the trade execution compliance schedule. The discussion that follows considers the section 15(a) factors for each set of rules separately. Prior to the section 15(a) consideration for each set of rules, the Commission discusses the costs, benefits, and alternatives to the approach adopted in these final rules as well as relevant comment letters.[217] With respect to the available-to-trade rule, costs, benefits, and alternatives are further broken out and discussed separately for various components of the process—Part 40 Process and Determination Factors, and Applicability.

Quantifying the costs and benefits to SEFs and DCMs is not reasonably feasible for many aspects of the available-to-trade rule because costs will depend, among other things, on the future business decisions of SEFs and DCMs. The Commission expects that the costs and benefits with respect to the available-to-trade rule will vary, based on the specific circumstances of the individual SEFs, DCMs, and market participants. Where the Commission is unable to quantify the costs and benefits, the Commission identifies and considers the costs and benefits of these rules in qualitative terms.

Given the novelty of the trade execution requirement—the mandatory trading of swaps on a new type of entity, SEFs, or on DCMs—the Commission is inherently limited by a lack of available data in attempting to quantify the costs and benefits of implementing the trade execution compliance schedule. As discussed further below, the Commission is not aware of any analog to another requirement that would provide information that is sufficient to ascertain such costs and benefits in quantitative terms. Accordingly, the Commission identifies and considers the costs and benefits of the compliance schedule in qualitative terms.

1. Available-to-Trade Rule

a. Part 40 Process and Determination Factors

Final §§ 37.10 and 38.12 govern the process that a SEF or DCM must use to determine whether a swap is available to trade for purposes of the trade execution requirement. For a swap to be subject to the trade execution requirement under section 2(h)(8) of the CEA, a SEF or DCM must have first determined that a swap is available to trade. The Commission views this determination as a trading protocol issued by the SEF or DCM (and therefore as a ''rule,'' as defined in § 40.1 of the Commission's regulations); as a rule, the SEF or DCM must submit the determination to the Commission in accordance with the procedures contained in part 40 of the Commission's regulations. Final §§ 37.10(a) and 38.12(a) set forth the procedure for a SEF or DCM to submit the determination under § 40.5 or § 40.6 of the Commission's regulations.

Final §§ 37.10(b) and 38.12(b) require a SEF or DCM to consider, as appropriate, six factors with respect to each swap when determining whether a swap is available to trade: (1) Whether there are ready and willing buyers and sellers; (2) the frequency or size of transactions; (3) the trading volume; (4) the number and types of market participants; (5) the bid/ask spread; or (6) the usual number of resting firm or indicative bids and offers. No single factor must always be considered as to whether a swap is available to trade; therefore, the SEF or DCM may consider any one or more of the factors in its initial determination. In its submission to the Commission under § 37.10(a) or § 38.12(a), a SEF or DCM must describe how it considered the factors that it deems appropriate.

Costs

Costs to SEFs and DCMs

In the proposed rule, the Commission estimated that conducting the assessment and submission process in §§ 37.10(a) and (b) and 38.12(a) and (b) could be performed internally by one compliance personnel of the SEF or DCM over approximately eight hours on average. The Commission further estimated that the cost per hour for one compliance personnel to be $43.25 per hour;[218] therefore, it would cost each SEF and DCM $346 per rule submission to comply with the proposed requirements.[219] The Commission also noted that this estimate was general in nature and that it would be difficult to determine the number of hours involved with reasonable precision, given the novelty of the process.[220] The

[215] The Commission may determine that swap transactions exempted from the section 2(h)(1) clearing requirement pursuant to other statutory authority would also not be subject to the section 2(h)(8) trade execution requirement. *See supra* note 1.

[216] CEA section 15(a), 7 U.S.C. 19(a).

[217] The Commission solicited comments to aid its consideration of the costs and benefits resulting from (1) the proposed available-to-trade rule, 76 FR 77733, and (2) the proposed trade execution compliance schedule. 76 FR 58192.

[218] *See* Report on Management & Professional Earnings in the Securities Industry 2010, Securities Industry and Financial Markets Association at 4 (Sept. 2010). The report lists the average total annual compensation for a compliance specialist (intermediate) as $58,878. The Commission estimated the personnel's hourly cost by assuming an 1,800 hour work year and by multiplying by 1.3 to account for overhead and other benefits.

[219] 76 FR 77735.

[220] The Commission also noted that certain additional factors could affect these estimates, such as the complexity of the swap's terms. *Id.*

Commission solicited comments on the costs associated with §§ 37.10(a) and (b) and 38.12(a) and (b), *i.e.,* assessing whether a swap is available to trade and submitting a determination pursuant to part 40 of the Commission's regulations.[221]

Some commenters claimed that the Commission's estimate for the number of personnel required to carry out the process was low.[222] For example, WMBAA stated that the Commission under-estimated the different types of personnel that would be required to make an available-to-trade determination, which include information technology professionals, operations staff, legal and compliance staff, and management.[223] Spring Trading anticipated that the Commission would require large amounts of data and analysis from SEFs and DCMs to support their determinations; therefore, the costs required to make a determination and submit a filing would be similar to the effort required by a DCM to assess whether a new futures contract is susceptible to manipulation.[224] WMBAA also asserted that the initial costs of implementing the new procedure would be higher than the Commission's proposed projection.[225] MarketAxess commented that the process would require SEFs to expend significant resources, which would pose a barrier to entry and lead to fewer trading platforms for market participants.[226]

Commenters did not provide alternative numerical estimates or discuss the magnitude of costs that would be imposed by the determination process. Based on the qualitative comments received from WMBAA and Spring Trading, however, the Commission is revising its estimated cost of conducting the assessment and submission process to reflect the addition of an economist to the estimate of necessary personnel. The Commission agrees with Spring Trading that SEFs and DCMs may analyze trading data in considering the factors under §§ 37.10(b) and 38.12(b); the compliance personnel would likely be assisted by an economist in carrying out such an analysis over approximately eight hours on average. Further, the Commission is also revising its estimates based on updated wage rate data. The Commission's updated estimate of the cost per hour for one compliance personnel is $42.16 per hour[227] and $64.60 per hour for one economist.[228]

The Commission is also adopting a listing requirement under final §§ 37.10(a)(2) and 38.12(a)(2) that requires the SEF or DCM to demonstrate that they have listed or offered for trading the swap for which they are submitting an available-to-trade determination. A SEF or DCM incurs costs to list or offer a swap for trading pursuant to § 40.2 and 40.3 of the Commission's regulations, which requires a product filing that includes, among other things, a ''concise explanation and analysis'' of the product, that the Commission has acknowledged as *de minimis.*[229] Although a SEF or DCM may decide to list a product for trading without a desire to submit an available-to-trade determination, to the extent that the SEF or DCM lists a product exclusively to meet the requirements of §§ 37.10(a)(2) or 38.12(a)(2), the Commission estimates that it would take one compliance personnel approximately 2 hours, on average, to submit a product filing.

Therefore, the Commission estimates that it would cost a SEF and DCM a maximum of $938.40 per rule submission filing to comply with final §§ 37.10(a) and (b) and 38.12(a) and (b).

With respect to MarketAxess's comment, the Commission does not believe that the costs associated with the determination process pose a barrier to entry for trading platforms. The rule does not affirmatively require a SEF or DCM to first submit to the Commission that a swap is available to trade via a part 40 filing in order to list or offer that swap for trading on its platform. If one SEF or DCM makes the swap available to trade through the part 40 process, then other SEFs and DCMs who subsequently choose to list or trade the swap are only required to do so through methods of execution consistent with the trade execution requirement. The Commission notes that in order to register and operate as a SEF, a trading platform or facility must already be able to demonstrate that they offer certain minimum functionality in terms of methods of execution (*i.e.,* a central limit order book (''CLOB'') or request-for-quote (''RFQ'') system).[230]

The Commission specifically designed the process to mitigate costs by allowing SEFs and DCMs to utilize existing personnel and infrastructure to carry out the determination and submission process under part 40 procedures. Further, the process affords SEFs and DCMs the flexibility to consider any one or more enumerated factors in determining that a swap is available to trade. This flexibility will allow them to tailor their considerations, while also managing costs of research and analysis, by selecting from a range of factors. Moreover, the Commission believes that the costs will decrease for both SEFs and DCMs as they become more familiar with using the part 40 procedures to make a swap available to trade. The Commission also believes that the part 40 process will require fewer resources as centralized trading develops and SEFs and DCMs become more familiar with the types of swaps that can be made available to trade.

The Commission believes that Spring Trading's comparison between the costs of the process and the costs to assess whether a new futures contract is susceptible to manipulation rests on a flawed analogy. The costs of the latter are based upon the Commission's annual burden hours estimate, in the aggregate, for the information collection requirements under §§ 40.2 and 40.3 of the Commission's regulations,[231] estimated per registered entity to be 200 hours based on 100 responses and an estimated average of 2 hours per

[221] *Id.*

[222] WMBAA Comment Letter at 5; Spring Trading Comment Letter at 5 (Jan. 12, 2012).

[223] WMBAA Comment Letter at 5.

[224] Spring Trading Comment Letter at 5 (Jan. 12, 2012). The Commission has noted that the costs of compliance with DCM Core Principle 3—Contracts Not Readily Subject to Manipulation, as codified in § 38.200 of the Commission's regulations—consist of supplying supporting information and documentation to justify the contract specifications of a new product. That process is governed by the product listing submission procedures codified in §§ 40.2 and 40.3 of the Commission's regulations.

[225] *Id.*

[226] MarketAxess Comment Letter at 9.

[227] *See* Report on Management & Professional Earnings in the Securities Industry 2011, Securities Industry and Financial Markets Association at 4 (Oct. 2011). The FRPRM calculated the proposed estimate for the assessment and submission process based on salary information in the 2010 report. *See supra* note 218. The 2011 report lists the average total annual compensation for a compliance specialist (intermediate) as $58,371. The Commission estimated the personnel's hourly cost by assuming an 1,800 hour work year and by multiplying by 1.3 to account for overhead and other benefits.

[228] *See* Bureau of Labor Statistics, U.S. Department of Labor, Occupational Outlook Handbook, 2012–13 Edition, Economists, *http://www.bls.gov/ooh/life-physical-and-social-science/economists.htm.* The report lists the average total annual compensation for an economist as $89,450. The Commission estimated the personnel's hourly cost by assuming an 1,800 hour work year and by multiplying by 1.3 to account for overhead and other benefits.

[229] For further Commission discussion of the costs associated with listing or offering a product for trading under §§ 40.2 and 40.3 of the Commission's regulations, *see* Provisions Common to Registered Entities, 76 FR 44776, 44787 (Jul. 27, 2011).

[230] *See* Core Principles and Other Requirements for Swap Execution Facilities (May 16, 2013).

[231] 76 FR 44790.

response.[232] The Commission's estimate of 18 hours to comply with final §§ 37.10(a) and (b) and 38.12(a) and (b), however, is based upon a single submission of an available-to-trade determination.[233] It is not feasible at this time to estimate the average number of rule submissions that a SEF or DCM will file per year; therefore, the Commission believes that the burden hours estimate for the information collection requirements under §§ 40.2 and 40.3 is not illustrative here.

Costs to Market Participants

Some commenters also stated that the process would impose direct costs on market participants. For example, Chatham stated that end-users would have to expend resources to monitor whether swaps are subject to the trade execution requirement, and if so, connect to a SEF or DCM that offers or lists that swap for trading.[234]

Some commenters also expressed concern that the available-to-trade determination process would impose indirect costs on market participants. These commenters maintained that SEFs and DCMs would be incentivized to exploit the process by indiscriminately determining that swaps are available to trade. Making determinations in this manner, they claimed, would lead to illiquid swaps trading on a SEF or DCM, which could result in increasing swap price volatility; increased spreads; misleading market prices; and front-running behavior.[235] Chatham commented that end-users would encounter higher hedging and swap execution costs, particularly from swap dealers passing on the costs of higher volatility.[236] ISDA stated that those costs would deter market participants from executing hedge transactions.[237] FSR stated that improper determinations by a SEF or DCM, such as one primarily driven by the desire to capture market share rather than on the merits, would compel market participants to avail themselves of exemptions to the trade execution requirement, thus undermining the goal of promoting a centralized trading market.[238]

Notwithstanding the fact that commenters did not provide data to support or monetize their cost concerns, the Commission has qualitatively considered their comments about the direct and indirect costs of the available-to-trade determination process. First, with respect to the direct costs cited by Chatham—that end-users would have to follow which swaps are subject to mandatory trade execution and connect to a SEF or DCM to trade that swap—these costs are primarily attributable to the statutory trade execution requirement and not to the Commission's action in this final rule. The costs incurred by market participants to connect to a SEF or DCM are attendant to complying with the trade execution requirement. While the number of swaps subject to the trade execution requirement will be affected by this final rule in conjunction with business decisions by SEFs and DCMs, market participants (as well as SEFs and DCMs) would incur these costs for any swap subject to the statutory trade execution requirement. While commenters did not provide any quantitative estimates regarding connectivity costs, the Commission understands that clearing firms' connectivity services to DCMs can be bundled into the clearing services provided by clearing firms, and expects that this will occur at SEFs as well. Hence, the connectivity costs arising directly from the trade execution requirement are likely to be subsumed into the costs of complying with the mandatory clearing requirement.[239] It is also possible that SEFs and DCMs will bundle connectivity costs into transaction fees. Moreover, SEFs and DCMs have an incentive to keep connectivity costs low in order to attract market participants.

Further, while there may be some attendant search costs, the Commission's approach in this final rule greatly minimizes the costs to market participants to monitor whether a SEF or DCM is subject to the trade execution requirement. Under existing practice for part 40 rule submissions, the Commission will post a notice and copy of all available-to-trade submissions on its Web site. The Commission also intends to establish an updated, centralized list of all of the swaps that are available to trade. This will provide market participants with a single reference for knowing whether a particular swap has been determined to be available to trade.

With respect to the potential indirect costs imposed upon market participants if illiquid swaps are made available to trade and become subject to the trade execution requirement, the Commission acknowledges the concerns of commenters. The Commission, however, believes that the part 40 process is appropriate and well-suited to moderate this possibility and views the adopted determination factors as probative of whether an actual trading market exists.[240] Mandating SEFs and DCMs to consider these factors prior to making a determination will compel them at the outset to internally consider the benefits versus the costs that will be incurred to list and subsequently support trading in a particular swap. The Commission also believes that the transparency of the process (*e.g.,* submissions must be posted on the submitting SEF or DCM's Web site and will be posted on the Commission's Web site as well), coupled with Commission review and potential for public comment, provides an important backstop to protect the integrity of the determinations that are submitted.

Benefits

The process set forth in §§ 37.10 and 38.12 will advance the Congressional goal of promoting swap execution and developing a centralized trading market that facilitates price discovery in the manner as described below.

Most importantly, the adopted process in the final rule will provide an up-to-date, singular reference for SEFs, DCMs, and market participants for identifying which swaps are available to trade, and therefore subject to the trade execution requirement. Sections 37.10(a) and 38.12(a) prescribe the use of the part 40 process for the submission of rules for Commission review and approval (§ 40.5) or the self-certification

[232] *Id.*

[233] As discussed above, the Commission estimates the assessment and submission process in §§ 37.10(a) and (b) and 38.12(a) and (b) for each submission will be performed by one compliance personnel and one economist over approximately eight hours each on average. In addition, the Commission estimates that it would take one compliance personnel approximately 2 hours, on average, to comply with the listing prerequisite under §§ 37.10(a)(2) and 38.12(a)(2) by submitting a product filing.

[234] Chatham Comment Letter at 2.

[235] AIMA Comment Letter at 1; CME Comment Letter at 6; Morgan Stanley Comment Letter at 3; CEWG Comment Letter at 4.

[236] Chatham Comment Letter at 2.

[237] ISDA Comment Letter at 4.

[238] FSR Comment Letter at 2.

[239] Depending on their individual business needs, market participants could also use connectivity services provided by independent software vendors to trade swaps subject to the trade execution requirement. These costs may also be bundled into transaction fees. The Commission also notes that it is typically the case that for most new contracts, DCMs tend to waive execution and other fees during the initial six to twelve months after listing, and such fee waivers are meant to help mitigate any incremental costs for market participants to connect to a new platform or trade a new product.

[240] The Commission believes that market participants can use any or each of the factors to demonstrate that active trading is occurring for a particular swap. For example, a high frequency of transactions, narrow bid/ask spread, or large trading volume would indicate execution of transactions for that swap. A large number of buyers or sellers, or a large number of resting firm or indicative bids and offers would also indicate an active market based on the presence of market participants seeking to execute transactions in that swap.

of rules (§ 40.6).[241] Under these processes, SEFs and DCMs must submit an initial available-to-trade determination to the Commission either for rule approval or as a self-certification; both require Commission review. If appropriate, the Commission may approve a § 40.5 or § 40.6 rule submission within the designated timeframes. SEFs and DCMs will be familiar with this process; part 40 is already used by DCMs for other rule filings and similarly will be used by SEFs going forward. Part 40 further requires SEFs and DCMs to post a copy and notice of their submissions on their respective Web sites; the Commission also posts that information on its own Web site. Therefore, the adopted process will allow market participants to know (1) whether a particular swap has been submitted as available to trade; (2) whether that swap has been deemed as available to trade by the Commission; and (3) when the swap was made or will be made available to trade. In those submissions, SEFs and DCMs must consider the six enumerated factors under §§ 37.10(b) and 38.12(b) as appropriate, which provides other SEFs, DCMs, and market participants with information about the basis for determining that a swap is available to trade.

The process adopted in §§ 37.10 and 38.12 also increases transparency for market participants and the public. Under part 40, submissions must contain an explanation of how the SEF or DCM determined that a swap is available to trade, including the consideration of one or more of the relevant factors listed in §§ 37.10(b) and 38.12(b), as well as a brief explanation of any substantive opposing views. The part 40 process allows the Commission to go back to the submitting entity in the case that an insufficient explanation of the determination is provided.[242] In addition, when warranted (*e.g.,* when a submission presents novel or complex issues), market participants and the public will have the opportunity to provide public comment on the merits of the SEF or DCM's submission directly through the Commission's Web site.[243] Therefore, part 40 will not only inform market participants of the justifications for and against an available-to-trade determination, but provides an opportunity for market participants and the public to submit their own views as well.

The adopted process also provides SEFs and DCMs with flexibility in determining whether a swap is available to trade. Under §§ 37.10(b) and 38.12(b), a SEF or DCM may consider any one or more of the enumerated factors in its initial determination, given that the Commission believes that no single factor must always be considered. Accordingly, this approach allows SEFs and DCMs to submit swaps with different trading characteristics to the Commission as available to trade. Rather than require SEFs and DCMs to respond to a rigid set of determination criteria, this flexibility was designed to encourage SEFs and DCMs to make a broader range of swaps subject to the trade execution requirement.

The Commission anticipates that these benefits will produce a more efficient process and consistent determinations over time. Under the part 40 procedures, SEFs and DCMs will submit to the Commission, for further review with the potential for public comment, an initial determination of whether a swap is available to trade. This approach will (1) benefit market participants during the initial stages of implementation by providing them, in circumstances as described above, with an opportunity to comment on determinations and (2) help the Commission track and maintain a record of which swaps are subject to the trade execution requirement.

The transparency and flexibility offered under the adopted processes will further the development of a centralized trading market, consistent with the objectives of the Dodd-Frank Act.[244] By requiring a submission that details the analysis and justifications behind an available-to-trade determination, the part 40 procedures provide the Commission with a well-established protocol for reviewing whether swaps should be subject to the trade execution requirement. The procedures set forth in the final rule provide the building blocks for the development of a robust and liquid centralized trading market, consisting of a diverse array of offered or listed swaps, thus inviting market participation. Competition between SEFs and DCMs is expected to increase the number of swaps available for trading on SEFs and DCMs, thereby encouraging innovation and inviting broader market participation. Growth in swaps trading on SEFs and DCMs will benefit market participants by increasing price transparency and facilitating price discovery.

Consideration of Alternatives

Several commenters recommended that swaps subject to the clearing requirement should be subject to the trade execution requirement without an additional available-to-trade determination. Some of these commenters stated that the CEA does not specify a formal process with determination factors.[245] Other commenters asserted that the clearing determination considers a swap's trading liquidity and therefore already addresses whether the swap should be subject to mandatory trade execution.[246] Several commenters stated that requiring trading facilities to consider the enumerated factors in an available-to-trade determination would be ''inefficient and burdensome'' and waste limited regulatory resources.[247] MarketAxess asserted that allowing a SEF or DCM to (1) recognize that a swap is available to trade based on the clearing determination and (2) notify the Commission that it is listing the swap, thereby making the swap subject to

[241] Part 40 of the Commission's regulations governs regulatory obligations of registered entities, which include DCMs and SEFs under section 1(a)(40) of the CEA, with respect to, among other things, the certification or approval of new products for trading; and the certification or approval of rules governing the SEF or DCM.

[242] Under rule approval process, the Commission may extend the review period of a determination submitted if, among other things, the submission is incomplete. § 40.5(d)(1). Under the self-certification process, the Commission may stay the certification if, among other things, the rule submission is accompanied by an inadequate explanation. § 40.6(c)(1).

[243] Under § 40.6(c)(2) of the Commission's regulations, the Commission will provide a 30-day public comment period where the available-to-trade determination submitted is subject to a stay because, among other things, it presents novel or complex issues that require additional time to analyze. As discussed in section II.A.1 of the preamble to the final rule, the Commission will also provide an opportunity to submit public comment for determinations submitted to the Commission under the § 40.5 rule approval process. *See supra* notes 58–60 and accompanying text.

[244] *See* CEA section 5h(e), as enacted by section 733 of the Dodd-Frank Act, 7 U.S.C. 7b–3(e) (stating that one of the Act's objectives is ''to promote the trading of swaps on swap execution facilities and to promote pre-trade price transparency in the swaps market''); CEA section 5(d)(9)(A), as amended by section 735(b) of the Dodd-Frank Act, 7 U.S.C. 7(d)(9) (stating under a DCM core principle that ''the board of trade shall provide a competitive, open and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade'').

[245] MarketAxess Comment Letter at 3; WMBAA Comment Letter at 3; AFR Comment Letter at 2–3; ODEX Comment Letter at 1; SDMA Comment Letter at 3–4.

[246] SDMA Comment Letter at 4–5; WMBAA Comment Letter at 3; MarketAxess Comment Letter at 5. AFR claimed that a DCO can only clear a class of swaps if a reasonable level of market liquidity is demonstrated; otherwise, the DCO could not establish the statistically expected loss levels in a liquidation of positions so as to set an initial margin level. AFR Comment Letter at 4.

[247] SDMA Comment Letter at 5–6; WMBAA Comment Letter at 3; MarketAxess Comment Letter at 7–8.

mandatory trade execution, would not require the Commission, or a SEF or DCM to expend any resources.[248]

The Commission considered the costs and benefits of subjecting swaps to mandatory trade execution based on whether the swap must be cleared rather than through a separate available-to-trade determination. While the Commission recognizes that adopting a distinct determination process may impose some additional costs on SEFs and DCMs, it believes that these costs are warranted by the benefits that market participants will realize from the process: transparency and knowledge that only swaps that are either deemed certified or approved by the Commission as available to trade are subject to the trade execution requirement. This process insulates against SEFs or DCMs engaging in inconsistent or improper determinations to subject swaps to the trade execution requirement. As previously stated, the Commission expects the cost of making a determination to decrease over time as SEFs, DCMs, and market participants become more knowledgeable about the process and gain more experience in considering the factors to make a swap available to trade.

Several commenters proposed that the Commission, not SEFs and DCMs, should maintain the exclusive authority to determine whether a swap is available to trade.[249] Commenters expressed concern that illiquid swaps would become subject to the trade execution requirement if SEFs and DCMs were allowed to make the determination based on their incentives to maximize the number of swaps traded on a facility or platform.[250] CME stated a Commission-based review of whether a swap is available to trade would lead to a more ''logical and efficient'' use of Commission and industry resources.[251]

The Commission believes that benefits are maximized under the approach adopted, rather than an alternative under which the Commission would hold sole authority to determine whether a swap is available to trade. The part 40 approach leverages the trading expertise of SEFs and DCMs to determine whether a swap is available to trade, while the Commission's authority to review these determinations under part 40 will help ensure that they are appropriate. The Commission expects that SEFs and DCMs will have an understanding of the markets that they list for trading and will regularly communicate with market participants about liquidity in their markets. Accordingly, the Commission believes that SEFs and DCMs are best positioned to make appropriate available-to-trade determinations. Relying on SEFs and DCMs, who would be incentivized to make swaps available to trade, to initiate the determination process in consultation with market participants will also facilitate innovation and promote swaps trading in accordance with section 5h(e) of the CEA. By allowing SEFs and DCMs to make these determinations, the Commission will be able to focus on its responsibilities in conducting market oversight.

The Commission has also considered whether a SEF or DCM should be able to submit an available-to-trade determination for a swap that it does not list or offer for trading. While SDMA responded in the affirmative,[252] several other commenters stated that a SEF or DCM should be required to list the swap for a period of time prior to submitting a determination.[253] ISDA stated that the lack of such a requirement would otherwise incentivize SEFs and DCMs to submit as many determinations as possible, merely to promote centralized trading.[254]

The Commission has determined that a listing requirement supports the integrity of the available-to-trade determination process. Moreover, the Commission expects that a SEF or DCM will have no business incentive to submit an available-to-trade determination for a swap that it has no intention of listing for trading. While the Commission recognizes that the listing SEF or DCM will likely incur some cost to submit an available to trade determination, the Commission believes that those costs would necessarily be accompanied by a stream of benefits once the swap is subject to the trade execution requirement. Accordingly, the Commission has adopted a listing requirement under new §§ 37.10(a)(2) and 38.12(a)(2). As discussed above, the Commission believes that a SEF or DCM will incur *de minimis* costs to list or offer a swap for trading under the part 40 procedures for listing a product for trading—the Commission estimates that it would take one compliance personnel approximately 2 hours, on average, to submit a product filing.

The Commission has also considered the costs and benefits of, and requested comment on, whether or not a SEF or DCM should (1) be allowed to submit its available-to-trade determination for a ''group, category, type or class of swap''; and (2) be allowed to consider the determination factors under §§ 37.10(b) and 38.12(b) for the same swap on another SEF or DCM, or activity primarily or solely in bilateral transactions. Because each of the adopted provisions is permissive rather than compulsory in nature, neither should impose costs upon SEFs and DCMs relative to the alternative of not providing such allowances. SEFs and DCMs will internally analyze the costs and benefits before availing themselves of either provision, and forego the opportunity if not warranted by the perceived benefits. Should a SEF or DCM choose to submit a ''group, category, type or class of swap,'' the adopted approach would impose fewer costs than requiring a submission for each individual swap.

The Commission has identified the benefits of both provisions relative to the alternatives of not providing such allowances. First, allowing a SEF or DCM to submit a determination for a group, category, type or class of swap would promote economies of scale and streamline the process for SEFs, DCMs, and the Commission; rather than submit separate determinations for individual swaps with similar characteristics, a SEF or DCM may elect to include them in a single filing.[255] Based on its review, however, the Commission may approve or deem only part or some of the swaps within that group, category, type or class as available to trade. Second, allowing a SEF or DCM to consider activity in the same swap that is listed on another trading platform or in the bilateral market would yield information about how that swap trades in the overall market and better inform market participants and the Commission

[248] MarketAxess Comment Letter at 7–8.

[249] Markit Comment Letter at 5–6; Vanguard Comment Letter at 5; Geneva Energy Markets Comment Letter at 2; JPMorgan Comment Letter at 1; CME Comment Letter at 4–5; FHLB Comment Letter at 3; FSR Comment Letter at 4; FXall Comment Letter at 5–6; Morgan Stanley Comment Letter at 5–6; CEWG Comment Letter at 6; ISDA Comment Letter at 3–4, 6; Tradeweb Comment Letter at 4–5.

[250] Bloomberg Comment Letter at 2; Vanguard Comment Letter at 5; Geneva Energy Markets Comment Letter at 2; JPMorgan Comment Letter at 1–2; CME Comment Letter at 4–5; FHLB Comment Letter at 3; ISDA Comment Letter at 3–4; Markit Comment Letter at 5; CEWG Comment Letter at 2; Morgan Stanley Comment Letter at 5–6; AIMA Comment Letter at 2; FXall Comment Letter at 6–7; Tradeweb Comment Letter at 2–3; FSR Comment Letter at 2.

[251] CME Comment Letter at 4–5.

[252] SDMA Comment Letter at 9.

[253] Eaton Vance Management Comment Letter at 3; SIFMA AMG Comment Letter at 10; UBS Comment Letter at 2; Morgan Stanley Comment Letter at 6 n.6; ISDA Comment Letter at 7; Tradeweb Comment Letter at 5.

[254] ISDA Comment Letter at 6.

[255] The Commission notes that it also considers swaps as a group, category, type or class in other instances, such as for clearing determinations. *See supra* note 79.

about how the swap may trade in a centralized environment.

A number of commenters recommended that the Commission pursue an alternative approach that would establish objective threshold criteria for the determination factors.[256] For example, Markit and FSR commented that without objective thresholds, SEFs and DCMs would not be able to determine that a swap is available to trade with regards to its liquidity.[257] ICI and Eaton Vance Management stated that buy-side market participants would indirectly incur higher trading costs in the event that a swap with limited liquidity were to trade on a SEF or DCM.[258]

The Commission does not deem the risk of limited liquidity swaps becoming available to trade as significant relative to the benefits of the final rule's flexible approach. As such, the Commission does not believe that establishing objective threshold criteria would provide a sufficient benefit to warrant imposing additional administrative burdens—the Commission would first be required to determine which swaps (among a wide variety) may potentially be available to trade, and establish and update criteria for those swaps. Market participants would then have to fulfill the burden of processing and analyzing trade data to demonstrate that those criteria are met for swaps that they submit. The rule, as adopted, allows the Commission to consider data and other objective factors submitted by SEFs and DCMs, or the comments from other market participants during the determination process. The Commission will review and assess each available-to-trade submission to ensure that it is consistent with the CEA and the Commission's regulations. Further, the Commission believes that the adopted approach promotes greater swaps trading on SEFs and DCMs, in accordance with the statutory objectives of the CEA, by providing the flexibility to make swaps with different trading characteristics available to trade, rather than imposing rigid threshold criteria.

Several commenters recommended that SEFs and DCMs must consider and demonstrate that a swap is available to trade based on more than one factor.[259] Many of these commenters stated that SEFs and DCMs should be required to consider all of the enumerated factors;[260] Vanguard and SIFMA AMG, for example, supported this approach because they believed that all of the factors are relevant in determining if a swap is available to trade.[261] Bloomberg commented that the factors are all important indicators of an actual trading market and recommended mandatory consideration of all of them, given the implications of making a swap available to trade and potential conflicts of interest.[262] FHLB commented that a determination should be based on multiple factors.[263]

The Commission has considered the range of alternatives suggested by some commenters with respect to more specific or mandatory consideration of the determination factors, but believes that requiring consideration of every factor or a specific set of factors would require additional effort on the part of the SEFs or DCMs without significant added benefit.[264] In the event that a SEF's or DCM's submission does not adequately support an available-to-trade determination, the Commission, under part 40, may request additional information in order to complete its review[265] or extend the review period. The adopted approach achieves the goal of making swaps available for centralized trading, while allowing SEFs and DCMs the flexibility to subject swaps with different trading characteristics to the trade execution requirement.

Several commenters supported incorporating a process for determining whether a swap is no longer available to trade;[266] some recommended using the same factors as those used to determine whether a swap is available to trade, albeit with objective thresholds.[267] Commenters were split on the issue of applicability; some expressed that a determination that a swap is no longer available to trade should apply only to individual SEFs or DCMs,[268] while others recommended that such a determination should apply on a marketwide basis, consistent with how the trade execution requirement is applied.[269]

The Commission believes that inclusion at this time of a separate process for determining that a swap is no longer available to trade is unnecessary and unwarranted by the limited, if any, benefit that would be afforded. In this circumstance, to impose a requirement for the last SEF or DCM that ceases to list a swap for trading to submit an official determination that the swap is no longer available to trade would be unnecessary.[270]

The Commission proposed, and several commenters supported, a requirement that each SEF or DCM (1) conduct an annual review and assessment of each swap it has made available to trade to determine whether or not each of these swaps should continue to be available to trade; and (2) submit an electronic copy of the review and assessment, including any supporting information or data, to the Commission no later than 30 days after its fiscal year end. The Commission estimated that it would cost each DCM an additional $1,730 per review to comply with the proposed requirement.[271] Some commenters recommended more frequent reviews in order to identify illiquid swaps on a timelier basis.[272]

[256] Markit Comment Letter at 3; Spring Trading Comment Letter at 4; AIMA Comment Letter at 4; Bloomberg Comment Letter at 4; FXall Comment Letter at 6; Vanguard Comment Letter at 5; SIFMA AMG Comment Letter at 5; JPMorgan Comment Letter at 1; ISDA Comment Letter at 7; Eaton Vance Management Comment Letter at 3; ICI Comment Letter at 6; Morgan Stanley Comment Letter at 6; FSR Comment Letter at 6–7.

[257] Markit Comment Letter at 3; FSR Comment Letter at 3, 6–7.

[258] ICI Comment Letter at 6; Eaton Vance Management Comment Letter at 2–3.

[259] FHLB Comment Letter at 3; Markit Comment Letter at 3; ICI Comment Letter at 5; CEWG Comment Letter at 3.

[260] Markit Comment Letter at 3; ISDA Comment Letter at 7; Morgan Stanley Comment Letter at 4; FSR Comment Letter at 3; ICI Comment Letter at 5; SIFMA AMG Comment Letter at 7.

[261] Vanguard Comment Letter at 4; SIFMA AMG Comment Letter at 5.

[262] Bloomberg Comment Letter at 4.

[263] FHLB Comment Letter at 4.

[264] The Commission notes that a SEF or DCM, if it chooses, may consider more than one factor in determining if a swap is available to trade.

[265] Under §§ 40.5(c)(2)(ii) and 40.6(a)(8), the Commission may request that a registered entity to supplement the submission with additional information.

[266] MFA Comment Letter at 4; FXall Comment Letter at 7–8; ICI Comment Letter at 7; SIFMA AMG Comment Letter at 11–12; Spring Trading Comment Letter at 7 (Jan. 12, 2012); ISDA Comment Letter at 8–9; JPMorgan Comment Letter at 2.

[267] MFA Comment Letter at 4; ICI Comment Letter at 7–8; FXall Comment Letter at 7–8.

[268] Spring Trading Comment Letter at 7–8 (Jan. 12, 2012); SDMA Comment Letter at 10.

[269] MFA Comment Letter at 4–5; ICI Comment Letter at 8.

[270] The Commission acknowledges the concern that the de-listing of swaps by one or more SEFs or DCMs may affect the liquidity in the market for such swaps, or could be a reflection of reduced liquidity in such markets, and that such reduced liquidity could affect the costs of executing such swaps on a SEF or DCM. In such circumstances where swaps are de-listed by SEFs or DCMs, however, the Commission may review the available-to-trade status of such a swap under part 40 of the Commission's regulations; additionally, section 8a(7) of the CEA affords market participants an avenue to request the Commission to designate a swap as no longer available to trade. *See supra* note 140.

[271] 76 FR 77735.

[272] Morgan Stanley Comment Letter at 8; MFA Comment Letter at 4–5; ISDA Comment Letter at 8; AIMA Comment Letter at 2–3; Eaton Vance Management Comment Letter at 4; ICI Comment Letter at 7; Markit Comment Letter at 4; Vanguard Comment Letter at 6; JPMorgan Comment Letter at

Continued

Other commenters, however, opposed the requirement. MarketAxess commented that conducting annual assessments would require SEFs and DCMs to allocate substantial resources.[273] WMBAA stated that the proposed requirement is arbitrary, time-consuming, and offered insufficient regulatory value, and that the costs and burdens of an annual review would be higher than the Commission's projections.[274] Sunguard Kiodex asserted that periodic reviews would cause swaps' statuses to fluctuate, therefore negating the benefit of an initial determination.[275] WMBAA and SDMA alternatively recommended that a SEF or DCM annually renew its self-certification based on the clearing determination review.[276]

In line with its reasoning for not adopting a separate process for determining that a swap is no longer available to trade, the Commission is also not adopting an annual review and assessment requirement. A swap will no longer be available to trade when all relevant SEFs and DCMs have de-listed the swap; in the ordinary course of business, the Commission believes that a SEF or DCM will already assess whether it should continue to list or offer a swap for trading. Such an assessment would likely consider similar factors, such as trading volume, to those used to determine that a swap is available to trade. Therefore, the Commission believes that imposing a separate review and assessment requirement would necessitate duplicative and costly effort with limited, if any, additional benefit. In response to commenters who support more frequent reviews to identify illiquid swaps that should no longer be available to trade, the Commission notes that market participants themselves may request that a SEF or DCM review and assess an available-to-trade determination. The Commission may also request relevant information from SEFs and DCMs to conduct a review and assessment.[277]

b. Applicability

Sections 37.10(c) and 38.12(c) of the final rule require that once a swap is deemed to be available to trade, then all other SEFs and DCMs listing or offering the same swap must do so in accordance with the trade execution requirement under section 2(h)(8) of the CEA.[278] The Commission did not identify alternatives to this requirement. Further, the Commission also requested, but did not receive, comments on alternatives to the proposed requirement.

Costs

The Commission anticipates that final §§ 37.10(c) and 38.12(c) will impose some minimal costs for SEFs and DCMs related to monitoring and identifying swaps to discern whether a swap is available to trade on another SEF or DCM, and therefore would be subject to the trade execution requirement. The Commission has almost entirely eliminated these costs by assuming the responsibility for maintaining a public record of all of the swaps that are subject to the trade execution requirement in an accessible, central location on its Web site.

The Commission solicited comments on the costs associated with §§ 37.10(c) and 38.10(c) and received one comment. WMBAA stated that the ongoing surveillance necessary to determine which swaps have been made available to trade would impose excessive costs on SEFs and DCMs.[279] WMBAA, however, did not provide an estimate of such costs or further substantiate its claim. Therefore, the Commission does not deem WMBAA's comment sufficient to alter its belief that these costs will be minimal, given that the Commission will maintain on its Web site a centralized list of all swaps that are available to trade.

Benefits

Sections 37.10(c) and 38.12(c) promote trading on SEFs and DCMs, consistent with the trade execution requirement under section 2(h)(8) of the CEA. Specifically, swaps traded on a SEF will be executed as Required Transactions under § 37.9 of the Commission's regulations, which means that they will be executed via an Order Book or RFQ. Swaps that are subject to the trade execution requirement and traded on a DCM must be executed pursuant to subpart J of part 38 of the Commission's regulations, which implements revised DCM Core Principle 9, as amended by section 735(b) of the Dodd-Frank Act. Core Principle 9 requires DCMs to ''provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade.'' Accordingly, market participants in these swaps will benefit from the pre-trade transparency and price discovery associated with trading on DCMs and SEFs as well as the application of other DCM and SEF core principles. The Commission also anticipates that greater competition among SEFs and DCMs will lower bid-ask spreads and transaction costs for some market participants.[280]

c. Consideration of Section 15(a) Factors—Available-to-Trade Rule

Protection of Market Participants and the Public

In crafting the final rule to provide a method for determining that a swap is subject to the trade execution requirement under section 2(h)(8) of the CEA, the Commission has endeavored to create a regime that foremost will protect market participants and the public. Under the final rule, a SEF or DCM must consider certain factors specified by the Commission under § 37.10(b) or § 38.12(b), respectively, in determining that a swap is available to trade. A SEF or DCM must also submit such determinations to the Commission, either for approval or under self-certification procedures, pursuant to part 40 of the Commission's regulations. Part 40 also requires SEFs and DCMs to post a notice and a copy of rule submissions on their Web site concurrent with the filing of the submissions with the Commission. The Commission, consistent with current practice, will also post SEF and DCM rule submission filings on its Web site. Therefore, under the final rule, SEFs, DCMs, and market participants will have full information about the factors that a SEF or DCM considered in determining that a swap is available to trade, the procedure for a SEF or DCM to submit a swap as available to trade, the swaps that are presently available to trade, and the progress of swaps under review. Accordingly, the final rule promotes the protection of market participants by ensuring transparency in the available-to-trade process.

The final rule will also promote the protection of market participants and the public by providing for Commission review and encouraging public comment in appropriate circumstances. Under the final rule, the Commission will review the SEF's or DCM's available-to-trade determination. To facilitate this review, part 40 requires

2; SIFMA AMG Comment Letter at 11; FSR Comment Letter at 3–4.

[273] MarketAxess Comment Letter at 9.

[274] WMBAA Comment Letter at 5.

[275] Sunguard Kiodex Comment Letter at 2.

[276] SDMA Comment Letter at 10; WMBAA Comment Letter at 4.

[277] *See supra* note 155 and accompanying text.

[278] *See supra* note 14.

[279] WMBAA Comment Letter at 5.

[280] S. Rep. No. 111–176, at 34 (2010) (quoting International Risk Analytics co-founder Christopher Whalen, ''[t]he absence of an exchange trading mandate provides 'supra-normal returns paid to the dealers in the closed OTC derivatives market [and] are effectively a tax on other market participants, especially investors who trade on open, public exchanges'''').

SEFs and DCMs to provide the Commission with, and to post on their Web sites, a brief explanation of any substantive opposing views in rule filings, and allow for a public comment period when warranted.

The final rule also will promote the protection of market participants and the public by ensuring that transactions in swaps that are available to trade and subject to the trade execution requirement are executed on regulated SEFs and DCMs in accordance with section 2(h)(8) of the CEA, rather than the bilateral OTC market. Therefore, these swaps will be transacted with the pre-trade and post-trade transparency that swap execution on SEFs and DCMs provide, reducing search costs relative to the bilateral OTC market, and potentially lowering bid-ask spreads.

At the same time, the final rule will further promote the protection of market participants and the public by providing for a Commission review of the available-to-trade process. SEFs and DCMs will have considerable discretion on the application and consideration of the factors to make swaps available to trade, which may vary depending on the nature of the relevant swap market. This approach will enable SEFs and DCMs to utilize their expertise in the markets in which they list swaps for trading to determine which swaps should be available to trade, subject to Commission review of these determinations to ensure that they are consistent with the CEA and the Commission's regulations, and therefore for market participants and the public.

Efficiency, Competitiveness, and Financial Integrity of the Markets

The final rule promotes the trading of swaps on SEFs and DCMs by establishing a process that specifies when a swap is available to trade; once a swap is deemed available to trade, that swap must be traded on a SEF or DCM if it is subject to the clearing requirement. Accordingly, the adopted process will promote market efficiency and competitiveness by (1) informing market participants of when the trade execution requirement applies and (2) prescribing the methods by which all market participants may execute a particular swap, depending on whether the trade execution requirement applies.

The final rule further promotes market efficiency by tasking SEFs and DCMs with the primary responsibility and discretion to consider any one or several factors in determining whether a swap is available to trade. This approach reflects the Commission's view that SEFs and DCMs have (or will have) the expertise and ability to form reasonable conclusions about which swaps should be subject to the trade execution requirement and which swaps should not be traded pursuant to mandatory trade execution. By assigning primary responsibility to SEFs and DCMs in this manner—subject to Commission review to assure consistency with the CEA and the Commission's regulations—the Commission believes that the final rule further promotes both market efficiency and integrity. Further, by assuming the responsibility for maintaining an up-to-date list of swaps made available to trade, the Commission is also mitigating the search costs for market participants to identify whether a swap is available to trade on SEF or a DCM, thereby promoting the overall efficiency of the swaps markets for SEFs, DCMs and market participants.

Price Discovery

As stated above, the final regulations are expected to promote the trading of swaps on SEFs and DCMs. Swaps that are subject to the clearing requirement must be executed on a SEF or DCM, in a manner consistent with the trade execution requirement, if made available to trade on a SEF or DCM. By providing the procedural mechanism to establish when a swap is available to trade—an issue on which the statute is silent—the rule operationalizes the trade execution requirement. Accordingly, the rule reinforces price discovery promoted through mandatory trade execution. For example, swaps traded on DCMs that are made available to trade would be subject to DCM Core Principle 9, which requires DCMs to ''provide a competitive, open, and efficient market and mechanism for executing transactions that protects the price discovery process of trading in the centralized market of the board of trade.'' [281] Under § 37.9 of the Commission's regulations, SEFs will be required to provide an order book or an RFQ method of trade execution that offers pre-trade price transparency for swaps listed or offered for trading that are available to trade. This pre-trade transparency promotes price discovery for swaps.

Sound Risk Management Practices

The enhanced pre-trade and post-trade transparency and price discovery in contracts that have been made available to trade, and thus subject to the trade execution requirement, under the procedures set out in this rule will promote sound risk management practices by ensuring that market participants and clearing organizations are able to base their risk management decisions on publicly available prices discovered on the competitive and efficient markets offered by SEFs and DCMs. As trading on SEFs and DCMs is not relationship-based, as is typical of trading in the OTC market, market participants will have access to a broader range of risk management options in the form of swaps that are available to trade.

Other Public Interest Considerations

The final regulations are not expected to affect public interest considerations other than those identified above.

2. Trade Execution Compliance Schedule

Final §§ 37.12 and 38.11 establishes a compliance schedule following a determination that a swap is subject to the trade execution requirement under section 2(h)(8) of the CEA. Market participants are required to comply with the trade execution requirement upon the later of (1) the applicable deadline established under the compliance and implementation schedule for the clearing requirement for a swap under section 2(h)(1) of the CEA; [282] or (2) 30 days after the swap is first made available to trade on either a SEF or DCM. Absent this final rule, market participants would have been required to comply with the trade execution requirement immediately after a swap is determined to be available to trade and required to be cleared. To provide further flexibility to registrants and market participants, the Commission is exercising its discretion to stagger implementation of the trade execution requirement.

For reasons discussed below, the cost and benefits associated with requiring mandatory trade execution immediately upon making a swap available to trade and requiring it to be cleared, or after some longer versus shorter period of delay, are not susceptible to meaningful quantification. Costs and benefits associated with trade execution are independent of costs and benefits of implementing mandatory trade execution itself and pertain exclusively to the pace of implementation. The Commission is not aware of any analog,

[281] 7 U.S.C. 7(d)(9); subpart J of part 38 of the Commission's regulations, which implements revised DCM Core Principle 9, as amended by section 735(b) of the Dodd-Frank Act.

[282] The Commission has adopted the final compliance and implementation schedule for the clearing requirement under section 50.25(b). Swap Transaction Compliance and Implementation Schedule: Clearing Requirement Under Section 2(h) of the CEA, 77 FR 44441 (July 20, 2012). *See supra* note 158.

to either an immediate or delayed requirement, to comply with the trade execution requirement that would produce data useful in estimating the difference in costs and benefits between the two approaches. Notwithstanding these limitations, the Commission identifies and considers the costs and benefits of this rule in qualitative terms.

Costs

The Commission solicited comments regarding costs associated with §§ 37.12 and 38.11, including the costs and benefits of any alternative compliance schedule proposed. Although the Commission requested quantification of those costs discussed, commenters did not provide specific estimates in dollar terms.

The Commission recognizes that the compliance schedule entails certain initial costs to the market and public—in particular, a delay in obtaining the benefits of pre-trade price transparency and price discovery. The Commission believes, however, that such costs are warranted because incurring them at the outset facilitates the ability to more fully realize the intended pre-trade price transparency and price discovery benefits upon the compliance date and thereafter. As discussed below in connection with the benefits of this rule, this compliance schedule provides market participants with sufficient time to transition trading from the OTC markets to SEFs and DCMs. Absent this window for transition, market participants would likely encounter an impaired ability to manage their risks and adequately hedge their positions. Further, the inability of market participants to execute swaps on SEFs and DCMs as they engage in necessary transaction activities would likely reduce liquidity in certain swaps and increase transaction costs for other market participants.

In response to requests for comment on the compliance schedule, some commenters stated that 30 days would be insufficient for market participants to comply with the trade execution requirement.[283] For example, ISDA and AIMA expressed concern that such a compressed schedule would preclude market participants from hedging their exposures,[284] while CME commented that DCOs, DCMs, and SEFs would not be able to establish technological linkages within 30 days.[285] MFA stated that the Commission's compliance schedule could require simultaneous compliance with the trade execution requirement and the clearing requirement, which would require devoting resources to both efforts and create a significant burden.[286]

Given that the final rule does not impose a fixed 30-day requirement, the Commission disagrees that the schedule is overly costly or onerous. In response to commenters concerned that 30 days would be insufficient to achieve compliance, the Commission notes that the implementation period for the trade execution requirement may vary depending on the timing of the available-to-trade determination and the clearing determination. In some, if not many, instances, market participants will have more than 30 days after a swap is made available to trade to comply. For example, depending upon when a swap is deemed as available to trade and the amount of time a particular market participant is afforded to comply with the clearing requirement under the Commission's final schedule (90 days, 180 days, or 270 days), the 30th day after a swap is deemed as available to trade pursuant to the part 40 procedures may occur prior to the date in which the market participant must comply with the clearing requirement. Further, part 40 review procedures will provide market participants advance awareness that a swap may potentially be deemed as available to trade, during which time market participants logically should undertake initial transition planning in the event that the swap is ultimately deemed as available to trade.[287] Moreover, certain prerequisite activities, such as establishing SEF or DCM connectivity, will be carried out infrequently or on a one-time basis, such that a longer implementation period would not be necessary when preparing to comply with the trade execution requirement for future swap trading.[288]

Benefits

The compliance schedule set forth in final §§ 37.12 and 38.11 will allow market participants to comply with the trade execution requirement in an organized and timely manner, while mitigating potential disruptions to trading during the transition. The schedule will afford market participants the opportunity to resolve logistical issues prior to trading swaps on a SEF or DCM,[289] such as establishing connectivity to a registered trading facility or platform; notifying customers and completing or amending any applicable legal documentation; and revising internal standards and procedures. The additional time will facilitate a greater number of potential swap counterparties who are prepared to participate in centralized trading, thereby increasing competition, pre-trade price transparency, and price discovery. Increasing the number of potential market participants will also promote market liquidity and reduce the costs of using swaps to manage risk.

Consideration of Alternatives

Tradeweb commented that 30 days may not be sufficient to achieve compliance for a class of swaps that is being made available to trade for the first time, and recommended that the Commission set an appropriate implementation period on a case-by-case basis, with input from SEFs, DCMs, and market participants.[290]

The Commission, however, believes that a case-by-case approach is neither feasible nor necessary to establish an appropriate implementation period for different classes of swaps. The data needed to precisely determine the optimal time period—accommodating a reasonable transition while not unduly delaying the benefits of trade execution—does not yet exist; such data would be obtained from the transition process itself. Further, the adopted approach will allow the Commission to accommodate a large number of submissions for different classes of swaps through the transition process. Accordingly, the Commission believes that it is more appropriate to opt for an approach that is flexible and provides market participants with notice and

[283] JPMorgan Comment Letter at 3–4; UBS Comment Letter at 2; ICI Comment Letter at 5 (Nov. 4, 2011); CME Comment Letter at 2 (Nov. 4, 2011); Westpac Comment Letter at 3 (Nov. 4, 2011); Regional Banks Comment Letter at 7 (Nov. 4, 2011); FHLBanks Comment Letter at 5 (Nov. 4, 2011); ICI Comment Letter at 9; ISDA Comment Letter at 11; AIMA Comment Letter at 2–3; ACLI Comment Letter at 2.

[284] ISDA Comment Letter at 11; AIMA Comment Letter at 2–3.

[285] CME Comment Letter at 2 (Nov. 4, 2011).

[286] MFA Comment Letter at 10–11.

[287] Similarly, where a swap first becomes subject to the clearing requirement before being made available to trade, the clearing determination would alert market participants to the fact that specific classes of swaps may become subject to the trade execution requirement.

[288] Under the §§ 37.10(a)(2) and 38.12(a)(2) of the final rule, a SEF or DCM that submits a swap as available to trade must certify that it is listing it for trading on its own trading system or platform. This requirement will ensure that a minimum level of connectivity is present between a SEF or DCM and market participants prior to determining whether it is available to trade.

[289] The Commission believes that DCMs will be prepared to comply with the trade execution requirement to a certain extent because they may have the infrastructure in place to facilitate the trading of swaps. DCMs may require fewer technology, legal arrangements, and changes to operational patterns. As the Commission noted in the proposed rule, however, they may still have to update their internal policies and procedures. 76 FR 58190.

[290] Tradeweb Comment Letter at 4.

certainty, rather than one that attempts to assign a definite time period for swaps on a case-by-case basis.

The Commission views the ideal implementation period for a class of swaps to depend on, among other factors, how the class of swaps is defined, and the number and complexity of those swaps within that class. This amount of time also depends on the nature, experience, and resources of the market participant to whom the requirement applies. The Commission's adopted approach accounts for the latter consideration by incorporating the implementation periods for the clearing requirement—90, 180, and 270 days—that are based on the type of market participant.[291] Where a swap first becomes subject to the clearing requirement before being made available to trade, the clearing determination would alert market participants to the fact that specific classes of swaps may become subject to the trade execution requirement. Therefore, the rule as adopted addresses Tradeweb's concern by providing sufficient flexibility to accommodate different classes of swaps, without the added complexity of instituting an compliance schedule that applies on a case-by-case basis. In contrast, a case-by-case approach would likely increase the administrative burden by requiring an additional review and determination process, thereby further delaying the benefits of the trade execution requirement.

Several commenters recommended a longer implementation period, *i.e.,* more than 30 days after a swap is made available to trade, ranging from 90 to 180 days after a swap is made available to trade.[292] Some commenters also recommended establishing the implementation period after the swap becomes subject to the trade execution requirement.[293] Other commenters recommended that the trade execution requirement should not apply until full implementation of the clearing requirement.[294] Commenters generally stated that lengthening the implementation period would provide market participants with adequate time to establish new infrastructure, standards, and procedures;[295] develop adequate connectivity[296] and obtain trading access;[297] and complete documentation and agreements.[298] Tradeweb, however, stated that 30 days would be adequate to comply with the trade execution requirement for individual swaps.[299]

The Commission believes that the adopted approach appropriately balances the benefits of attaining mandatory trade execution as expeditiously as possible with the need for sufficient preparation time for compliance. As noted above, 30 days represents a minimum duration of time provided for compliance. Depending on when a swap is submitted and deemed available to trade, market participants may also utilize the time afforded under the clearing implementation schedule to complete the requisite activities necessary to trade on a SEF or DCM. The Commission also notes that the final rule requires that a SEF or DCM submitting a swap as available to trade must already list it for trading. This requirement will ensure that a minimum level of connectivity is present between a SEF or DCM and market participants prior to determining whether it is available to trade.

Consideration of Section 15(a) Factors—Trade Execution Compliance Schedule Protection of Market Participants and the Public

An extended implementation period will help facilitate an orderly transition of swaps trading to a centralized market structure. The inability of SEFs and DCMs to comply with the trade execution requirement by any particular designated date risks excluding market participants from transacting swaps that are subject to mandatory trade execution; this would reduce overall liquidity and increase the costs of executing those swaps for other market participants. Thus, absent a reasonable implementation schedule, market participants could potentially be exposed to higher market risk due to increased costs of hedging their positions or the inability to hedge their positions. The implementation period allows for timely compliance and protects market participants by mitigating the potential disruptions to the transition to trading on a SEF or DCM.

Efficiency, Competitiveness, and Financial Integrity of the Markets

The implementation period promotes efficiency in the markets by providing additional time for market participants to identify and resolve technical or logistical issues related to trading on a SEF or DCM in a manner consistent with the trade execution requirement. By enabling a broader group of market participants to comply with the trade execution requirement in a timely manner, the implementation period will facilitate competition in the centralized market, which in turn will promote greater pre-trade price transparency and price integrity in the market.

Price Discovery

By providing adequate time to prepare for such trading, the implementation period will facilitate an orderly transition to centralized trading and mitigate instances in which some market participants would not be prepared to enter the market by the given compliance date. In doing so, the Commission is affording the opportunity for the maximum number of potential swap counterparties to participate, thereby enhancing the price discovery process.

Sound Risk Management Practices

The implementation period reflected in the final rule should ensure that market participants have adequate time to comply with the trade execution requirement and will be prepared to transact swaps on a SEF or DCM. As a result, market participants should be able to maintain hedges that have been executed through swap transactions, thereby mitigating market and counterparty risks. Moreover, a compliance schedule that facilitates SEF and DCM swap execution by the greatest number of potential market participants, as does the final rule, indirectly promotes market liquidity, thereby reducing the overall costs of utilizing swaps for risk management purposes.

[291] *See supra* note 158.

[292] FXall Comment Letter at 7; ICI Comment Letter at 9; CME Comment Letter at 6–7; Vanguard Comment Letter at 6; Bloomberg Comment Letter at 5; Westpac Comment Letter at 3 (Nov. 4, 2011); Chatham Comment Letter at 4; FSR Comment Letter at 4.

[293] SIFMA AMG Comment Letter at 9; Eaton Vance Management Comment Letter at 3; ISDA Comment Letter at 11; Westpac Comment Letter at 3 (Nov. 4, 2011); FHLBanks Comment Letter at 5 (Nov. 4, 2011).

[294] AIMA Comment Letter at 3 (Nov. 3, 2011); MarkitSERV Comment Letter at 5 (Nov. 4, 2011); Citadel Comment Letter at 5 (Nov. 4, 2011); MFA Comment Letter at 7 (Nov. 4, 2011); Vanguard Comment Letter at 5 (Nov. 4, 2011).

[295] JPMorgan Comment Letter at 3–4; ISDA Comment Letter at 11; FHLBanks Comment Letter at 5 (Nov. 4, 2011); Westpac Comment Letter at 2–3 (Nov. 4, 2011).

[296] FSR Comment Letter at 4; Bloomberg Comment Letter at 5; ICI Comment Letter at 8; ISDA Comment Letter at 11; Eaton Vance Management Comment Letter at 3; Chatham Comment Letter at 4; SIFMA AMG Comment Letter at 9; CME Comment Letter at 6–7; Westpac Comment Letter at 3 (Nov. 21, 2011); ICI Comment Letter at 5 (Nov. 4, 2011).

[297] MFA Comment Letter at 4; Vanguard Comment Letter at 6; SIFMA AMG Comment Letter at 9; AIMA Comment Letter at 3; CME Comment Letter at 6–7.

[298] SIFMA AMG Comment Letter at 9; ICI Comment Letter at 9; AIMA Comment Letter at 3; CME Comment Letter at 7; ISDA Comment Letter at 11; Westpac Comment Letter at 3; FIA/ISDA/SIFMA Comment Letter at 8 (Nov. 4, 2011).

[299] Tradeweb Comment Letter at 4 (Nov. 4, 2011).

Other Public Interest Considerations

The final regulations are not expected to affect public interest considerations other than those identified above.

V. List of Commenters

1. Alternative Investment Management Association (''AIMA'')
2. Americans for Financial Reform (''AFR'')
3. American Council of Life Insurers (''ACLI'')
4. Asset Management Group, Securities Industry and Financial Markets Association (''SIFMA AMG'')
5. Bloomberg
6. CBOE Futures Exchange (''CBOE'')
7. Chatham Financial (''Chatham'')
8. Chris Barnard
9. Citadel
10. CME Group (''CME'')
11. Commercial Energy Working Group (''CEWG'')
12. Eaton Vance Management
13. Federal Home Loan Banks (''FHLB'')
14. Fifth Third Bank, PNC Bank, Regions Bank, U.S. Bank National Association (''Regional Banks'')
15. Financial Services Roundtable (''FSR'')
16. Futures Industry Association (''FIA'')
17. FX Alliance (''FXall'')
18. Geneva Energy Markets, LLC
19. ICAP
20. International Swaps and Derivatives Association (''ISDA'')
21. Investment Company Institute (''ICI'')
22. Javelin Capital Markets
23. JP Morgan
24. Managed Funds Association (''MFA'')
25. MarketAxess Holdings, Inc. (''MarketAxess'')
26. Markit
27. MarkitSERV
28. Morgan Stanley
29. ODEX Group, Inc. (''ODEX'')
30. Spring Trading, LLC (''Spring Trading'')
31. Swaps & Derivatives Market Association (''SDMA'')
32. Sunguard Kiodex LLC (''Sunguard Kiodex'')
33. Tradeweb Markets LLC (''Tradeweb'')
34. UBS Securities LLC (''UBS'')
35. Vanguard
36. Westpac Banking Corporation (''Westpac'')
37. Wholesale Markets Brokers' Association, Americas (''WMBAA'')

List of Subjects

17 CFR Part 37

Registered entities, Reporting and recordkeeping requirements, Swap execution facilities, Swaps.

17 CFR Part 38

Designated contract markets, Registered entities, Reporting and recordkeeping requirements, Swaps.

For the reasons stated in the preamble, the Commission amends 17 CFR part 37 and part 38 as follows:

PART 37—SWAP EXECUTION FACILITIES

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

Authority: 7 U.S.C. 1a, 2, 5, 6, 6c, 7, 7a-2, 7b-3 and 12a, as amended by Titles VII and VIII of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376 (2010).

■ 2. Subpart A, as amended elsewhere in this issue of the **Federal Register**, is further amended by adding §§ 37.10 through 37.12 to read as follows:

Subpart A—General Provisions

Sec.

* * * * *

37.10 Process for a swap execution facility to make a swap available to trade.
37.11 [Reserved].
37.12 Trade execution compliance schedule.

§ 37.10 Process for a swap execution facility to make a swap available to trade.

(a)(1) *Required submission.* A swap execution facility that makes a swap available to trade in accordance with paragraph (b) of this section, shall submit to the Commission its determination with respect to such swap as a rule, as that term is defined by § 40.1 of this chapter, pursuant to the procedures under part 40 of this chapter.

(2) *Listing requirement.* A swap execution facility that makes a swap available to trade must demonstrate that it lists or offers that swap for trading on its trading system or platform.

(b) *Factors to consider.* To make a swap available to trade, for purposes of section 2(h)(8) of the Act, a swap execution facility shall consider, as appropriate, the following factors with respect to such swap:

(1) Whether there are ready and willing buyers and sellers;

(2) The frequency or size of transactions;

(3) The trading volume;

(4) The number and types of market participants;

(5) The bid/ask spread; or

(6) The usual number of resting firm or indicative bids and offers.

(c) *Applicability.* Upon a determination that a swap is available to trade on any swap execution facility or designated contract market pursuant to part 40 of this chapter, all other swap execution facilities and designated contract markets shall comply with the requirements of section 2(h)(8)(A) of the Act in listing or offering such swap for trading.

(d) *Removal*—(1) *Determination.* The Commission may issue a determination that a swap is no longer available to trade upon determining that no swap execution facility or designated contract market lists such swap for trading.

(2) *Delegation of Authority.* (i) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority to issue a determination that a swap is no longer available to trade.

(ii) The Director may submit to the Commission for its consideration any matter that has been delegated in this section. Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

§ 37.11 [Reserved].

§ 37.12 Trade execution compliance schedule.

(a) A swap transaction shall be subject to the requirements of section 2(h)(8) of the Act upon the later of:

(1) The applicable deadline established under the compliance schedule provided under § 50.25(b) of this chapter; or

(2) Thirty days after the available-to-trade determination submission or certification for that swap is, respectively, deemed approved under § 40.5 of this chapter or deemed certified under § 40.6 of this chapter.

(b) Nothing in this section shall prohibit any counterparty from complying voluntarily with the requirements of section 2(h)(8) of the Act sooner than as provided in paragraph (a) of this section.

PART 38—DESIGNATED CONTRACT MARKETS

■ 3. The authority citation for part 38 continues to read as follows:

Authority: 7 U.S.C. 1a, 2, 6, 6a, 6c, 6d, 6e, 6f, 6g, 6i, 6j, 6k, 6l, 6m, 6n, 7, 7a-2, 7b, 7b-1, 7b-3, 8, 9, 15, and 21, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, 124 Stat. 1376.

Subpart A—General Provisions

■ 4. Add § 38.11 to subpart A to read as follows:

§ 38.11 Trade execution compliance schedule.

(a) A swap transaction shall be subject to the requirements of section 2(h)(8) of the Act upon the later of:

(1) The applicable deadline established under the compliance schedule provided under § 50.25(b) of this chapter; or

(2) Thirty days after the available-to-trade determination submission or certification for that swap is, respectively, deemed approved under § 40.5 of this chapter or deemed certified under § 40.6 of this chapter.

(b) Nothing in this section shall prohibit any counterparty from complying voluntarily with the requirements of section 2(h)(8) of the Act sooner than as provided in paragraph (a) of this section.

■ 5. Add § 38.12 to subpart A to read as follows:

§ 38.12 Process for a designated contract market to make a swap available to trade.

(a)(1) *Required submission.* A designated contract market that makes a swap available to trade in accordance with paragraph (b) of this section, shall submit to the Commission its determination with respect to such swap as a rule, as that term is defined by § 40.1 of this chapter, pursuant to the procedures under part 40 of this chapter.

(2) *Listing requirement.* A designated contract market that makes a swap available to trade must demonstrate that it lists or offers that swap for trading on its trading system or platform.

(b) *Factors to consider.* To make a swap available to trade, for purposes of section 2(h)(8) of the Act, a designated contract market shall consider, as appropriate, the following factors with respect to such swap:

(1) Whether there are ready and willing buyers and sellers;

(2) The frequency or size of transactions;

(3) The trading volume;

(4) The number and types of market participants;

(5) The bid/ask spread; or

(6) The usual number of resting firm or indicative bids and offers.

(c) *Applicability.* (1) Upon a determination that a swap is available to trade on any designated contract market or swap execution facility pursuant to part 40 of this chapter, all other designated contract markets and swap execution facilities shall comply with the requirements of section 2(h)(8)(A) of the Act in listing or offering such swap for trading.

(d) *Removal*—(1) *Determination.* The Commission may issue a determination that a swap is no longer available to trade upon determining that no swap execution facility or designated contract market lists such swap for trading.

(2) *Delegation of Authority.* (i) The Commission hereby delegates, until it orders otherwise, to the Director of the Division of Market Oversight or such other employee or employees as the Director may designate from time to time, the authority to issue a determination that a swap is no longer available to trade.

(ii) The Director may submit to the Commission for its consideration any matter that has been delegated in this section. Nothing in this section prohibits the Commission, at its election, from exercising the authority delegated in this section.

Issued in Washington, DC, on May 17, 2013, by the Commission.

Christopher J. Kirkpatrick,

Deputy Secretary of the Commission.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices To Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade, Swap Transaction Compliance and Implementation Schedule, and Trade Execution Requirement Under the Commodity Exchange Act—Commission Voting Summary and Statements of Commissioners

Appendix 1—Commission Voting Summary

On this matter, Chairman Gensler and Commissioners Chilton and Wetjen voted in the affirmative; Commissioners Sommers and O'Malia voted in the negative.

Appendix 2—Statement of Chairman Gary Gensler

I support the final rulemaking to implement a process for swap execution facilities (SEFs) and designated contract markets (DCMs) to ''make a swap available to trade'' (MAT). Today's rule also finalizes the Commission's separate rule proposal to phase in compliance for the trade execution requirement.

Completion of these two rules facilitates the congressionally mandated critical reform promoting pre-trade transparency in the swaps market.

The trade execution provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires that swaps be traded on SEFs or DCMs if they are (1) subject to mandatory clearing, and (2) made available to trade. Such platforms allow multiple participants the ability to trade swaps by accepting bids and offers made by multiple participants with all participants given impartial access to the market.

The MAT rule establishes a flexible process for a SEF or DCM to make a swap available to trade. The SEFs and DCMs first will determine which swaps they wish to make available to be traded on their platforms. Then these determinations will be submitted to the Commission either as self-certified by the trading platform or for approval under the Commission's Part 40 rules.

The phase-in rule would provide market participants with 30 days after the SEF's or DCM's self-certification or submission is deemed approved prior to such swaps being subject to the trade execution mandate.

Those swaps that are made available to trade and thus subject to the trade execution requirement will be publicly posted on the Commission's Web site.

Appendix 3—Dissenting Statement of Commissioner Scott D. O'Malia—May 16, 2013

I respectfully dissent from the Commission's approval today of the rule establishing Process for a Designated Contract Market or Swap Execution Facility to Make a Swap Available to Trade under Section 2(h)(8) of the Commodity Exchange Act (CEA).

I supported the proposed rule because I wanted to solicit public comment and engage market participants in an open discussion on how the Commission should implement the available-to-trade provision in section 2(h)(8) of the CEA.

During the comment period, the Commission received 33 comment letters and held a roundtable [300] to solicit public views on this matter. The commenters provided various recommendations but in general virtually all of them rejected the proposal; the Commission would be hard pressed to point to one comment letter that supported the Commission's approach. Unfortunately, despite this strong feedback from the public, the Commission has chosen to follow its original proposal.

I recognize the challenge that the Commission is facing in interpreting the ''make available to trade'' provision. Unfortunately, Congress did not provide the Commission with any guidance as to how and under what conditions the trade execution mandate must be triggered. Nevertheless, a lack of direction from Congress should not be an excuse for the Commission to come up with an unworkable rule.

As I explain below, the rule provides illusory comfort that the Commission will have a legal authority to review and, if necessary, challenge a mandatory trading determination made by a Swap Execution Facility (SEF) or Designated Contract Market (DCM). In fact, the only authority that the Commission has is to ''rubber stamp'' a SEF or DCM's initial determination.

Sections 40.5 and 40.6 of the Commission's Regulations Do Not Provide an Appropriate Avenue for a Made Available-to-Trade Determination

I have deep reservations about the process that the Commission is proposing for ''making a swap available to trade.''

First, the Commission's determination under the rule approval process (§ 40.5) or the rule certification process (§ 40.6) is

[300] January 30, 2012.

intended to apply to only one particular DCM or SEF that requested such rule approval or submitted such rule certification. However, under this rule, an available-to-trade determination has a far reaching effect. It binds not only the requesting SEF or DCM but the entire market, thus forcing all SEFs and all DCMs to trade a particular swap by using more restrictive methods of execution.

Second, the Part 40 process does not give the Commission any legal authority to object to a SEF or DCM's made available-to-trade determination. Under the rule approval procedures, the Commission must approve a rule unless such rule is inconsistent with the CEA or the Commission's regulations.[301] Similarly, a new rule subject to stay will become effective, pursuant to its certification, unless the rule is inconsistent with the CEA or the Commission's regulations.[302]

How will the Commission be able to point to a provision in the CEA or in the regulations that is inconsistent with one or all subjective factors?

The Commission's Determinations Must Be Based on Objective Criteria

In essence, the rule allows a SEF or a DCM to make a made available-to-trade determination based solely on factors it deems relevant, while ignoring other considerations that may be of vital importance to the trading liquidity of a particular contract. The Commission needs to require more than a simple ''consideration'' of these factors.[303]

The lack of specific objective criteria for determining trading liquidity introduces uncertainty into the market and makes it unfeasible for the Commission to have any meaningful regulatory oversight over the made available-to-trade determination process.

The Commission's Factors Are Not Supported by Data

I agree with the commenters who requested that the Commission implement a pilot program or perform an in-depth study of various classes of swaps to determine the appropriate criteria for a made available-to-trade determination.[304] A better approach would be for the Commission to review trading data currently submitted to the Commission pursuant to the Swap Data Repository (SDR) rules and after thorough analysis, come up with objective criteria that would define trading liquidity. Instead, the Commission chose to implement a flawed process that does not lead to any substantive analysis of trading liquidity.

The Commission Failed to Establish a Process for Removing Made Available-to-Trade Determinations

Without providing any reasoning, the Commission has decided that only after all SEFs and all DCMs have de-listed a particular swap, will such swap be deemed by the Commission to be no longer available-to-trade.[305] This process lacks any logical or legal basis and is the exact opposite of what is required to make the initial available-to-trade determination. The initial made available-to-trade determination provides that, if one SEF or DCM determines a swap to be made available to trade, then such swap is deemed to be made available-to-trade on all SEFs or DCMs.

Again, the Commission neglects to analyze swap transaction data that it receives from SDRs. In my view, if a swap does not have sufficient trading liquidity to be traded in a more restrictive manner on a SEF or DCM, as determined by the Commission's broader view of market trading data, then such product must be determined by the Commission to be no longer available-to-trade.

Conclusion

Due to the above concerns, I respectfully dissent from the decision of the Commission to approve this final rule for publication in the **Federal Register**.

[FR Doc. 2013–12250 Filed 6–3–13; 8:45 am]

BILLING CODE 6351–01–P

[301] Commission Regulation § 40.5(b)

[302] Commission Regulation § 40.6(c)(3).

[303] Commission Regulations § 37.10(b) and 38.12(b).

[304] Tradeweb Markets Comment Letter at 3–5 (Feb. 13, 2012); ISDA/SIFMA Comment Letter at 8–9 (March 8, 2011).

[305] Commission Regulations §§ 37.10(c), 37.10(d), 38.12(c), 38.12(d).

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Part IV

Federal Communications Commission

47 CFR Parts 1, 2, and 15, et al.
Human Exposure to Radiofrequency Electromagnetic Fields; Reassessment of Exposure to Radiofrequency Electromagnetic Fields Limits and Policies; Final Rule and Proposed Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, and 95

[ET Docket No. 03–137; FCC 13–39]

Human Exposure to Radiofrequency Electromagnetic Fields

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: This document resolves several issues regarding compliance with the Federal Communications Commission's (FCC's) regulations for conducting environmental reviews under the National Environmental Policy Act (NEPA) as they relate to the guidelines for human exposure to RF electromagnetic fields. More specifically, the Commission clarifies evaluation procedures and references to determine compliance with its limits, including specific absorption rate (SAR) as a primary metric for compliance, consideration of the pinna (outer ear) as an extremity, and measurement of medical implant exposure. The Commission also elaborates on mitigation procedures to ensure compliances with its limits, including labeling and other requirements for occupational exposure classification, clarification of compliance responsibility at multiple transmitter sites, and labeling of fixed consumer transmitters.

DATES: Effective August 5, 2013.

FOR FURTHER INFORMATION CONTACT: Ed Mantiply, email: *ed.mantiply@fcc.gov;* Martin Doczkat, email: *martin.doczkat@fcc.gov;* the Commission's RF Safety Program, *rfsafety@fcc.gov;* or call the Office of Engineering and Technology at (202) 418–2470.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Report and Order, ET Docket No. 03–137, FCC 13–39, adopted March 27, 2012 and released March 29, 2012. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street SW., Room CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov.* People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Summary of Report and Order

1. This *Report and Order* (Order) resolves issues raised in the 2003 *Notice of Proposed Rulemaking,* (*NPRM*), specifically certain evaluation matters involving the determination of potential exposure levels by calculation or measurement and certain mitigation matters involving post-evaluation procedures to ensure exposure limits are not exceeded (such as labels, signs, barriers, enforcement, and occupational issues.

a. Evaluation of RF Exposure

2. Currently, ''routine environmental evaluation'' is described in the Commission's rules as ''determination of compliance'' with its exposure limits, which could be achieved by either computation or measurement. Methods for evaluation of compliance include computation and measurement of field strength, power density, or specific absorption rate (SAR), depending on the RF source. The guidelines for evaluation of compliance with the Commission's human exposure limits can be found in OET Bulletin 65.

1. Primacy of Specific Absorption Rate (SAR) Over Power Density or Field Strength Below 6 GHz

3. In the *NPRM,* the Commission proposed to allow evaluation based on specific absorption rate (SAR) in lieu of maximum permissible exposure (MPE) for fixed and mobile RF sources below 6 GHz, since the MPE limits are derived from the SAR limits. Comments received were generally supportive.

4. *Decision.* The Commission amends its rules as proposed. (SAR evaluation continues to be required as the only acceptable compliance metric for portable devices below 6 GHz.) Entities can continue to use derived MPE evaluation methods for fixed and mobile RF sources where appropriate, as long as compliance with both the whole-body and localized SAR limits are ensured.

5. As SAR is the basic restriction developed to safeguard human health from the effects of RF emissions and MPE limits were derived from whole-body SAR, compliance with the SAR guidelines directly will provide *ipso facto* the protection specified in the Commission's RF safety guidelines. However, for whole-body exposure at distances greater than 20 centimeters and below 6 GHz, the Commission continues to consider spatial-averaging techniques as sufficient to use along with MPE to demonstrate compliance with both localized and whole-body SAR limits in non-uniform fields in most cases.

6. In a compliance showing that uses SAR, the proponent must demonstrate that the device was evaluated in all applicable operating configurations and exposure conditions, considering both whole- and partial-body limits and both near- and far-field situations. The Commission will continue to allow MPE for demonstration of compliance with its limits under the conditions it has allowed in the past as a matter of choice SAR evaluation *post factum* where a violation of the MPE limits is found cannot be used to undermine enforceability of the MPE limits.

2. Technical Evaluation References in Rules

7. In the NPRM, the Commission proposed to discontinue the Office of Engineering and Technology (OET) Bulletin 65 Supplement C, an informational document which provides guidance and general statements of its policies with regard to its RF exposure limits for portable and mobile devices, since OET is able to provide more up-to-date information for these devices in its Knowledge Database (KDB). The Commission also proposed to require that adequate documentation be provided with any application relying on computational modeling to demonstrated compliance showing that the test device and exposure conditions have been correctly modeled.

8. *Decision.* The Commission amends the rules as proposed to reference the KDB in lieu of Supplement C to provide current guidance and policies on acceptable procedures for evaluating wireless devices. This will provide the Commission with the ability to promptly update this guidance as the work of expert bodies and other research indicate that changes are appropriate. Rulemaking procedures are not required by the Administrative Procedure Act for interpretative guidance and general statements of Commission policy. *See* Administrative Procedure Act, 5 U.S.C. 553(b)(A). Exceptions to rulemaking include ''interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.'' The KDB falls within this scope.

9. The Commission fully intends to continue to use the KDB to provide guidance on techniques and methodologies recommended by internationally and domestically accepted expert standards bodies, such as the IEEE and the IEC, to the extent

that their standard procedures ensure compliance with the Commission's exposure limits. However, it is the responsibility of this Commission to ensure compliance with its exposure limits, and thus this agency will make the ultimate judgment as to whether it should include them. By issuing the Commission's own guidance on its policies, it can communicate how best to incorporate the input of all relevant expert standards, readily use the most appropriate elements of conflicting outside standards, and also provide any additional information that may be helpful for evaluation.

10. The Commission also adopts its proposal to modify the language of § 2.1093(d)(3) to require that adequate documentation be provided in all cases relying on computational modeling. Parties are currently required to submit technical documentation supportive of the basis for compliance only upon request by the Commission, which would occur if there is information to cast doubt on the assertion of compliance. In the case of computational modeling, however, a review of the technical bases for the modeling of the test device and exposure conditions is required in order for the Commission to make a determination of compliance before approval.

3. Pinna (Outer Ear) Classification as an Extremity

11. In the *NPRM,* the Commission requested comment on classifying the pinna (outer ear) as an extremity, to which less stringent exposure criteria would apply. Currently, the outer ear, or ''pinna,'' is not explicitly included on the list of exceptions from the localized SAR limits for ''extremities'' in the Commission's rules. Nor has the Commission treated the pinna as subject to the localized SAR limits applicable to the head or required parties seeking equipment authorizations to measure or calculate localized SAR in the pinna, as there is no standard for SAR measurement in the pinna. At the time of the *NPRM* IEEE Std 1528–2003 described the measurement procedure to be used for SAR measurement in the human head from cell phones. It stated in pertinent part that, ''[t]he measurement of SAR induced in the external tissues of the head, *e.g.,* the external ear (pinna), is not addressed in this standard.'' It stated further that, ''[t]his recommended practice does not address the measurement of SAR induced in the external tissues of the head, *e.g.,* the external ear (pinna).'' IEEE subsequently initiated deliberations to consider classifying the pinna as an extremity.

12. *Decision.* The Commission received comments for and against this classification, and it amends § 1.1310 of its rules to subject the pinnae to the same RF exposure limit currently applicable to hands, wrists, feet, and ankles. The classification of the pinna as an extremity is supported by the expert determinations of the FDA (which has the expertise and statutory responsibility to carry out a program designed to protect public health and safety from electronic product radiation) and of the IEEE and will have no practical impact on the amount of human exposure to RF radiation, and is therefore appropriate.

4. Part 1/Part 95 MedRadio (Formerly Medical Implant Communications Service) Measurement Consistency

12. Section 1.1307(b)(2) requires initial SAR evaluation for medical devices within the Medical Device Radiocommunication Service (MedRadio Service) by either computation or measurement, but for MedRadio medical implant transmitters, § 95.1221 allows only computation for initial evaluation of these devices. In the *NPRM*, the Commission proposed to amend § 95.1221 to correct this inconsistency to allow either computation or measurement in both sections.

13. *Decision.* The Commission amends the rule as proposed. The inconsistency originated with the promulgation of § 95.603(f) and was perpetuated when the Commission relocated that section to another location in part 95, renumbering it as § 95.1221, as a result of the establishment of the new MedRadio Service.

b. Mitigation

14. Mitigation matters are post-evaluation procedures to ensure exposure limits are not exceeded, such as labels, signs, barriers, enforcement, and occupational issues. The Commission includes in this section clarifications related to the application of occupational exposure limits for devices and at fixed transmitter sites.

5. Labeling and Instructions for Mobile and Portable Devices Intended for Occupational Use Only

15. In the *NPRM,* the Commission proposed more specific labeling and instructional requirements for devices intended to be operated only in an occupational setting.

16. *Decision.* Comments received were generally supportive, and the Commission adopts its proposed changes in §§ 2.1091(d)(3) and 2.1093(d)(1) of its rules. The Commission is adopting labeling requirements related to occupational/controlled exposure from mobile and portable devices, consistent with its proposals and the comments it received, by modifying §§ 2.1091(d)(3) and 2.1093(d)(1) to provide that labels may be used to satisfy the requirements for making workers aware of the potential for exposure under the conditions proposed in the NPRM. In addition, the Commission will update OET Laboratory Division publications as necessary to provide more detailed guidance on complying with the requirements for labeling devices intended for occupational use. The Commission does not consider that label placement in the battery compartment helps ensure integrity and legibility of a label, nor is it clearly visible to the user. However, a ''screen flash'' option on power up is a more practical solution than external labeling, and so the Commission refers in general to either labels or a screen flash as ''visual advisories'' required in the final rules. On the other hand, the Commission does not specify a format for visual advisories at this time but rather encourages development of labeling standards using similar symbols, colors, and signal words. With respect to requirements for coordination between equipment manufacturers and end users on training, the Commission is adopting language that coordination with end-user organizations is encouraged but not required. However, as discussed in the R&O training is required for persons subject to exposure in excess of the general population exposure limits.

6. Clarification of Application of Occupational Exposure Limits

17. The Commission's occupation/controlled limits apply in part when individuals are ''fully aware'' of and can ''exercise control'' over their exposure. In the *NPRM,* the Commission proposed to state in its rules that appropriate information and training is necessary to achieve full awareness and control of exposure and to identify what would constitute appropriate information and training.

18. *Decision.* The Commission adopts its proposals with minor modification based on the comments received. The Commission specifies that for individuals exposed as a consequence of their employment, using the occupational/controlled limits, written and/or verbal (orally-communicated) information must be provided, at the discretion of the responsible party as is

necessary to ensure compliance with the occupational/controlled limits. In addition, with the exception of transient individuals, appropriate training regarding work practices that will ensure that exposed persons are ''fully aware of the potential for exposure and can exercise control over their exposure'' is required to be provided. The Commission concludes that this two-tiered approach will provide sufficient information to ensure that people are adequately protected.

19. Regarding specific guidelines on what kind of information is required and what constitutes adequate training, the Commission will rely primarily on instructional and training resources already available. Section 1.1310 of the Commission's rules already references OET Bulletin 65 as one resource, and it plans to update this bulletin after the conclusion of this docket to provide additional information regarding RF safety programs and available resources, including information now incorporated in the IEEE C95.7 recommended practice for RF safety programs referenced in the *NPRM.* The Commission notes that training is not required for transient individuals, but they must receive written and/or verbal information and notification (for example, using signs) concerning their exposure potential and appropriate means available to mitigate their exposure. The Commission further notes that the designation of ''transient individual'' applies to visitors and people traversing the site, not to third-party workers performing maintenance on the site for an extended period. However, in the event of complaints that result in enforcement investigations, the Commission will evaluate, on a case-by-case basis, whether the information requirements are met, and if not whether the general population/uncontrolled exposure limits are appropriate to apply in a specific area where transient access is permitted. The Commission also adds language to remind licensees of their obligation to consider worker as well as public exposure. Finally, the Commission codifies in its rules the extent to which occupation/controlled limits apply to amateur radio licensees.

7. Responsibility for Compliance at Fixed Sites With Multiple Transmitters

20. The Commission's rules do not address apportionment of responsibility among licensees that exceed 5% of the exposure limits and are not categorically excluded. Comments received suggested that it is necessary for an individual licensee to be assigned primary responsibility for compliance at a multiple use site. However, the Commission clarifies that this is not the case and emphasize cooperation and that failure to comply at multiple use sites can result in penalties for all site occupants that contribute significantly to exposure, not just the newest occupant or the occupant which contributes the most to exposure.

21. *Discussion.* Given the variety of situations presented by multiple transmitter sites, responsibility for compliance and preparation of Environmental Assessments continues to apply to multiple transmitter sites as described in § 1.1307(b)(3) of the Commission's rules, and ''significant'' transmitters can be assumed to be based on the same threshold of 5% defined there. The Commission notes that when routine evaluations are required at such sites, all relevant co-located licensees are responsible for compliance. Therefore, it is in the interest of these licensees to share information about power and other operating characteristics in order to achieve accurate representations of the RF environment. The Commission continues to encourage all site occupants, owners, leasers, and managers to cooperate in these endeavors, and notes that site user agreements are particularly useful and desirable to achieve this end. As demonstrated in the record, all licensees that exceed five percent of the RF exposure limit at any non-compliant location are jointly and severally responsible, and the Commission may impose forfeiture liability on all such licensees.

c. Effective Date

22. *Original Proposal.* In the *NPRM,* the Commission recognized that licensees and applicants will need some period of time to become familiar with any changes to the Commission's rules that could require additional routine evaluation for some previously excluded transmitters and devices and to modify their processes and procedures accordingly. Therefore, the Commission proposed in the *NPRM* to provide a transition period of six months after it adopts any new rules in this proceeding before they become effective. The Commission now defers many of its decisions as proposals in the *Further NPRM,* and those adopted here are not as extensive as those it originally proposed. The Commission expects that these rules can be readily complied with, and so it adopts an effective date of August 5, 2013 for the final rules in this *Order.*

23. *Decision.* The Commission will not require a new evaluation of all existing sites that were excluded from evaluation under previous criteria. NEPA is a prospective statute. Moreover, even if NEPA or the Communications Act provided discretionary authority to require such existing sites to be evaluated under the Commission's new rules, it would find that such evaluation would not be necessary in this case. The rule revisions set forth are generally procedural. The Commission is not adopting any changes to the exclusion criteria in the rules at this time. In other words, if a site was ''categorically excluded'' or ''exempt'' from routine evaluation under the previous rules, it will still be exempt from routine evaluation under the rules the Commission adopts here. The Commission notes, however, that regardless of whether a site is exempt from routine evaluation, licensees are required to ensure that existing sites are in compliance with the exposure limits. Furthermore, the Commission cautions that it may take enforcement action against licensees that do not comply with the exposure limits in the rules, regardless of whether their transmitters were ''categorically excluded'' or ''exempt'' from routine evaluation in the past.

24. The Commission's final changes to its rules in this *Order* are relatively minor. However, the Commission recognizes that any such changes require a reasonable period of time to be implemented. Therefore, the Commission is setting an effective date of August 5, 2013 for its final rules.

d. Deletion of Old Rules and Update of Portable and Mobile Service Evaluation List

25. The Commission notes that an administrative change is necessary in the rules dealing with RF exposure. When the Commission last adopted major changes to these rules in 1996 and 1997, it also adopted certain ''Transition Provisions.'' These transition provisions, contained in § 1.1307(b)(4) and (5) of the Commission's rules, no longer have any effect and are thus not necessary. ''All existing transmitting facilities, operations and devices'' the Commission regulates were required to be in compliance with § 1.1307(b)(1) through (b)(3), by September 1, 2000 in accord with § 1.1307(b)(5). The Commission states in § 1.1307(b)(1) of its rules that its exposure limits ''are generally applicable to all facilities, operations, and transmitters regulated by the Commission.'' Thus, there are no facilities operating pursuant to the requirements in effect before the transition period that would become

non-compliant with the rules as a result of the elimination of the transition period. Moreover, there are no pending enforcement cases where compliance with the transition deadline is at issue. The Commission is, therefore, *sua sponte* deleting these transition provisions from this rule part.

26. The Commission also notes that it is making necessary minor administrative changes for clarification and consistency between §§ 1.1307(b)(2), 2.1091(c), and 2.1093, which list services requiring routine RF evaluation for portable and mobile devices. Specifically, the Commission adds ''Miscellaneous'' to all three sections to correctly name the Miscellaneous Wireless Communications Service defined by part 27 of its rules; it adds ''the 4.9 GHz Band Service'' and ''the Medical Device Radiocommunication Service (MedRadio)'' to § 1.1307(b)(2) to reflect their inclusion in § 2.1093(c); and it adds ''the 3650 MHz Wireless Broadband Service'' to § 2.1091(c) and 2.1093(c), since this change was already adopted in the Report and Order in ET Docket 04–151, published in the **Federal Register** on May 11, 2005, but was never actually incorporated into the Code of Federal Regulations. These changes do not affect evaluation requirements for compliance or applicability of these sections to portable or mobile devices.

27. The regulatory changes discussed in the two preceding paragraphs do not require prior notice and opportunity for comment. Under the Administrative Procedure Act, notice and opportunity for comment are not required ''when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor[e] in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' Here, the Commission for good cause finds that notice and comment are unnecessary for eliminating 47 CFR 1.1307(b)(4) and (5), because these rules have outlived their purpose and no longer serve any function. Similarly, the Commission for good cause finds that notice and comment are unnecessary for amending 47 CFR 1.1307(b)(2), 2.1091(c), and 2.1093.

Final Regulatory Flexibility Analysis

28. As required by the Regulatory Flexibility Act (RFA),[1] an Initial Regulatory Flexibility Analysis was incorporated in the *Notice of Proposed Rulemaking* (*NPRM*) in ET Docket 03–137.[2] The Commission sought written public comment on the proposals in the NPRM, including comment on the IRFA.[3] This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Report and Order

29. The National Environmental Policy Act of 1969 (NEPA) requires agencies of the Federal Government to evaluate the effects of their actions on the quality of the human environment.[4] To meet its responsibilities under NEPA, the Commission has adopted requirements for evaluating the environmental impact of its actions. One of several environmental factors addressed by these requirements is human exposure to radiofrequency (RF) energy emitted by FCC-regulated transmitters, facilities and devices.[5]

30. The Report and Order amends parts 1, 2 and 95 of our rules relating to the compliance of FCC-regulated transmitters, facilities, and devices with the guidelines for human exposure to radiofrequency (RF) energy adopted by the Commission in l996 and 1997. Specifically we are making certain revisions in the rules that we believe will result in more efficient, practical and consistent application of compliance procedures.

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

31. No public comments were filed in response to the IRFA in this proceeding. In addition, no comments were submitted concerning small business issues.

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

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

D. Description and Estimate of the Number of Small Entities To Which Rules Will Apply

33. 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 and policies, if adopted.[6] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' [7] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[8] A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[9]

Small Businesses. Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.[10]

Small Businesses, Small Organizations, and Small Governmental Jurisdictions. Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.[11] First, nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.[12] In addition, a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' [13] Nationwide, as of 2007, there were approximately 1,621,315 small organizations.[14] Finally, the term ''small governmental jurisdiction'' is defined generally as

[1] *See* 5 U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612 has been amended by the Contract with America Advancement Act of 1996, Public Law 104–121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[2] *Notice of Proposed Rulemaking* in ET Docket 03–137 (Proposed Changes in the Commission's Rules Regarding Human Exposure to Radio frequency Electromagnetic Fields), 18 FCC Rcd 13187 (2003).

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

[4] National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321–4335.

[5] *See* 47 CFR 1.1307(b).

[6] 5 U.S.C. 603(b)(3).

[7] 5 U.S.C. 601(6).

[8] 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**.''

[9] 15 U.S.C. 632.

[10] *See* SBA, Office of Advocacy, ''Frequently Asked Questions,'' *http://web.sba.gov/faqs* (accessed Jan. 2009).

[11] *See* 5 U.S.C. 601(3)–(6).

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

[13] 5 U.S.C. 601(4).

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

''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' [15] Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States.[16] We estimate that, of this total, as many as 88, 506 entities may qualify as ''small governmental jurisdictions.'' [17] Thus, we estimate that most governmental jurisdictions are small.

Experimental Radio Service (Other Than Broadcast). The majority of experimental licenses are issued to companies such as Motorola and Department of Defense contractors such as Northrop, Lockheed, and Martin Marietta. Businesses such as these may have as many as 200 licenses at one time. The majority of these applications are from entities such as these. Given this fact, the remaining 30 percent of applications, we assume, for purposes of our evaluations and conclusions in this FRFA, will be awarded to small entities, as that term is defined by the SBA.

The Commission processes approximately 1,000 applications a year for experimental radio operations. About half or 500 of these are renewals and the other half are for new licenses. We do not have adequate information to predict precisely how many of these applications will be impacted by our rule revisions. However, based on the above figures we estimate that as many as 300 of these applications could be from small entities and potentially could be impacted.

[15] 5 U.S.C. 601(5).

[16] U.S. Census Bureau, Statistical Abstract of the United States: 2011, Table 427 (2007)

[17] The 2007 U.S Census data for small governmental organizations indicate that there were 89, 476 ''Local Governments'' in 2007. (U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Table 428.) The criterion by which the size of such local governments is determined to be small is a population of 50,000. However, since the Census Bureau does not specifically apply that criterion, it cannot be determined with precision how many of such local governmental organizations is small. Nonetheless, the inference seems reasonable that substantial number of these governmental organizations has a population of less than 50, 000. To look at Table 428 in conjunction with a related set of data in Table 429 in the Census's Statistical Abstract of the U.S., that inference is further supported by the fact that in both Tables, many entities that may well be small are included in the 89,476 local governmental organizations, e.g. county, municipal, township and town, school district and special district entities. Measured by a criterion of a population of 50,000 many specific sub-entities in this category seem more likely than larger county-level governmental organizations to have small populations. Accordingly, of the 89,746 small governmental organizations identified in the 2007 Census, the Commission estimates that a substantial majority is small. 17 13 CFR 121.201, NAICS code 517110.

International Broadcast Stations. Commission records show that there are 19 international high frequency broadcast station authorizations. We do not request nor collect annual revenue information, and are unable to estimate the number of international high frequency broadcast stations that would constitute a small business under the SBA definition. Since all international broadcast stations operate using relatively high power levels, it is likely that they could all be impacted by our rule revisions.

Satellite Telecommunications Providers. Two economic census categories address the satellite industry. The first category has a small business size standard of $15 million or less in average annual receipts, under SBA rules.[18] The second has a size standard of $25 million or less in annual receipts.[19] The category of Satellite Telecommunications ''comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' [20] Census Bureau data for 2007 show that 512 Satellite Telecommunications firms that operated for that entire year.[21] Of this total, 464 firms had annual receipts of under $10 million, and 18 firms had receipts of $10 million to $24,999,999.[22] Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our actions.

The second category, i.e. ''All Other Telecommunications'' comprises ''establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.'' [23] For this category, Census Bureau data for 2007 shows that there were a total of 2,383 firms that operated for the entire year.[24] Of this total, 2,347 firms had annual receipts of under $25 million and 12 firms had annual receipts of $25 million to $49, 999,999.[25] Consequently, the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by our actions.

Fixed Satellite Transmit/Receive Earth Stations. There are approximately 4,303 earth station authorizations, a portion of which are Fixed Satellite Transmit/Receive Earth Stations. We do not request nor collect annual revenue information, and are unable to estimate the number of the earth stations that would constitute a small business under the SBA definition. However, the majority of these stations could be impacted by our revised rules.

Fixed Satellite Small Transmit/Receive Earth Stations. There are approximately 4,303 earth station authorizations, a portion of which are Fixed Satellite Small Transmit/Receive Earth Stations. We do not request nor collect annual revenue information, and are unable to estimate the number of fixed small satellite transmit/receive earth stations that would constitute a small business under the SBA definition. However, the majority of these stations could be impacted by our revised rules.

Fixed Satellite Very Small Aperture Terminal (VSAT) Systems. These stations operate on a primary basis, and frequency coordination with terrestrial microwave systems is not required. Thus, a single ''blanket'' application may be filed for a specified number of small antennas and one or more hub stations. There are 492 current VSAT System authorizations. We do not request nor collect annual revenue information, and are unable to estimate the number of VSAT systems that would constitute a small business under the SBA definition. However, it is expected that many of these stations could be impacted by our revised rules.

Mobile Satellite Earth Stations. There are 19 licensees. We do not request nor

[18] 13 CFR 121.201, NAICS code 517410.

[19] 13 CFR 121.201, NAICS code 517919.

[20] U.S. Census Bureau, 2007 NAICS Definitions, 517410 Satellite Telecommunications.

[21] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.*

[22] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.*

[23] *http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search.*

[24] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.*

[25] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.*

collect annual revenue information, and are unable to estimate the number of mobile satellite earth stations that would constitute a small business under the SBA definition. However, it is expected that many of these stations could be impacted by our revised rules.

Wireless Telecommunications Carriers (except satellite). This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services.[26] The appropriate size standard under SBA rules is for the category Wireless Telecommunications Carriers. The size standard for that category is that a business is small if it has 1,500 or fewer employees.[27] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[28] For this category, census data for 2007 show that there were 1,383 firms that operated for the entire year.[29] Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more.[30] Thus under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by our proposed actions.[31]

Licenses Assigned by Auctions. Initially, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

Paging Services. Neither the SBA nor the FCC has developed a definition applicable exclusively to paging services. However, a variety of paging services is now categorized under Wireless Telecommunications Carriers (except satellite). [32] This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services. Illustrative examples in the paging context include paging services, except satellite; two-way paging communications carriers, except satellite; and radio paging services communications carriers. The SBA has deemed a paging service in this category to be small if it has 1,500 or fewer employees.[33] For this category, census data for 2007 show that there were 1,383 firms that operated for the entire year.[34] Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more.[35] Thus under this category and the associated small business size standard, the Commission estimates that the majority of paging services in the category of wireless telecommunications carriers(except satellite) are small entities that may be affected by our actions.[36]

In addition, in the Paging Second Report and Order, the Commission adopted a size standard for ''small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits.[37] A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[38] The SBA has approved this definition.[39] An initial auction of Metropolitan Economic Area (''MEA'') licenses was conducted in the year 2000. Of the 2,499 licenses auctioned, 985 were sold.[40] Fifty-seven companies claiming small business status won 440 licenses.[41] A subsequent auction of MEA and Economic Area (''EA'') licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold.[42] One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses. [43] A fourth auction of 9,603 lower and upper band paging licenses was held in the year 2010. 29 bidders claiming small or very small business status won 3,016 licenses.

2.3 GHz Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (''WCS'') auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years.[44] The SBA approved

[26] *http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517210&search=2007%20NAICS%20Search.*

[27] 13 CFR 121.201, NAICS code 517210.

[28] 13 CFR 121.201, NAICS code 517210. The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[29] U.S. Census Bureau, Subject Series: Information, Table 5, ''Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210'' (issued Nov. 2010).

[30] *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''100 employees or more.''

[31] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

[32] U.S. Census Bureau, 2007 NAICS Definitions, ''517210 Wireless Telecommunications Categories (Except Satellite)''; *http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.*

[33] U.S. Census Bureau, 2007 NAICS Definitions, ''517210 Wireless Telecommunications Categories (Except Satellite)''

[34] U.S. Census Bureau, Subject Series: Information, Table 5, ''Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210'' (issued Nov. 2010).

[35] *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''100 employees or more.''

[36] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

[37] *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems,* Second Report and Order, 12 FCC Rcd 2732, 2811–2812, paras. 178–181 (''*Paging Second Report and Order*''); *see also Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems,* Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 10030, 10085–10088, paras. 98–107 (1999).

[38] *Paging Second Report and Order,* 12 FCC Rcd at 2811, para 179.

[39] *See* Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau (''WTB''), FCC (Dec. 2, 1998) (''*Alvarez Letter 1998*'').

[40] *See* ''*929 and 931 MHz Paging Auction Closes,*'' Public Notice, 15 FCC Rcd 4858 (WTB 2000).

[41] *See id.*

[42] *See* ''*Lower and Upper Paging Band Auction Closes,*'' Public Notice, 16 FCC Rcd 21821 (WTB 2002).

[43] *See* ''Lower and Upper Paging Bands Auction Closes,'' Public Notice, 18 FCC Rcd 11154 (WTB 2003). The current number of small or very small business entities that hold wireless licenses may differ significantly from the number of such entities that won in spectrum auctions due to assignments and transfers of licenses in the secondary market over time. In addition, some of the same small business entities may have won licenses in more than one auction.

[44] *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS),* Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

these definitions.[45] The Commission conducted an auction of geographic area licenses in the WCS service in 1997. In the auction, seven bidders that qualified as very small business entities won 31 licenses, and one bidder that qualified as a small business entity won a license.

1670–1675 MHz Services. This service can be used for fixed and mobile uses, except aeronautical mobile.[46] An auction for one license in the 1670–1675 MHz band was conducted in 2003. The Commission defined a ''small business'' as an entity with attributable average annual gross revenues of not more than $40 million for the preceding three years, which would thus be eligible for a 15 percent discount on its winning bid for the 1670–1675 MHz band license. Further, the Commission defined a ''very small business'' as an entity with attributable average annual gross revenues of not more than $15 million for the preceding three years, which would thus be eligible to receive a 25 percent discount on its winning bid for the 1670–1675 MHz band license. The winning bidder was not a small entity.

Wireless Telephony. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).[47] Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.[48] Census data for 2007 shows that there were 1,383 firms that operated that year.[49] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. According to Trends in Telephone Service data, 434 carriers reported that they were engaged in wireless telephony.[50] Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees.[51] Therefore, approximately half of these entities can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.[52] Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.[53] Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

Broadband Personal Communications Service. The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a ''small business'' for C- and F-Block licenses as an entity that has average gross revenues of $40 million or less in the three previous years.[54] For F-Block licenses, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three years.[55] These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.[56] No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small and very small business status won approximately 40 percent of the 1,479 licenses in the first auction for the D, E, and F Blocks.[57] On April 15, 1999, the Commission completed the re-auction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22.[58] Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 claimed small business status.[59] Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No. 58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses.[60] On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71.[61] Of the 14 winning bidders in that auction, six claimed small business status and won 18 licenses.[62] On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block Broadband PCS licenses in Auction No. 78.[63] Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.[64]

Advanced Wireless Services. In 2006, the Commission conducted its first auction of Advanced Wireless Services licenses in the 1710–1755 MHz and 2110–2155 MHz bands (''AWS–1''), designated as Auction 66.[65] For the AWS–1 bands, the Commission has defined a ''small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a ''very small

[45] *See Alvarez Letter 1998.*

[46] 47 CFR 2.106; *see* generally 47 CFR 27.1–.70.

[47] 13 CFR 121.201, NAICS code 517210.

[48] *Id.*

[49] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

[50] *Trends in Telephone Service,* at tbl. 5.3.

[51] *Id.*

[52] *See Trends in Telephone Service,* at tbl. 5.3.

[53] *See id.*

[54] *See Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule,* WT Docket No. 96–59, GN Docket No. 90–314, Report and Order, 11 FCC Rcd 7824, 7850–52 paras. 57–60 (1996) (''*PCS Report and Order*''); *see also* 47 CFR 24.720(b).

[55] *See PCS Report and Order,* 11 FCC Rcd at 7852 para. 60.

[56] *See Alvarez Letter 1998.*

[57] *See Broadband PCS, D, E and F Block Auction Closes,* Public Notice, Doc. No. 89838 (rel. Jan. 14, 1997).

[58] *See C, D, E, and F Block Broadband PCS Auction Closes,* Public Notice, 14 FCC Rcd 6688 (WTB 1999). Before Auction No. 22, the Commission established a very small standard for the C Block to match the standard used for F Block. *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees,* WT Docket No. 97–82, Fourth Report and Order, 13 FCC Rcd 15743, 15768 para. 46 (1998).

[59] *See C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,* Public Notice, 16 FCC Rcd 2339 (2001).

[60] *See Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58,* Public Notice, 20 FCC Rcd 3703 (2005).

[61] *See Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71,* Public Notice, 22 FCC Rcd 9247 (2007).

[62] *Id.*

[63] *See Auction of AWS–1 and Broadband PCS Licenses Closes; Winning Bidders Announced for Auction 78,* Public Notice, 23 FCC Rcd 12749 (WTB 2008).

[64] *Id.*

[65] *See* Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66, AU Docket No. 06–30, *Public Notice,* 21 FCC Rcd 4562 (2006) (''*Auction 66 Procedures Public Notice*'');

business'' as an entity with average annual gross revenues for the preceding three years not exceeding $15 million.[66] In 2006, the Commission conducted its first auction of AWS–1 licenses.[67] In that initial AWS–1 auction, 31 winning bidders identified themselves as very small businesses won 142 licenses.[68] Twenty-six of the winning bidders identified themselves as small businesses and won 73 licenses.[69] In a subsequent 2008 auction, the Commission offered 35 AWS–1 licenses.[70] Four winning bidders identified themselves as very small businesses, and three of the winning bidders identifying themselves as a small businesses won five AWS–1 licenses.[71]

Narrowband Personal Communications Services. In 1994, the Commission conducted two auctions of Narrowband PCS licenses. For these auctions, the Commission defined a ''small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $40 million.[72] Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.[73] To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order.*[74] A ''small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million.[75] A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million.[76] The SBA has approved these small business size standards.[77] A third auction of Narrowband PCS licenses was conducted in 2001. In that auction, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.[78] Three of the winning bidders claimed status as a small or very small entity and won 311 licenses.

Lower 700 MHz Band Licenses. The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.[79] The Commission defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[80] A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[81] Additionally, the Lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (''MSA/RSA'') licenses —''entrepreneur''— which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[82] The SBA approved these small size standards.[83] An auction of 740 licenses was conducted in 2002 (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)). Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business, or entrepreneur status and won a total of 329 licenses. [84] A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses.[85] Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.[86] In 2005, the Commission completed an auction of 5 licenses in the lower 700 MHz band (Auction 60). All three winning bidders claimed small business status.

In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order.*[87] An auction of A, B and E block licenses in the Lower 700 MHz band was held in 2008.[88] Twenty winning bidders claimed small business status (those with attributable average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years). Thirty three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years). In 2011, the Commission conducted Auction 92, which offered 16 lower 700 MHz band licenses that had

[66] *See* Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Report and Order,* 18 FCC Rcd 25,162, App. B (2003), *modified by* Service Rules for Advanced Wireless Services In the 1.7 GHz and 2.1 GHz Bands, *Order on Reconsideration,* 20 FCC Rcd 14,058, App. C (2005).

[67] *See Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66,* AU Docket No. 06–30, Public Notice, 21 FCC Rcd 4562 (2006) (''*Auction 66 Procedures Public Notice*'').

[68] *See Auction of Advanced Wireless Services Licenses Closes; Winning Bidders Announced for Auction No. 66,* Public Notice, 21 FCC Rcd 10,521 (2006) (''*Auction 66 Closing Public Notice*'').

[69] *See id.*

[70] See *AWS–1 and Broadband PCS Procedures Public Notice,* 23 FCC Rcd at 7499. Auction 78 also included an auction of broadband PCS licenses.

[71] *See Auction of AWS–1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period,* Public Notice, 23 FCC Rcd 12,749 (2008).

[72] *Implementation of Section 309(j) of the Communications Act—Competitive Bidding Narrowband PCS,* Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

[73] *See* ''Announcing the High Bidders in the Auction of Ten Nationwide Narrowband PCS Licenses, Winning Bids Total $617,006,674,'' *Public Notice,* PNWL 94–004 (rel. Aug. 2, 1994); ''Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total $490,901,787,'' *Public Notice,* PNWL 94–27 (rel. Nov. 9, 1994).

[74] *Amendment of the Commission's Rules to Establish New Personal Communications Services,* Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000) (''*Narrowband PCS Second Report and Order*'').

[75] *Narrowband PCS Second Report and Order,* 15 FCC Rcd at 10476, para. 40.

[76] *Id.*

[77] *See Alvarez Letter 1998.*

[78] *See* ''Narrowband PCS Auction Closes,'' *Public Notice,* 16 FCC Rcd 18663 (WTB 2001).

[79] *See Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59)*, Report and Order, 17 FCC Rcd 1022 (2002) (''*Channels 52–59 Report and Order*'').

[80] *See Channels 52–59 Report and Order,* 17 FCC Rcd at 1087–88, para. 172.

[81] *See id.*

[82] *See id,* 17 FCC Rcd at 1088, para. 173.

[83] *See* Letter from Aida Alvarez, Administrator, SBA, to Thomas Sugrue, Chief, WTB, FCC (Aug. 10, 1999) (''*Alvarez Letter 1999*'').

[84] *See* ''Lower 700 MHz Band Auction Closes,'' *Public Notice,* 17 FCC Rcd 17272 (WTB 2002).

[85] *See* Lower 700 MHz Band Auction Closes, *Public Notice,* 18 FCC Rcd 11873 (WTB 2003).

[86] *See id.*

[87] Service Rules for the 698–746, 747–762 and 777–792 MHz Band, WT Docket No. 06–150, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems,* CC Docket No. 94–102, *Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephone,* WT Docket No. 01–309, *Biennial Regulatory Review—Amendment of Parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various Rules Affecting Wireless Radio Services,* WT Docket No. 03–264, *Former Nextel Communications, Inc. Upper700 MHz Guard Band Licenses and Revisions to Part 27 of the Commission's Rules,* WT Docket No. 06–169, *Implementing a Nationwide, Broadband Interoperable Public Safety Network in the 700 MHz Band,* PS Docket No. 06–229, *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Communications Requirements Through the Year 2010,* WT Docket No. 96–86, Second Report and Order, 22 FCC Rcd 15289 (2007) (''*700 MHz Second Report and Order*'').

[88] *See* Auction of 700 MHz Band Licenses Closes, *Public Notice,* 23 FCC Rcd 4572 (WTB 2008).

been made available in Auction 73 but either remained unsold or were licenses on which a winning bidder defaulted. Two of the seven winning bidders in Auction 92 claimed very small business status, winning a total of four licenses.

Upper 700 MHz Band Licenses. In the *700 MHz Second Report and Order,* the Commission revised its rules regarding Upper 700 MHz licenses.[89] On January 24, 2008, the Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band were available for licensing: 12 Regional Economic Area Grouping licenses in the C Block, and one nationwide license in the D Block.[90] The auction concluded on March 18, 2008, with 3 winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years) and winning five licenses.

700 MHz Guard Band Licenses. In 2000, the Commission adopted the *700 MHz Guard Band Report and Order,* in which it established rules for the A and B block licenses in the Upper 700 MHz band, including size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits.[91] A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[92] Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[93] SBA approval of these definitions is not required.[94] An auction of these licenses was conducted in 2000.[95] Of the 104 licenses auctioned, 96 licenses were won by nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses was held in 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[96]

Specialized Mobile Radio. The Commission adopted small business size standards for the purpose of determining eligibility for bidding credits in auctions of Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands. The Commission defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[97] The Commission defined a ''very small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $3 million for the preceding three years.[98] The SBA has approved these small business size standards for both the 800 MHz and 900 MHz SMR Service.[99] The first 900 MHz SMR auction was completed in 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 licenses in the 900 MHz SMR band. In 2004, the Commission held a second auction of 900 MHz SMR licenses and three winning bidders identifying themselves as very small businesses won 7 licenses.[100] The auction of 800 MHz SMR licenses for the upper 200 channels was conducted in 1997. Ten bidders claiming that they qualified as small or very small businesses under the $15 million size standard won 38 licenses for the upper 200 channels.[101] A second auction of 800 MHz SMR licenses was conducted in 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.[102]

The auction of the 1,053 800 MHz SMR licenses for the General Category channels was conducted in 2000. Eleven bidders who won 108 licenses for the General Category channels in the 800 MHz SMR band qualified as small or very small businesses.[103] In an auction completed in 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.[104] Of the 22 winning bidders, 19 claimed small or very small business status and won 129 licenses. Thus, combining all four auctions, 41 winning bidders for geographic licenses in the 800 MHz SMR band claimed to be small businesses.

In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues not exceeding $15 million. One firm has over $15 million in revenues. In addition, we do not know how many of these firms have 1500 or fewer employees.[105] We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

220 MHz Radio Service—Phase I Licensees. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, the Commission applies the small business size standard under the SBA rules applicable. The SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[106] For this service, the SBA uses the category of Wireless Telecommunications Carriers (except Satellite). Census data for 2007, which supersede data contained in the 2002

[89] *700 MHz Second Report and Order,* 22 FCC Rcd 15289.

[90] *See Auction of 700 MHz Band Licenses Closes,* Public Notice, 23 FCC Rcd 4572 (WTB 2008).

[91] *See* Service Rules for the 746–764 MHz Bands, and Revisions to Part 27 of the Commission's Rules, Second Report and Order, 15 FCC Rcd 5299 (2000) (''*700 MHz Guard Band Report and Order*'').

[92] See 700 MHz Guard Band Report and Order, 15 FCC Rcd at 5343, para. 108.

[93] *See id.*

[94] *See id.,* 15 FCC Rcd 5299, 5343, para. 108 n.246 (for the 746–764 MHz and 776–794 MHz bands, the Commission is exempt from 15 U.S.C. 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

[95] See ''700 MHz Guard Bands Auction Closes: Winning Bidders Announced,'' *Public Notice,* 15 FCC Rcd 18026 (2000).

[96] *See* ''700 MHz Guard Bands Auction Closes: Winning Bidders Announced,'' *Public Notice,* 16 FCC Rcd 4590 (WTB 2001).

[97] 47 CFR 90.810, 90.814(b), 90.912.

[98] 47 CFR 90.810, 90.814(b), 90.912.

[99] *See Alvarez Letter 1999.*

[100] *See* 900 MHz Specialized Mobile Radio Service Spectrum Auction Closes: Winning Bidders Announced,'' *Public Notice,* 19 FCC Rcd. 3921 (WTB 2004).

[101] *See* ''Correction to Public Notice DA 96–586 'FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,' '' *Public Notice,* 18 FCC Rcd 18367 (WTB 1996).

[102] *See* ''Multi-Radio Service Auction Closes,'' *Public Notice,* 17 FCC Rcd 1446 (WTB 2002).

[103] *See* ''800 MHz Specialized Mobile Radio (SMR) Service General Category (851–854 MHz) and Upper Band (861–865 MHz) Auction Closes; Winning Bidders Announced,'' *Public Notice,* 15 FCC Rcd 17162 (2000).

[104] *See,* ''800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced,'' *Public Notice,* 16 FCC Rcd 1736 (2000).

[105] See *generally* 13 CFR 121.201, NAICS code 517210.

[106] 13 CFR 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

Census, show that there were 1,383 firms that operated that year.[107] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

220 MHz Radio Service—Phase II Licensees. The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service licenses are assigned by auction, where mutually exclusive applications are accepted. In the *220 MHz Third Report and Order,* the Commission adopted a small business size standard for defining ''small'' and ''very small'' businesses for purposes of determining their eligibility for special provisions such as bidding credits.[108] This small business standard indicates that a ''small business'' is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[109] A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years.[110] The SBA has approved these small size standards.[111] Auctions of Phase II licenses commenced on and closed in 1998.[112] In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.[113] Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.[114] A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.[115] In 2007, the Commission conducted a fourth auction of the 220 MHz licenses, designated as Auction 72.[116] Auction 72, which offered 94 Phase II 220 MHz Service licenses, concluded in 2007.[117] In this auction, five winning bidders won a total of 76 licenses. Two winning bidders identified themselves as very small businesses won 56 of the 76 licenses. One of the winning bidders that identified themselves as a small business won 5 of the 76 licenses won.

Private Land Mobile Radio (''PLMR''). PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we use the broad census category, Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.[118] The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. We note that PLMR licensees generally use the licensed facilities in support of other business activities, and therefore, it would also be helpful to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.[119]

As of March 2010, there were 424,162 PLMR licensees operating 921,909 transmitters in the PLMR bands below 512 MHz. We note that any entity engaged in a commercial activity is eligible to hold a PLMR license, and that any revised rules in this context could therefore potentially impact small entities covering a great variety of industries.

Fixed Microwave Services. Microwave services include common carrier,[120] private-operational fixed,[121] and broadcast auxiliary radio services.[122] They also include the Local Multipoint Distribution Service (''LMDS''),[123] the Digital Electronic Message Service (''DEMS''),[124] and the 24 GHz Service,[125] where licensees can choose between common carrier and non-common carrier status.[126] The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, the Commission will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.,* an entity with no more than 1,500 persons is considered small.[127] For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 shows that there were 1,383 firms that operated that year.[128] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

39 GHz Service. The Commission adopted small business size standards for 39 GHz licenses. A ''small business''

[107] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

[108] *Amendment of Part 90 of the Commission's Rules to Provide For the Use of the 220–222 MHz Band by the Private Land Mobile Radio Service,* Third Report and Order, 12 FCC Rcd 10943, 11068–70 paras. 291–295 (1997).

[109] *Id.* at 11068 para. 291.

[110] *Id.*

[111] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998 (*Alvarez to Phythyon Letter 1998*).

[112] *See generally 220 MHz Service Auction Closes,* Public Notice, 14 FCC Rcd 605 (WTB 1998).

[113] *See FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made,* Public Notice, 14 FCC Rcd 1085 (WTB 1999).

[114] *See Phase II 220 MHz Service Spectrum Auction Closes,* Public Notice, 14 FCC Rcd 11218 (WTB 1999).

[115] *See Multi-Radio Service Auction Closes,* Public Notice, 17 FCC Rcd 1446 (WTB 2002).

[116] *See* ''Auction of Phase II 220 MHz Service Spectrum Scheduled for June 20, 2007, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 72, *Public Notice,* 22 FCC Rcd 3404 (2007).

[117] *See Auction of Phase II 220 MHz Service Spectrum Licenses Closes, Winning Bidders Announced for Auction 72, Down Payments due July 18, 2007, FCC Forms 601 and 602 due July 18, 2007, Final Payments due August 1, 2007, Ten-Day Petition to Deny Period,* Public Notice, 22 FCC Rcd 11573 (2007).

[118] *See* 13 CFR 121.201, NAICS code 517210.

[119] *See generally* 13 CFR 121.201.

[120] *See* 47 CFR part 101, subparts C and I.

[121] *See id.* Subparts C and H.

[122] Auxiliary Microwave Service is governed by Part 74 of Title 47 of the Commission's Rules. *See* 47 CFR part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[123] *See* 47 CFR part 101, subpart L.

[124] *See id.* Subpart G.

[125] *See id.*

[126] *See* 47 CFR 101.533, 101.1017.

[127] 13 CFR 121.201, NAICS code 517210.

[128] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million in the preceding three years.[129] A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues of not more than $15 million for the preceding three years.[130] The SBA has approved these small business size standards.[131] In 2000, the Commission conducted an auction of 2,173 39 GHz licenses. A total of 18 bidders who claimed small or very small business status won 849 licenses.

Local Multipoint Distribution Service. Local Multipoint Distribution Service (''LMDS'') is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[132] The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous years.[133] An additional small business size standard for ''very small business'' was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three years.[134] The SBA has approved these small business size standards in the context of LMDS auctions.[135] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. In 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

218–219 MHz Service. The first auction of 218–219 MHz Service (previously referred to as the Interactive and Video Data Service or IVDS) licenses resulted in 170 entities winning licenses for 594 Metropolitan Statistical Areas (''MSAs'').[136] Of the 594 licenses, 557 were won by 167 entities qualifying as a small business. For that auction, the Commission defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.[137] In the *218–219 MHz Report and Order and Memorandum Opinion and Order,* the Commission revised its small business size standards for the 218–219 MHz Service and defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years.[138] The Commission defined a ''very small business'' as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million for the preceding three years.[139] The SBA has approved these definitions.[140]

Location and Monitoring Service (''LMS''). Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For auctions of LMS licenses, the Commission has defined a ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million.[141] A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $3 million.[142] These definitions have been approved by the SBA.[143] An auction of LMS licenses was conducted in 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

Rural Radiotelephone Service. The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[144] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (''BETRS'').[145] For purposes of its analysis of the Rural Radiotelephone Service, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite),'' which is 1,500 or fewer employees.[146] Census data for 2007 shows that there were 1,383 firms that operated that year.[147] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms in the Rural Radiotelephone Service can be considered small.

Air-Ground Radiotelephone Service.[148] The Commission has previously used the SBA's small business definition applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.,* an entity employing no more than 1,500 persons.[149] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and under that definition, we estimate that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $40 million.[150] A ''very

[129] *See Amendment of the Commission's Rules Regarding the 37.0–38.6 GHz and 38.6–40.0 GHz Bands,* ET Docket No. 95–183, Report and Order, 12 FCC Rcd 18600 (1997).

[130] *Id.*

[131] *See* Letter from Aida Alvarez, Administrator, SBA, to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb. 4, 1998); *see* Letter from Hector Barreto, Administrator, SBA, to Margaret Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Jan. 18, 2002).

[132] *See* Rulemaking to Amend Parts 1, 2, 21, 25, of the Commission's Rules to Redesignate the 27.5–29.5 GHz Frequency Band, Reallocate the 29.5–30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, CC Docket No. 92–297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689–90, para. 348 (1997) (''*LMDS Second Report and Order*'').

[133] *See* LMDS Second Report and Order, 12 FCC Rcd at 12689–90, para. 348.

[134] *See id.*

[135] *See Alvarez to Phythyon Letter 1998.*

[136] *See ''Interactive Video and Data Service (IVDS) Applications Accepted for Filing,''* Public Notice, 9 FCC Rcd 6227 (1994).

[137] *Implementation of Section 309(j) of the Communications Act—Competitive Bidding,* Fourth Report and Order, 9 FCC Rcd 2330 (1994).

[138] *Amendment of Part 95 of the Commission's Rules to Provide Regulatory Flexibility in the 218–219 MHz Service,* Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999).

[139] *Id.*

[140] *See Alvarez to Phythyon Letter 1998.*

[141] *Amendment of Part 90 of the Commission's rules to Adopt Regulations for Automatic Vehicle Monitoring Systems,* Second Report and Order, 13 FCC Rcd 15182, 15192, para. 20 (1998) (''Automatic Vehicle Monitoring Systems Second Report and Order''); *see also* 47 CFR 90.1103.

[142] *Automatic Vehicle Monitoring Systems Second Report and Order,* 13 FCC Rcd at 15192, para. 20; *see also* 47 CFR 90.1103.

[143] See *Alvarez Letter 1998.*

[144] The service is defined in 47 CFR 22.99 of the Commission's rules.

[145] BETRS is defined in 47 CFR 22.757 and 22.759 of the Commission's rules.

[146] 13 CFR 121.201, NAICS code 517210.

[147] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

[148] The service is defined in 47 CFR 22.99 of the Commission's rules.

[149] 13 CFR 121.201, NAICS codes 517210.

[150] *Amendment of Part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review—Amendment of parts 1, 22, and 90 of the Commission's Rules, Amendment of Parts 1 and 22 of the Commission's Rules to Adopt Competitive Bidding Rules for Commercial and General Aviation*

small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million.[151] These definitions were approved by the SBA.[152] In 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction 65). The auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

Aviation and Marine Radio Services. Small businesses in the aviation and marine radio services use a very high frequency (''VHF'') marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite),'' which is 1,500 or fewer employees.[153] Census data for 2007 shows that there were 1,383 firms that operated that year.[154] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

Offshore Radiotelephone Service. This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.[155] There are presently approximately 55 licensees in this service. The Commission is unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for the category of Wireless Telecommunications Carriers (except Satellite). Under that standard.[156] Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[157] Census data for 2007 shows that there were 1,383 firms that operated that year.[158] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

Multiple Address Systems (''MAS''). Entities using MAS spectrum, in general, fall into two categories: (1) Those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. The Commission defines a small business for MAS licenses as an entity that has average gross revenues of less than $15 million in the preceding three years.[159] A very small business is defined as an entity that, together with its affiliates, has average gross revenues of not more than $3 million for the preceding three years.[160] The SBA has approved these definitions.[161] The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of March 5, 2010, there were over 11,500 MAS station authorizations. In 2001, an auction of 5,104 MAS licenses in 176 EAs was conducted.[162] Seven winning bidders claimed status as small or very small businesses and won 611 licenses. In 2005, the Commission completed an auction (Auction 59) of 4,226 MAS licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

With respect to entities that use, or seek to use, MAS spectrum to accommodate internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the small business size standard developed by the SBA would be more appropriate. The applicable size standard in this instance appears to be that of Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.[163] The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

1.4 GHz Band Licensees. The Commission conducted an auction of 64 1.4 GHz band licenses in the paired 1392–1395 MHz and 1432–1435 MHz bands, and in the unpaired 1390–1392 MHz band in 2007.[164] For these licenses, the Commission defined ''small business'' as an entity that, together with its affiliates and controlling interests, had average gross revenues not exceeding $40 million for the preceding three years, and a ''very small business'' as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding $15 million for the preceding three years.[165] Neither of the two winning bidders claimed small business status.[166]

Incumbent 24 GHz Licensees. This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. For this service, the Commission uses the SBA small business size standard for the category ''Wireless Telecommunications Carriers (except satellite),'' which is 1,500 or fewer employees.[167] To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007 shows that there were 1,383 firms

Air-Ground Radiotelephone Service, WT Docket Nos. 03–103 and 05–42, Order on Reconsideration and Report and Order, 20 FCC Rcd 19663, paras. 28–42 (2005).

[151] *Id.*

[152] *See* Letter from Hector V. Barreto, Administrator, SBA, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, WTB, FCC (Sept. 19, 2005).

[153] 13 CFR 121.201, NAICS code 517210.

[154] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

[155] This service is governed by subpart I of Part 22 of the Commission's Rules. *See* 47 CFR 22.1001–22.1037.

[156] 13 CFR 121.201, NAICS code 517210.

[157] *Id.*

[158] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

[159] *See Amendment of the Commission's Rules Regarding Multiple Address Systems,* Report and Order, 15 FCC Rcd 11956, 12008, para. 123 (2000).

[160] *Id.*

[161] *See Alvarez Letter 1999.*

[162] *See* ''*Multiple Address Systems Spectrum Auction Closes,*'' Public Notice, 16 FCC Rcd 21011 (2001).

[163] *See* 13 CFR 121.201, NAICS code 517210.

[164] *See* ''*Auction of 1.4 GHz Band Licenses Scheduled for February 7, 2007,*'' Public Notice, 21 FCC Rcd 12393 (WTB 2006); ''*Auction of 1.4 GHz Band Licenses Closes; Winning Bidders Announced for Auction No. 69,*'' Public Notice, 22 FCC Rcd 4714 (2007) (''*Auction No. 69 Closing PN*'').

[165] *Auction No. 69 Closing PN,* Attachment C.

[166] *See Auction No. 69 Closing PN.*

[167] 13 CFR 121.201, NAICS code 517210.

that operated that year.[168] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census' use of the classifications ''firms'' does not track the number of ''licenses''. The Commission believes that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent[169] and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in the 24 GHz band is a small business entity.

Future 24 GHz Licensees. With respect to new applicants for licenses in the 24 GHz band, for the purpose of determining eligibility for bidding credits, the Commission established three small business definitions. An ''entrepreneur'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $40 million.[170] A ''small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million.[171] A ''very small business'' in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years.[172] The SBA has approved these small business size standards.[173] In a 2004 auction of 24 GHz licenses, three winning bidders won seven licenses.[174] Two of the winning bidders were very small businesses that won five licenses.

Broadband Radio Service and Educational Broadband Service. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (''MDS'') and Multichannel Multipoint Distribution Service (''MMDS'') systems, and ''wireless cable,'' transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (''BRS'') and Educational Broadband Service (''EBS'') (previously referred to as the Instructional Television Fixed Service (''ITFS'').[175] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three years.[176] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (''BTAs''). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[177] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[178] The Commission offered three levels of bidding credits: (i) A bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid.[179] Auction 86 concluded in 2009 with the sale of 61 licenses.[180] Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[181] Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' [182] For these services, the

[168] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

[169] Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

[170] *Amendments to Parts 1, 2, 87 and 101 of the Commission's Rules To License Fixed Services at 24 GHz,* Report and Order, 15 FCC Rcd 16934, 16967 para. 77 (2000) (''*24 GHz Report and Order*''); see *also* 47 CFR 101.538(a)(3).

[171] *24 GHz Report and Order,* 15 FCC Rcd at 16967 para. 77; *see also* 47 CFR 101.538(a)(2).

[172] *24 GHz Report and Order,* 15 FCC Rcd at 16967 para. 77; *see also* 47 CFR 101.538(a)(1).

[173] *See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

[174] *Auction of 24 GHz Service Spectrum Auction Closes, Winning Bidders Announced for Auction 56, Down Payments Due August 16, 2004, Final Payments Due August 30, 2004, Ten-Day Petition to Deny Period,* Public Notice, 19 FCC Rcd 14738 (2004).

[175] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding,* MM Docket No. 94–131, PP Docket No. 93–253, Report and Order, 10 FCC Rcd 9589, 9593 para. 7 (1995).

[176] 47 CFR 21.961(b)(1).

[177] 47 U.S.C. 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

[178] *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86,* Public Notice, 24 FCC Rcd 8277 (2009).

[179] Id. at 8296.

[180] *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period,* Public Notice, 24 FCC Rcd 13572 (2009).

[181] The term ''small entity'' within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. 601(4)–(6). We do not collect annual revenue data on EBS licensees.

[182] U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, (partial definition), *www.census.gov/naics/2007/def/ND517110.HTM#N517110.*

Commission uses the SBA small business size standard for the category ''Wireless Telecommunications Carriers (except satellite),'' which is 1,500 or fewer employees.[183] To gauge small business prevalence for these cable services we must, however, use the most current census data. According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.[184] Of this total, 939 firms employed 999 or fewer employees, and 16 firms employed 1,000 employees or more.[185] Thus, the majority of these firms can be considered small.

Television Broadcasting. This Economic Census category ''comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public.'' [186] The SBA has created the following small business size standard for Television Broadcasting firms: those having $14 million or less in annual receipts.[187] The Commission has estimated the number of licensed commercial television stations to be 1,387.[188] In addition, according to Commission staff review of the BIA Advisory Services, LLC's *Media Access Pro Television Database* on March 28, 2012, about 950 of an estimated 1,300 commercial television stations (or approximately 73 percent) had revenues of $14 million or less.[189] We therefore estimate that the majority of commercial television broadcasters are small entities.

We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations [190] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396.[191] These stations are non-profit, and therefore considered to be small entities.[192]

In addition, there are also 2,528 low power television stations, including Class A stations (LPTV).[193] Given the nature of these services, we will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

Radio Broadcasting. This Economic Census category ''comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.'' [194] The SBA has established a small business size standard for this category, which is: Such firms having $7 million or less in annual receipts.[195] According to Commission staff review of BIA Advisory Services, LLC's *Media Access Pro Radio Database* on March 28, 2012, about 10,759 (97%) of 11,102 commercial radio stations had revenues of $7 million or less. Therefore, the majority of such entities are small entities.

We note, however, that in assessing whether a business concern qualifies as small under the above size standard, business affiliations must be included.[196] In addition, to be determined to be a ''small business,'' the entity may not be dominant in its field of operation.[197] We note that it is difficult at times to assess these criteria in the context of media entities, and our estimate of small businesses may therefore be over-inclusive.

Auxiliary, Special Broadcast and Other Program Distribution Services. This service involves a variety of transmitters, generally used to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the station). The Commission has not developed a definition of small entities applicable to broadcast auxiliary licensees. The applicable definitions of small entities are those, noted previously, under the SBA rules applicable to radio broadcasting stations and television broadcasting stations.[198]

The Commission estimates that there are approximately 6,099 FM translators and boosters.[199] The Commission does not collect financial information on any broadcast facility, and the Department of Commerce does not collect financial information on these auxiliary broadcast facilities. We believe that most, if not all, of these auxiliary facilities could be classified as small businesses by themselves. We also recognize that most commercial translators and boosters are owned by a parent station which, in some cases, would be covered by the revenue definition of small business entity discussed above. These stations would likely have annual revenues that exceed the SBA maximum to be designated as a small business ($7.0 million for a radio station or $14.0 million for a TV station). Furthermore, they do not meet the Small Business Act's definition of a ''small business concern'' because they are not independently owned and operated.[200]

Multichannel Video Distribution and Data Service. MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defines a very

[183] 13 CFR 121.201, NAICS code 517210.

[184] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued November 2010).

[185] *Id.*

[186] U.S. Census Bureau, 2007 NAICS Definitions, ''515120 Television Broadcasting'' (partial definition); *http://www.census.gov/naics/2007/def/ND515120.HTM#N515120.*

[187] 13 CFR 121.201, NAICS code 515120 (updated for inflation in 2010).

[188] *See FCC News Release,* ''Broadcast Station Totals as of December 31, 2011,'' dated January 6, 2012; *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311837A1.pdf.*

[189] We recognize that BIA's estimate differs slightly from the FCC total given *supra.*

[190] ''[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.'' 13 CFR 21.103(a)(1).

[191] *See FCC News Release,* ''Broadcast Station Totals as of December 31, 2011,'' dated January 6, 2012; *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf.*

[192] *See generally* 5 U.S.C. 601(4), (6).

[193] *See FCC News Release,* ''Broadcast Station Totals as of December 31, 2011,'' dated January 6, 2012; *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf.*

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

[195] 13 CFR 121.201, NAICS code 515112 (updated for inflation in 2010).

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

[197] 13 CFR 121.102(b) (an SBA regulation).

[198] 13 CFR 121.201, NAICS codes 515112 and 515120.

[199] *See FCC News Release,* ''Broadcast Station Totals as of December 31, 2011,'' dated January 6, 2012; *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC-311837A1.pdf.*

[200] *See* 15 U.S.C. 632.

small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years.[201] These definitions were approved by the SBA.[202] On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses.[203] Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.[204]

Amateur Radio Service. These licensees are held by individuals in a noncommercial capacity; these licensees are not small entities.

Personal Radio Services. Personal radio services provide short-range, low power radio for personal communications, radio signaling, and business communications not provided for in other services. The Personal Radio Services include spectrum licensed under Part 95 of our rules.[205] These services include Citizen Band Radio Service (''CB''), General Mobile Radio Service (''GMRS''), Radio Control Radio Service (''R/C''), Family Radio Service (''FRS''), Wireless Medical Telemetry Service (''WMTS''), Medical Implant Communications Service (''MICS''), Low Power Radio Service (''LPRS''), and Multi-Use Radio Service (''MURS'').[206] There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. Under the RFA, the Commission is required to make a determination of which small entities are directly affected by the rules being proposed. Since all such entities are wireless, we apply the definition of Wireless Telecommunications Carriers (except Satellite), pursuant to which a small entity is defined as employing 1,500 or fewer persons.[207] Many of the licensees in these services are individuals, and thus are not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities under an SBA definition that might be directly affected by our action.

Public Safety Radio Services. Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.[208] There are a total of approximately 127,540 licensees in these services. Governmental entities[209] as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.[210]

IMTS Resale Carriers. Providers of IMTS resale services are common carriers that purchase IMTS from other carriers and resell it to their own customers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[211] Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000.[212] Thus under this category and the associated small business size standard, the majority of these local resellers can be considered small entities. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.[213] Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.[214] Consequently, the Commission estimates that the majority of IMTS resellers are small entities that may be affected by our action.

Wireless Carriers and Service Providers. Included among the providers of IMTS resale are a number of wireless carriers that also provide wireless telephony services domestically. The Commission classifies these entities as providers of Commercial Mobile Radio Services (CMRS). At present, most, if not all, providers of CMRS that offer IMTS provide such service by purchasing IMTS from other carriers to resell it to their customers. The Commission has not developed a size standard specifically for CMRS providers that offer resale IMTS. Such entities would fall within the larger category of wireless carriers and service providers. For those services subject to auctions, the Commission notes that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also,

[201] *Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licenses and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to provide A Fixed Service in the 12.2–12.7 GHz Band,* ET Docket No. 98–206, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, para. 252 (2002).

[202] *See* Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb.13, 2002).

[203] *See* ''*Multichannel Video Distribution and Data Service Auction Closes,''* Public Notice, 19 FCC Rcd 1834 (2004).

[204] *See* ''*Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63,''* Public Notice, 20 FCC Rcd 19807 (2005).

[205] 47 CFR part 90.

[206] The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by subpart D, subpart A, subpart C, subpart B, subpart H, subpart I, subpart G, and subpart J, respectively, of part 95 of the Commission's rules. *See generally* 47 CFR part 95.

[207] 13 CFR 121.201, NAICS Code 517210.

[208] With the exception of the special emergency service, these services are governed by subpart B of part 90 of the Commission's Rules, 47 CFR 90.15–90.27. The police service includes approximately 27,000 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes approximately 23,000 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service is presently comprised of approximately 41,000 licensees that are state, county, or municipal entities that use the radio for official purposes not covered by other public safety services. There are approximately 7,000 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The approximately 9,000 state and local governments are licensed for highway maintenance service to provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The approximately 1,000 licensees in the Emergency Medical Radio Service (''EMRS'') use the 39 channels allocated to this service for emergency medical service communications related to the delivery of emergency medical treatment. 47 CFR 90.15–90.27. The approximately 20,000 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities. 47 CFR 90.33–90.55.

[209] 47 CFR 1.1162.

[210] 5 U.S.C. 601(5).

[211] 13 CFR 121.201, NAICS code 517911.

[212] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en.*

[213] *See Trends in Telephone Service,* at tbl. 5.3.

[214] *Id.*

the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

34. The amendments being made in this *Order* do not change reporting requirements but may require additional training consistent with industry RF safety program standards regarding compliance with our RF exposure limits for certain transmitting facilities, such as broadcast sites, some wireless base stations and some antennas at multiple transmitter sites. Also, we are clarifying that in order for the occupational/controlled SAR or MPE limits to be used in evaluating compliance for a portable or mobile device, certain conditions must be met that may include placing a visual advisory such as a label on a device that provides a user with specific information on RF exposure. We are also requiring a sample of the advisory and instructional material be filed with the Commission along with the application for equipment authorization.

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

35. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[215]

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

36. The Commission will send a copy of the *Order,* including this FRFA, in a report to be sent to Congress pursuant to the SBREFA.[216] In addition, the Commission will send a copy of the *Order,* including the FRFA, to the Chief Counsel for Advocacy of the SBA.[217]

Congressional Review Act

37. The Commission will send a copy of this *Report and Order* to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

Ordering Clauses

38. Pursuant to §§ 4(i), 301, 302(a), 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, 302a(a) 303(c), 303(f), 303(g), and 303(r), this Report and Order *is adopted* and parts 1, 2 and 95 of the Commission's Rules ARE AMENDED as set forth in Final Rules, effective August 5, 2013.

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

Report to Congress

40. The Commission will send a copy of this *Report and Order,* including this FRFA, in a report to Congress pursuant to the Congressional Review Act.[218] In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA.[219]

List of Subjects in 47 CFR Parts 1, 2 and 95

Communications equipment, Radio.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1, 2, and 95 to read as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 15 U.S.C. 79 *et seq.;* 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 227, 303(r), and 309, Cable Landing License Act of 1921, 47 U.S.C. 35–39, and the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112–96.

■ 2. Section 1.1307 is amended by revising paragraph (b)(2) and removing paragraphs (b)(4) and (5).

The revision reads as follows:

§ 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

* * * * *

(b) * * *

(2)(i) Mobile and portable transmitting devices that operate in the Commercial Mobile Radio Services pursuant to part 20 of this chapter; the Cellular Radiotelephone Service pursuant to part 22 of this chapter; the Personal Communications Services (PCS) pursuant to part 24 of this chapter; the Satellite Communications Services pursuant to part 25 of this chapter; the Miscellaneous Wireless Communications Services pursuant to part 27 of this chapter; the Maritime Services (ship earth stations only) pursuant to part 80 of this chapter; the Specialized Mobile Radio Service, the 4.9 GHz Band Service, or the 3650 MHz Wireless Broadband Service pursuant to part 90 of this chapter; or the Wireless Medical Telemetry Service (WMTS), or the Medical Device Radiocommunication Service (MedRadio) pursuant to part 95 of this chapter are subject to routine environmental evaluation for RF exposure prior to equipment authorization or use, as specified in §§ 2.1091 and 2.1093 of this chapter.

(ii) Unlicensed PCS, unlicensed NII and millimeter wave devices are also subject to routine environmental evaluation for RF exposure prior to equipment authorization or use, as specified in §§ 15.253(f), 15.255(g), 15.257(g), 15.319(i), and 15.407(f) of this chapter.

(iii) Portable transmitting equipment for use in the Wireless Medical Telemetry Service (WMTS) is subject to routine environment evaluation as specified in §§ 2.1093 and 95.1125 of this chapter.

(iv) Equipment authorized for use in the Medical Device Radiocommunication Service (MedRadio) as a medical implant device or body-worn transmitter (as defined in Appendix 1 to subpart E of part 95 of this chapter) is subject to routine environmental evaluation for RF exposure prior to equipment authorization, as specified in §§ 2.1093 and 95.1221 of this chapter by finite difference time domain (FDTD) computational modeling or laboratory measurement techniques. Where a showing is based on computational modeling, the Commission retains the discretion to request that supporting documentation and/or specific absorption rate (SAR) measurement data be submitted.

[215] 5 U.S.C. 603(c).

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

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

[219] *See* 5 U.S.C. 604(b).

(v) All other mobile, portable, and unlicensed transmitting devices are categorically excluded from routine environmental evaluation for RF exposure under §§ 2.1091, 2.1093 of this chapter except as specified in paragraphs (c) and (d) of this section.

* * * * *

■ 3. Section 1.1310 is revised to read as follows:

§ 1.1310 Radiofrequency radiation exposure limits.

(a) Specific absorption rate (SAR) shall be used to evaluate the environmental impact of human exposure to radiofrequency (RF) radiation as specified in § 1.1307(b) within the frequency range of 100 kHz to 6 GHz (inclusive).

(b) The SAR limits for occupational/controlled exposure are 0.4 W/kg, as averaged over the whole body, and a peak spatial-average SAR of 8 W/kg, averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube). Exceptions are the parts of the human body treated as extremities, such as hands, wrists, feet, ankles, and pinnae, where the peak spatial-average SAR limit for occupational/controlled exposure is 20 W/kg, averaged over any 10 grams of tissue (defined as a tissue volume in the shape of a cube). Exposure may be averaged over a time period not to exceed 6 minutes to determine compliance with occupational/controlled SAR limits.

(c) The SAR limits for general population/uncontrolled exposure are 0.08 W/kg, as averaged over the whole body, and a peak spatial-average SAR of 1.6 W/kg, averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube). Exceptions are the parts of the human body treated as extremities, such as hands, wrists, feet, ankles, and pinnae, where the peak spatial-average SAR limit is 4 W/kg, averaged over any 10 grams of tissue (defined as a tissue volume in the shape of a cube). Exposure may be averaged over a time period not to exceed 30 minutes to determine compliance with general population/uncontrolled SAR limits.

(d)(1) Evaluation with respect to the SAR limits in this section and in § 2.1093 of this chapter must demonstrate compliance with both the whole-body and peak spatial-average limits using technically supportable methods and exposure conditions in advance of authorization (licensing or equipment certification) and in a manner that permits independent assessment.

(2) At operating frequencies less than or equal to 6 GHz, the limits for maximum permissible exposure (MPE), derived from whole-body SAR limits and listed in Table 1 of paragraph (e) of this section, may be used instead of whole-body SAR limits as set forth in paragraph (a) through (c) of this section to evaluate the environmental impact of human exposure to RF radiation as specified in § 1.1307(b), except for portable devices as defined in § 2.1093 as these evaluations shall be performed according to the SAR provisions in § 2.1093 of this chapter.

(3) At operating frequencies above 6 GHz, the MPE limits shall be used in all cases to evaluate the environmental impact of human exposure to RF radiation as specified in § 1.1307(b).

(4) Both the MPE limits listed in Table 1 of paragraph (e) of this section and the SAR limits as set forth in paragraph (a) through (c) of this section and in § 2.1093 of this chapter are for continuous exposure, that is, for indefinite time periods. Exposure levels higher than the limits are permitted for shorter exposure times, as long as the average exposure over the specified averaging time in Table 1 is less than the limits. Detailed information on our policies regarding procedures for evaluating compliance with all of these exposure limits can be found in the FCC's *OET Bulletin 65,* ''Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields,'' and in supplements to *Bulletin 65,* all available at the FCC's Internet Web site: *http://www.fcc.gov/oet/rfsafety.*

Note to paragraphs (a) through (d): SAR is a measure of the rate of energy absorption due to exposure to RF electromagnetic energy. The SAR limits to be used for evaluation are based generally on criteria published by the American National Standards Institute (ANSI) for localized SAR in § 4.2 of ''IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz,'' ANSI/IEEE Std C95.1–1992, copyright 1992 by the Institute of Electrical and Electronics Engineers, Inc., New York, New York 10017. The criteria for SAR evaluation are similar to those recommended by the National Council on Radiation Protection and Measurements (NCRP) in ''Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields,'' NCRP Report No. 86, § 17.4.5, copyright 1986 by NCRP, Bethesda, Maryland 20814. Limits for whole body SAR and peak spatial-average SAR are based on recommendations made in both of these documents. The MPE limits in Table 1 are based generally on criteria published by the NCRP in ''Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields,'' NCRP Report No. 86, §§ 17.4.1, 17.4.1.1, 17.4.2 and 17.4.3, copyright 1986 by NCRP, Bethesda, Maryland 20814. In the frequency range from 100 MHz to 1500 MHz, these MPE exposure limits for field strength and power density are also generally based on criteria recommended by the ANSI in § 4.1 of ''IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz,'' ANSI/IEEE Std C95.1–1992, copyright 1992 by the Institute of Electrical and Electronics Engineers, Inc., New York, New York 10017.

(e) Table 1 below sets forth limits for Maximum Permissible Exposure (MPE) to radiofrequency electromagnetic fields.

TABLE 1—LIMITS FOR MAXIMUM PERMISSIBLE EXPOSURE (MPE)

Frequency range (MHz)	Electric field strength (V/m)	Magnetic field strength (A/m)	Power density (mW/cm^2)	Averaging time (minutes)
(A) Limits for Occupational/Controlled Exposure				
0.3–3.0	614	1.63	*100	6
3.0–30	1842/f	4.89/f	*900/f^2	6
30–300	61.4	0.163	1.0	6
300–1,500	.....	.....	f/300	6
1,500–100,000	.....	.....	5	6

TABLE 1—LIMITS FOR MAXIMUM PERMISSIBLE EXPOSURE (MPE)—Continued

Frequency range (MHz)	Electric field strength (V/m)	Magnetic field strength (A/m)	Power density (mW/cm^2)	Averaging time (minutes)
(B) Limits for General Population/Uncontrolled Exposure				
0.3–1.34	614	1.63	*100	30
1.34–30	824/f	2.19/f	*180/f^2	30
30–300	27.5	0.073	0.2	30
300–1,500	.....	.....	f/1500	30
1,500–100,000	.....	.....	1.0	30

f = frequency in MHz * = Plane-wave equivalent power density

(1) Occupational/controlled exposure limits apply in situations in which persons are exposed as a consequence of their employment provided those persons are fully aware of the potential for exposure and can exercise control over their exposure. Limits for occupational/controlled exposure also apply in situations when a person is transient through a location where occupational/controlled limits apply provided he or she is made aware of the potential for exposure. The phrase *fully aware* in the context of applying these exposure limits means that an exposed person has received written and/or verbal information fully explaining the potential for RF exposure resulting from his or her employment. With the exception of *transient* persons, this phrase also means that an exposed person has received appropriate training regarding work practices relating to controlling or mitigating his or her exposure. Such training is not required for *transient* persons, but they must receive written and/or verbal information and notification (for example, using signs) concerning their exposure potential and appropriate means available to mitigate their exposure. The phrase *exercise control* means that an exposed person is allowed to and knows how to reduce or avoid exposure by administrative or engineering controls and work practices, such as use of personal protective equipment or time averaging of exposure.

(2) General population/uncontrolled exposure limits apply in situations in which the general public may be exposed, or in which persons who are exposed as a consequence of their employment may not be fully aware of the potential for exposure or cannot exercise control over their exposure.

(3) Licensees and applicants are responsible for compliance with both the occupational/controlled exposure limits and the general population/uncontrolled exposure limits as they apply to transmitters under their jurisdiction. Licensees and applicants should be aware that the occupational/controlled exposure limits apply especially in situations where workers may have access to areas in very close proximity to antennas and access to the general public may be restricted.

(4) In lieu of evaluation with the general population/uncontrolled exposure limits, amateur licensees authorized under part 97 of this chapter and members of his or her immediate household may be evaluated with respect to the occupational/controlled exposure limits in this section, provided appropriate training and information has been provided to the amateur licensee and members of his/her household. Other nearby persons who are not members of the amateur licensee's household must be evaluated with respect to the general population/uncontrolled exposure limits.

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

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

Authority: 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

■ 5. Section 2.1091 is amended by revising paragraphs (c) and (d)(3) to read as follows:

§ 2.1091 Radio frequency radiation exposure evaluation: mobile devices.

* * * * *

(c)(1) Mobile devices that operate in the Commercial Mobile Radio Services pursuant to part 20 of this chapter; the Cellular Radiotelephone Service pursuant to part 22 of this chapter; the Personal Communications Services pursuant to part 24 of this chapter; the Satellite Communications Services pursuant to part 25 of this chapter; the Miscellaneous Wireless Communications Services pursuant to part 27 of this chapter; the Maritime Services (ship earth station devices only) pursuant to part 80 of this chapter; and the Specialized Mobile Radio Service, and the 3650 MHz Wireless Broadband Service pursuant to part 90 of this chapter are subject to routine environmental evaluation for RF exposure prior to equipment authorization or use if:

(i) They operate at frequencies of 1.5 GHz or below and their effective radiated power (ERP) is 1.5 watts or more, or

(ii) They operate at frequencies above 1.5 GHz and their ERP is 3 watts or more.

(2) Unlicensed personal communications service devices, unlicensed millimeter wave devices and unlicensed NII devices authorized under §§ 15.253(f), 15.255(g), 15.257(g), 15.319(i), and 15.407(f) of this chapter are also subject to routine environmental evaluation for RF exposure prior to equipment authorization or use if their ERP is 3 watts or more or if they meet the definition of a portable device as specified in § 2.1093(b) requiring evaluation under the provisions of that section.

(3) All other mobile and unlicensed transmitting devices are categorically excluded from routine environmental evaluation for RF exposure prior to equipment authorization or use, except as specified in §§ 1.1307(c) and 1.1307(d) of this chapter.

(4) Applications for equipment authorization of mobile and unlicensed transmitting devices subject to routine environmental evaluation must contain a statement confirming compliance with the limits specified in paragraph (d) of this section. Technical information showing the basis for this statement must be submitted to the Commission upon request.

(d) * * *

(3) If appropriate, awareness of exposure from devices in this section can be accomplished by the use of visual advisories (such as labeling, embossing, or on an equivalent electronic display) and by providing users with information concerning minimum separation distances from

radiating structures and proper installation of antennas.

(i) Visual advisories shall be legible and clearly visible to the user from the exterior of the device.

(ii) Visual advisories used on devices that are subject to occupational/controlled exposure limits must indicate that the device is for occupational use only, must refer the user to specific information on RF exposure, such as that provided in a user manual, and must note that the advisory and its information is required for FCC RF exposure compliance. Such instructional material must provide the user with information on how to use the device in order to ensure compliance with the occupational/controlled exposure limits.

(iii) A sample of the visual advisory, illustrating its location on the device, and any instructional material intended to accompany the device when marketed, shall be filed with the Commission along with the application for equipment authorization.

(iv) For occupational devices, details of any special training requirements pertinent to limiting RF exposure should also be submitted. Holders of grants for mobile devices to be used in occupational settings are encouraged, but not required, to coordinate with end-user organizations to ensure appropriate RF safety training.

* * * * *

■ 6. Section 2.1093 is amended by revising paragraphs (c) and (d)(1) through (3) to read as follows:

§ 2.1093 Radiofrequency radiation exposure evaluation: portable devices.

* * * * *

(c)(1) Portable devices that operate in the Cellular Radiotelephone Service pursuant to part 22 of this chapter; the Personal Communications Service (PCS) pursuant to part 24 of this chapter; the Satellite Communications Services pursuant to part 25 of this chapter; the Miscellaneous Wireless Communications Services pursuant to part 27 of this chapter; the Maritime Services (ship earth station devices only) pursuant to part 80 of this chapter; the Specialized Mobile Radio Service, the 4.9 GHz Band Service, and the 3650 MHz Wireless Broadband Service pursuant to part 90 of this chapter; the Wireless Medical Telemetry Service (WMTS) and the Medical Device Radiocommunication Service (MedRadio), pursuant to subparts H and I of part 95 of this chapter, respectively, and unlicensed personal communication service, unlicensed NII devices and millimeter wave devices authorized under §§ 15.253(f), 15.255(g), 15.257(g), 15.319(i), and 15.407(f) of this chapter are subject to routine environmental evaluation for RF exposure prior to equipment authorization or use.

(2) All other portable transmitting devices are categorically excluded from routine environmental evaluation for RF exposure prior to equipment authorization or use, except as specified in §§ 1.1307(c) and 1.1307(d) of this chapter.

(3) Applications for equipment authorization of portable transmitting devices subject to routine environmental evaluation must contain a statement confirming compliance with the limits specified in paragraph (d) of this section. Technical information showing the basis for this statement must be submitted to the Commission upon request.

(d) * * *

(1) The SAR limits for occupational/controlled exposure are 0.4 W/kg, as averaged over the whole body, and a peak spatial-average SAR of 8 W/kg, averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube). Exceptions are the parts of the human body treated as extremities, such as hands, wrists, feet, ankles, and pinnae, where the peak spatial-average SAR limit for occupational/controlled exposure is 20 W/kg, averaged over any 10 grams of tissue (defined as a tissue volume in the shape of a cube). Exposure may be averaged over a time period not to exceed 6 minutes to determine compliance with occupational/controlled SAR limits.

(i) Occupational/Controlled limits apply when persons are exposed as a consequence of their employment provided these persons are fully aware of and exercise control over their exposure. Awareness of exposure can be accomplished by use of visual advisories (such as labeling, embossing, or on an equivalent electronic display) or by specific training or education through appropriate means, such as an RF safety program in a work environment.

(ii) Visual advisories on portable devices designed only for occupational use can be used as part of an applicant's evidence of the device user's awareness of occupational/controlled exposure limits.

(A) Such visual advisories shall be legible and clearly visible to the user from the exterior of the device.

(B) Visual advisories must indicate that the device is for occupational use only, refer the user to specific information on RF exposure, such as that provided in a user manual and note that the advisory and its information is required for FCC RF exposure compliance.

(C) Such instructional material must provide the user with information on how to use the device in order to ensure compliance with the occupational/controlled exposure limits.

(D) A sample of the visual advisory, illustrating its location on the device, and any instructional material intended to accompany the device when marketed, shall be filed with the Commission along with the application for equipment authorization. Details of any special training requirements pertinent to limiting RF exposure should also be submitted.

(E) Holders of grants for portable devices to be used in occupational settings are encouraged, but not required, to coordinate with end-user organizations to ensure appropriate RF safety training.

(2) The SAR limits for general population/uncontrolled exposure are 0.08 W/kg, as averaged over the whole body, and a peak spatial-average SAR of 1.6 W/kg, averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube). Exceptions are the parts of the human body treated as extremities, such as hands, wrists, feet, ankles, and pinnae, where the peak spatial-average SAR limit is 4 W/kg, averaged over any 10 grams of tissue (defined as a tissue volume in the shape of a cube). Exposure may be averaged over a time period not to exceed 30 minutes to determine compliance with general population/uncontrolled SAR limits.

(i) General Population/Uncontrolled limits apply when the general public may be exposed, or when persons that are exposed as a consequence of their employment may not be fully aware of the potential for exposure or do not exercise control over their exposure.

(ii) Visual advisories (such as labeling, embossing, or on an equivalent electronic display) on consumer devices such as cellular telephones will not be sufficient reason to allow these devices to be evaluated subject to limits for occupational/controlled exposure in paragraph (d)(1) of this section.

(3) Compliance with SAR limits can be demonstrated by either laboratory measurement techniques or by computational modeling. The latter must be supported by adequate documentation showing that the test device and exposure conditions have been correctly modeled in accordance with the operating configurations for normal use. Guidance regarding SAR measurement techniques can be found in the Office of Engineering and Technology (OET) Laboratory Division

Knowledge Database (KDB). The staff guidance provided in the KDB does not necessarily represent the only acceptable methods for measuring RF exposure or emissions, and is not binding on the Commission or any interested party.

* * * * *

PART 95—PERSONAL RADIO SERVICES

■ 7. The authority citation for part 95 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

■ 8. Section 95.1221 is revised to read as follows:

§ 95.1221 RF exposure.

A MedRadio medical implant device or medical body-worn transmitter is subject to the radiofrequency radiation exposure requirements specified in §§ 1.1307(b) and 2.1093 of this chapter, as appropriate. Applications for equipment authorization of devices operating under this section must demonstrate compliance with these requirements using either finite difference time domain (FDTD) computational modeling or laboratory measurement techniques. Where a showing is based on computational modeling, the Commission retains the discretion to request that supporting documentation and/or specific absorption rate (SAR) measurement data be submitted.

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, 15, 24, 25, 27, 73, 90, 95, 97, and 101

[ET Docket Nos. 03–137 and 13–84; FCC 13–39]

Reassessment of Exposure to Radiofrequency Electromagnetic Fields Limits and Policies

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document seeks comment on proposals developed in the course of the Federal Communications Commission's (Commission's) proceeding regarding compliance with our guidelines for human exposure to RF electromagnetic fields. The Commission's further proposals reflect an effort to provide more efficient, practical, and consistent application of evaluation procedures to ensure compliance with its guidelines limiting human exposure to RF energy from Commission-regulated transmitters and devices. In addition the Commission has initiated a *Notice of Inquiry* (*NOI*) in a new proceeding to determine whether there is a need for reassessment of the Commission radiofrequency (RF) exposure limits and policies. The NOI acknowledges the research that has occurred in recent years and the changing nature of RF devices and their uses, and focuses on the propriety of the Commission's existing standards and policies, including its fundamental exposure guidelines and aspects of its equipment authorization process and policies as they relate to RF exposure in light of these changes since its rules were adopted.

DATES: Comments must be filed on or before September 3, 2013, and reply comments must be filed on or before November 1, 2013.

FOR FURTHER INFORMATION CONTACT: Ed Mantiply, email: *ed.mantiply@fcc.gov*; Martin Doczkat, email: *martin.doczkat@fcc.gov*; the Commission's RF Safety Program, *rfsafety@fcc.gov;* or call the Office of Engineering and Technology at (202) 418–2470.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Further Notice of Proposed Rulemaking, ET Docket No. 03–137, and Notice of Inquiry, ET Docket No. 13–84, FCC 13–39, adopted March 27, 2012 and released March 29, 2012. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room, CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov.* People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Summary of Further Notice of Proposed Rulemaking and Notice of Inquiry

1. The *Further Notice of Proposed Rulemaking* (*Further NPRM*) focuses on specific proposals to the Commission's RF safety rules not acted upon in the *Report and Order* (*Order*) in this proceeding, that have either been raised or have evolved significantly since the *NPRM, 68 FR 52879, September 8, 2003.* In the *Further NPRM,* the Commission's intent is to appropriately protect the public without imposing an undue burden on industry, and it seeks comment on the costs and benefits related to this issue in its proposals. For each cost or benefit addressed, the Commission asks that commenters provide specific data and information such as actual or estimated dollar figures, including a description of how the data or information was calculated or obtained and any supporting documentation. Vague or unsupported assertions regarding costs or benefits generally will be less persuasive than the more specific and supported statements.

I. Notice of Proposed Rulemaking (Further NPRM)

A. Definition of Terms Related to the Commission's Further Proposals

2. With respect to the Commission's use of varied definitions for ''power'' in its RF-exposure related rules, it is proposing explicit and consistent power definitions appropriate for the conditions of use and underlying exposure limits. The Commission clarifies for the purposes of its proposals here the definitions that it will use consistently throughout this *Further NPRM.* The ''maximum time-averaged ERP'' for a fixed RF source is the product of the maximum delivered power to the antenna and its maximum gain as averaged over any 30 minute time period; the ''available maximum time-averaged power'' is the maximum available power as averaged over any 30 minute time period; and the ''delivered maximum time-averaged power'' is the net maximum delivered or supplied power as averaged over any 30 minute time period.

3. The Commission is also proposing a modification to the terminology it uses in the context of providing for ''exclusions'' from routine evaluation. Section 1.1306 of the Commission's NEPA procedures, 47 CFR 1.1306, establishes a categorical ''exclusion'' for actions not specifically defined by § 1.1307(a) or (b), or determined by the processing bureau under § 1.1307(c) or (d), to have a potentially significant environmental impact that requires the applicant or license to prepare an EA. The Commission is proposing a change in the language used in its rules, so that an ''exemption'' will refer to an exemption from performing a routine RF evaluation, while the term ''exclusion'' will continue to be used in the context of an exclusion from preparation of any EA or other additional environmental document.

B. Exemption: Power and Distance Criteria to Streamline Determination of Compliance

4. The Commission proposes here to adopt general exemption criteria applying to single RF sources and then further generalized to multiple RF sources in § 1.1307(b) of its proposed revised rules, based on power, distance, and frequency, for all services using fixed, mobile, and portable transmitters, including implants. These exemption thresholds proposed in the *Further NPRM* are based on the general population exposure limits.

5. In the event that RF sources in fact cause human exposure to levels of RF radiation in excess of the Commission's limits, a routine RF evaluation or exemption from such an evaluation would not be sufficient to show that there is no significant effect on the quality of the human environment or that the RF sources are categorically excluded from environmental processing. Further, RF sources are subject to review under §§ 1.1307(c) and 1.1307(d) of the rules regardless of whether those RF sources have either been determined to be exempt from routine RF evaluation or have been satisfactorily evaluated for compliance.

1. Blanket 1 mW Exemption

6. The Commission proposes in§ 1.1307(b)(1) of its proposed revised rules an exemption from routine environmental evaluation for a single transmitter operating with up to one milliwatt available maximum time-

averaged power, independent of frequency and service type. The Commission seeks comment specifically on whether the 1-mW exemption threshold will be useful in streamlining approval of very-low-power implanted and body-mounted medical devices that operate intermittently and with a low transmitter duty cycle.

7. The Commission conservatively proposes two centimeters as a required separation distance between any portion of a blanket exempt radiating structure and the nearest portion of any other radiating structure in order to qualify for the 1-mW blanket exemption. Conversely, for the case of multiple transmitters having antennas within two centimeters of each other, the Commission proposes that the power from all such transmitters be added together, treated conservatively as a single transmitting antenna, and compared with the blanket 1-mW exemption. The Commission seeks comment on whether additive multiple transmitters operating at 1 mW at least two centimeters apart could under normal operating conditions exceed the exposure limits; on whether addition of a blanket exempt transmitter could cause its exposure limits to be exceeded when other compliant transmitters are present, exempt or not; and on whether the blanket exemption as proposed may not be adequate to prevent exposure over its limits, for example, in a situation involving multiple high-gain millimeter-wave radiators.

2. MPE-Based Exemption of Fixed, Mobile, and Portable RF Sources

8. Instead of defining an invariant power threshold beyond a certain distance, the Commission proposes herein to establish varying exemption criteria based on MPE limits for fixed, mobile, and portable RF sources so long as the separation distance for the operating frequency is beyond the distance where the reactive near-field dominates (*i.e.,* at distances beyond $\lambda/2\pi$, where λ is the free-space operating wavelength).

a. Single Transmitters

9. Rather than identifying power, distance, and frequency criteria by service, as has been done in the past, the Commission is proposing a revised table in § 1.1307(b)(1)(i) of its rules for single fixed, mobile, and portable antennas that specifies power and distance criteria for each of the five frequency bands used for the MPE limits, that would apply regardless of service category. The Commission proposes to apply these criteria to single fixed, mobile, and portable RF sources at separation distances from any part of the radiating structure of at least $\lambda/2\pi$ in all service categories and to use them to determine whether routine evaluation is necessary. The proposed thresholds in Table 1 in the proposed § 1.1307(b)(1)(i) are based on the general population maximum permissible exposure (MPE) limits with a single perfect reflection, outside of the reactive near-field, and in the main beam of the radiator, to be compared with the maximum time-averaged ERP.

10. In the context of the proposed Table 1, the Commission proposes to define ERP, as the product of the maximum time-averaged power delivered to the antenna and its maximum gain in any direction relative to a half-wave dipole. The maximum gain is the largest far-field total power gain relative to a dipole in any direction for all transverse polarization components. The maximum time-averaged power delivered to the antenna is averaged over any 30 minute time period for fixed sources and is averaged over a period inherent to the device transmission characteristics for mobile and portable sources. The term ''separation distance'' in Table 1 is defined as the minimum distance in any direction, from any part of the radiating structure of a transmitting antenna or antenna array, to the body of a nearby person. For these exemptions to apply, the Commission proposes that separation distance shall be required to be maintained for all persons, including those occupationally exposed, during operation at the ERP used for comparison to the applicable formula in the table above. Table 1 would strictly apply only to single transmitters.

11. With respect to the Commission's initial proposal in the *NPRM* to exempt low-power single fixed transmitters, it now proposes to delete the existing mobile power exemptions in § 2.1091(c) and apply the new proposed general fixed transmitter power exemptions to mobile and portable devices as well.

12. The Commission proposes to delete the special exemptions from evaluation in the Amateur Radio Service in § 97.13(c) of its rules, to avoid specific exemptions for particular services and maintain consistency. Application of the general exemptions proposed here to amateur radio installations would preclude the possibility of overexposure and require further evaluation only when necessary, giving guidance for both fixed and mobile transmitting antennas. Parties that support maintaining the current exemption based on power alone are requested to explain how it provides adequate assurance that the public is protected against exposure to RF energy in excess of the Commission's limits and the extent of the burden imposed by this proposal.

b. Multiple Fixed Transmitters

13. To quantitatively exempt multiple transmitting antenna configurations and transmitters where ambient exposure determined from a previous evaluation (measured or computed) may be significant, the Commission proposes to apply Table 1 in § 1.1307(b)(1)(i) of its proposed rules to multiple antennas operating in the same 30-minute time averaging period as follows: a summation of the fractional contributions to the exemption threshold for each antenna may be determined by calculating the ratio of the maximum time-averaged ERP for the antenna to the appropriate frequency- and distance-dependent exemption threshold calculated using either the formulas in Table 1 of the proposed § 1.1307(b)(1)(i) or the formulas in the proposed § 1.1307(b)(1)(ii) in the *Further NPRM,* summing these ratios, and adding any contributions from RF sources with known SAR as well as any significant ambient exposure (expressed as the ''ambient exposure quotient,'' (AEQ), *i.e.,* a fraction of the MPE that exists in the environment prior to considering the relevant sources) at a specific location, as defined below. An AEQ greater than 0.05 is considered significant. If the total is 1 or more, further evaluation would be required. In addition to ERP, if the configuration of a fixed RF source operating between 300 MHz and 6 GHz in frequency permits a minimum separation distance between 0.5 cm and 40 cm or less than $\lambda/2\pi$, the Commission also proposes alternatively to the MPE-based exemption criteria that the SAR-based exemption criteria may be used.

c. Summation for RF Sources Without Definable Physical Relationships Is Not Required

14. While it is reasonable to sum exposure due to all well-characterized sources, the Commission sees no practical method to quantitatively determine compliance for multiple RF sources that have no fixed physical relationship to one another. Examples where a physical relationship would not be well defined are between a fixed wireless base station and a mobile or portable device, or between two mobile or portable devices, but not between multiple transmitters within the same device or between some classes of dependent devices (such as USB dongles). For multiple exempt RF sources without an inherent spatial

relationship, it is not likely that the localized or whole-body SAR limits would be exceeded. The Commission therefore proposes to not require exemption summations where there is no inherent spatial relationship between RF sources. However, the Commission emphasizes that it will continue to routinely consider summation of multiple mobile and portable transmitters (including modular transmitters that may be installed) for the purpose of evaluation and/or FCC Laboratory test reduction procedures as long as these transmitters are within a single device and a clear spatial relationship among multiple transmitters within this single device is apparent. Notwithstanding this policy, the Commission emphasizes § 1.1307(c) and (d) of the Commission rules would require further environmental processing if the staff determined, on its own or based upon the allegations of an interested party in a written petition, that the particular use of a device(s) ordinarily exempt from routine RF evaluation exceed(s) the applicable exposure limits.

3. SAR-Based Exemption of Fixed, Mobile, and Portable RF Sources

15. Here the Commission proposes to establish additional exemption criteria for various transmitter configurations based primarily on SAR limits for fixed, mobile, and portable RF sources near a human body, when the separation distance may be less than $\lambda/2\pi$. These proposed additional exemption criteria are applicable between 300 MHz and 6 GHz in frequency and between 0.5 cm and 40 cm in separation distance.

a. Single Transmitters

16. The Commission recognizes that there are other important variables besides frequency, distance, and power that affect SAR; these variables include antenna type and impedance (and its relationship to RF current) and must be treated conservatively in order to define thresholds that will avoid exemption of devices with unusual antenna configurations that could result in a SAR above the limit. To qualify for this proposed exemption, the Commission would require both the ERP and matched or available conducted power to be less than the threshold to avoid problems with high gain or poorly matched antennas. The Commission proposes general frequency and separation distance dependent maximum time-averaged power thresholds for any RF source (*i.e.,* portable, mobile, and fixed) in § 1.1307(b)(1)(ii) of its rules to support an exemption from SAR testing between 300 MHz and 6 GHz in frequency and between 0.5 cm and 20 cm in separation distance. Additionally, in this same frequency range, the Commission proposes to extend the values obtained at exactly 20 cm from that distance to 40 cm for mobile devices so that the thresholds will be continuous with the exemption criteria in Table 1 in § 1.1307(b)(1)(i) of the proposed rules at 40 cm.

17. The proposed formulas in the proposed § 1.1307(b)(1)(ii) define the proposed SAR-based exemption thresholds in general for either available maximum time-averaged power or maximum time-averaged ERP, whichever is greater. If the ERP of a portable device is not easily obtained, the Commission proposes that available power may be used (*i.e.,* without consideration of ERP) for comparison with the proposed criteria below only if the device antenna(s) or radiating structure(s) do not exceed an electrical length of $\lambda/4$. As for devices such as ''leaky'' coaxial distribution systems, RF heating equipment, and devices in general where the gain is not well defined but always less than that of a half-wave dipole, the Commission proposes that the RF power generated by the device may be used in place of the ERP.

18. The proposed exemption threshold, P_{th}, is defined in accordance with the source-based time averaging requirements described in § 2.1093(d)(5). Time-averaged power measurements are necessary to determine if the maximum output of a transmitter is above or below the proposed threshold for exemption or routine SAR evaluation. The power measurement and SAR test procedures required to determine the number and types of SAR tests necessary to demonstrate device compliance will be available in procedures established by the OET Laboratory at *www.fcc.gov/oet/ea.*

b. Multiple Portable Transmitters

19. To determine whether a device with multiple transmitters is exempt, the Commission proposes that the individual contributions from each transmitter in the device be summed, and if the sum is less than 100% of the exemption threshhold then the device would be exempt. See the proposed revised rule §§ 2.1093(c)(1), 2.1093(c)(2), and 1.1307(b)(1)(v) for the proposed exemption summation formulas. The ratios proposed to determine these individual contributions are defined by dividing the maximum time-averaged power (either available power or ERP, whichever is greater) for each transmitter by the appropriate frequency- and distance-dependent threshold calculated using the formulas in the proposed § 1.1307(b)(1)(ii). If the ratios for all transmitters operating in the same time averaging period are included in the sum and the sum is less than one (*i.e.,* 100%), the device (*i.e.,* all transmitters within the device) is proposed to be exempt from routine evaluation.

20. For the case where one or more transmitters are being added to a device containing existing transmitters that already required SAR evaluation, the Commission is proposing that the remaining SAR margin be used to potentially exempt the additional transmitter(s). If the sum of the previously measured maximum 1-gram average SAR for the existing transmitters is less than 1.6 W/kg and the sum of the above defined ratios for the transmitters to be added is less than the ratio of the SAR margin to 1.6 W/kg, then the additional transmitters are proposed to be exempt from further SAR evaluation. The Commission also proposes that, in order to use exemption criteria for multiple transmitters, each additional transmitter being added to a device must also be exempt from evaluation for this to apply to avoid small incremental contributions that might approach the exposure limit.

21. Conventionally, the use of maximum time-averaged power requires that the power (and SAR) of multiple transmitters operating in the same time averaging period be summed even if they do not transmit at the same instant. For the purpose of implementing exemption thresholds of products that can operate with multiple transmitters, the proposed formula below must take into consideration all transmitters that can operate at the same time and transmit with or without overlapping transmissions to determine if evaluation exemption applies. The proposed values for P_i and SAR_j are determined according to the source-based time averaging requirements of § 2.1093(d)(5), and summing these values represents conservatively the maximum calculated exposure. As the extent of overlapping transmissions may vary among individual products and host configurations, the details of how to conduct evaluations and determine compliance are generally addressed in FCC Laboratory test procedures.

22. The proposed summation scheme for multiple transmitters makes the conservative assumption that antennas that are at the same body-to-antenna or radial distance are also at the same location. The Commission seeks

comment on this proposal. For some specific types of equipment where certain FCC Laboratory procedures apply, consideration of lateral separation has already been implemented in these procedures to streamline evaluation requirements, and this will continue. However, since the necessary lateral antenna-to-antenna or SAR peak location separation distance to avoid significant SAR overlap is a complex function of the radial antenna-to-body distance and antenna characteristics, the Commission is proposing not to allow a general exemption from routine evaluation based on lateral distance at this time. The Commission encourages further development and implementation of more efficient evaluation procedures in this area by the Laboratory and others.

c. Multiple Portable and Mobile Transmitters

23. A device may contain a combination of portable and mobile transmitters, that is, some at less than 20 cm and some at greater than 20 cm separation distances from the body, respectively. Other devices may contain either only mobile or only portable transmitters. In any case, the fractional contributions to the threshold can be determined according to this proposal by calculating for each transmitter the ratio of the maximum time-averaged power (matched conducted power and/or ERP, as appropriate) for the transmitter and comparing to the appropriate frequency- and distance-dependent threshold using the equations in Table 1 of the proposed § 1.1307(b)(1)(i) and the formulas in the proposed § 1.1307(b)(1)(ii) and then summing those ratios. If the ratios for all transmitters in a device operating in the same time averaging period are included in the sum and the sum is less than one, the device (*i.e.* all transmitters within the device) is proposed to be exempt from routine evaluation. The Commission proposes that all transmitters must be included in the summation of multiple transmitters in a device, including those that may be added subsequently under its permissive change authorization procedures.

24. For devices that have already been evaluated for compliance based on SAR, if one or more portable transmitters are being added, the additional transmitters are proposed to be exempt from further evaluation if all of the following conditions apply: (1) The summation of the ratios of either the available maximum time-averaged power or the ERP, whichever is greater, for the portable transmitters to be added and existing portable transmitters that do not require SAR evaluation to the threshold powers according to the formulas in the proposed § 1.1307(b)(1)(ii); (2) the ratio of the summation of previously measured maximum 1-gram average SAR for the existing portable transmitters to 1.6 W/kg; and (3) the summation of the ratios of the maximum time-averaged ERP for mobile transmitters to the exemption thresholds according to either the formulas in the proposed § 1.1307(b)(1)(ii) or Table 1of the proposed § 1.1307(b)(1)(i), as applicable—all sum to less than one.

25. The values for P_i, SAR_j, and ERP_k, where applicable, are proposed to be determined according to the source-based time averaging requirements of §§ 2.1093(d)(5) and 2.1091(d)(2), and the sum of those values represents conservatively the total calculated exposure. The proposed formula may be used even if some of the three terms do not apply (*i.e.,* where those terms would be zero). As the extent of overlapping transmissions may vary among individual products and host configurations, FCC Laboratory test procedures may address the details of how to conduct evaluations and determine compliance for specific types of devices.

26. The ambient exposure quotient (AEQ) proposed to be applicable in the summation of multiple fixed sources is not proposed to be applicable in the summation of multiple mobile and portable sources, because AEQ could vary significantly depending on the spatial location of the device and is thus indeterminate.

d. Portable Transmitters With Operating Frequencies Above Six Gigahertz or at Distances Greater Than $\lambda/2\pi$

27. The Commission proposes that above 6 GHz, the more conservative exemptions using the equations proposed in Table 1 of § 1.1307(b)(1)(i) must be used for portable devices if the separation distance is greater than $\lambda/2\pi$, again using only the third term involving ERP in the formula above. In general, the Commission proposes that any RF source operating above 6 GHz may use only the blanket 1 mW exemption and the MPE-based exemption in Table 1.

B. Evaluation of Portable Devices

28. The Commission proposes to remove material from the rules, as specifically described, that is more properly addressed by its guidance on evaluation procedures by measurement and computation. This guidance would continue to be updated as necessary in the Commission's Bulletins and in other supplemental materials such as the KDB.

1. Consistency in Usage of Any Valid Method for SAR Computation

29. The Commission is proposing to modify the language in §§ 1.1307(b)(2) and 95.1221 to allow any valid computational method by removing from its rules specific references to FDTD.

2. Removal of Minimum Evaluation Distance Requirement From Rules for Frequencies Above Six Gigahertz

30. There is no apparent reason why measurement or calculation to demonstrate compliance with MPE field strength or power density limits could not be achieved at distances of less than five centimeters as stated in § 2.1093(d) of the Commission's rules, provided, of course, that proper equipment and techniques are used. The 5-cm minimum distance appears to be no longer appropriate, and the Commission therefore proposes to remove it and document it in the Commission's Bulletins or other supplemental materials.

3. Technical Evaluation References in Rules

31. The Commission proposes to eliminate references in its rules to outside documents or specific editions of OET Bulletins and supplements when offering guidance on acceptable procedures for evaluating compliance. Thus, the Commission specifically proposes to remove the reference to IEEE Std C95.3–1991 in § 24.51(c). However, the Commission also notes and seeks comment on the potential implication of this overarching general proposal as it may affect cross-references by other federal agencies that may utilize its existing guidance that it is proposing to discontinue. Specifically, the Commission notes Federal Railroad Administration, Department of Transportation, 49 CFR part 236, Appendix E, section (h)(2).

C. Mitigation

32. Post-evaluation procedures to ensure that the Commission's exposure limits are not exceeded include labels, signs, barriers, occupational training, and enforcement. Here the Commission reviews in detail its definitions related to power and clarify issues related to exposure classification and time averaging. Additionally, the Commission proposes to provide further guidance on specific mitigation actions such as proximity restriction and disclosure requirements for fixed RF

sources. We proposed to define fixed RF sources in our proposed revised rules as transmitters which are physically attached to one location, sometimes temporarily, and are not able to be easily moved to another location while transmitting.

1. Transient Exposure in Controlled Environments Near Fixed RF Sources

33. The Commission seeks to clarify the applicability of transient exposure and how to apply its exposure limits in controlled environments with respect to averaging time near fixed transmitter sites in a controlled environment, and proposes a clarification of averaging time.

34. The Commission interprets the terms ''transient'' and ''brief'' in the context of human exposure to RF energy to imply that the general population exposure limits would apply to transient individuals near fixed RF sources within controlled environments, considering a time-averaging period of 30 minutes. In a controlled environment and with supervision, ''behavior-based'' time averaging such as moving through a specific area promptly would be feasible, while the Commission has not found it to be generally feasible in an uncontrolled environment. Thus, the Commission proposes the definition of transient exposure with respect to averaging time to mean general population/''controlled,'' that is, transient exposure should not exceed the general population limit considering 30-minute time averaging in a controlled environment. Additionally, the Commission proposes that transient exposure should not exceed the continuous occupational limit at any time, accounting for source-based time averaging. In other words, the Commission proposes that behavior-based time averaging may be used in controlled situations to maintain compliance with the general population exposure limits (this is the essence of the Commission's transient exposure interpretation), while behavior-based time averaging may not be used to maintain compliance with the occupational exposure limits for individuals classified as transient.

35. The Commission clarifies herein that transient individuals in a controlled area may be any individual who would normally be subject to the general population exposure limits in uncontrolled environments, including occupational personnel that have not received training. In the context of satisfying the requirement to present written and/or verbal information to transient individuals and occupational personnel within controlled environments, the Commission also clarifies here that written information may include signs, maps, or diagrams showing where exposure limits are exceeded, and verbal information may include prerecorded messages. Averaging time is an intrinsic part of the existing exposure limits, and as such, the Commission's intent is that averaging time may be used whenever there is adequate control over time of exposure. As the Commission has proposed here for transient exposure, where the general population limit is exceeded (but not the occupational limit) and adequate controls are in place, averaging time may be used to comply with the general population limit. The Commission seeks comment on all of these proposals to better define transient exposure conditions beyond what has already been adopted. Specifically, the Commission solicits comment on the expected cost associated with requiring supervision of transient individuals, where licensees would benefit from compliance certainty.

2. Proximity Restriction and Disclosure Requirements for Fixed RF Sources

36. The Commission proposes training, access restriction, and signage requirements for fixed transmitter sites considering recent standards activity working toward defining industrial RF safety programs. In particular, the Commission uses, in part, a combination of certain concepts, programs, specifications, and actions contained in IEEE Std C95.7–2005, IEEE Std C95.2–1999, NCRP 2002 Letter Report, and Chapter 2.4 of the NAB Engineering Handbook, in the derivation of these proposed rules. The Commission realizes that rigid requirements may not be practical in all cases, but clear rules that can be followed where feasible can help avoid both inadvertent over-exposure and unnecessary public concern. The Commission notes that fixed radio transmitters are no longer located only on towers or facilities such as utility poles. Radio transmitters and their antennas have been deployed in a wide variety of forms, often designed as trees, chimneys, or panels on a building for aesthetic reasons, and their presence therefore might not be obvious. The Commission realizes that each transmitter site is different and that a wide range of exposure environments may exist, and so it seeks comment on how to simultaneously provide flexibility and certainty to licensees and site owners while at the same time ensuring enforceable compliance with the exposure limits.

37. Relating terminology of Commission exposure limits to IEEE Std C95.7–2005 for the purpose of this discussion, the general term ''action level'' used in the IEEE standard should be considered equivalent to the Commission exposure limit for the general population in an uncontrolled environment; similarly, the general term ''exposure limit'' used by the IEEE should be considered equivalent to the Commission exposure limit for occupational personnel in a controlled environment. The Commission emphasizes that the general population exposure limit is a legal limit enforced by the Commission and should not be considered as merely action guidance, nor does this proposal suggest any different exposure limit than those currently in effect. The proposed mitigation actions in this section are meant to supplement the exposure limits themselves by facilitating compliance with them.

38. The Commission proposes to unambiguously define boundaries between each category based on the maximum time-averaged power over the appropriate time averaging period (six minutes for occupational or 30 minutes for general population).

39. The Commission seeks comment on how potential equipment failures or non-routine or auxiliary operation that may cause exposure over the exposure limits should be considered in the determination of these categories. The Commission also proposes and seeks comment on the feasibility of requiring positive access control for Category Two and the advisability of continuing the ''remote'' designation. The question becomes one of determining whether an area can be considered ''remote.'' Evidence of public access, such as litter and trails, has been used by the Commission in past inspections to show that an area is not ''remote.'' The Commission further seeks comment on how to better encourage cooperation between property owners, managers, and licensees in the implementation of RF safety programs, since it is ultimately the licensee that is responsible for compliance.

40. The Commission maintains that accurate placement of appropriate signage is important and that such placement should make clear both where limits are exceeded and where limits are not exceeded. The Commission has observed inappropriate postings that imply that occupational limits are exceeded far outside areas that approach the general population limit. Such ''over-signage'' may result in undue alarm, confusion, and subsequent disregard of meaningful postings. Since

each situation is different, the Commission proposes that those responsible for the placement of signs consider the potential implications of over-signage, and it will consider compliance with these proposed rules on a case-by-case basis. Unnecessary public concern may also arise from placement of a sign with an inappropriate signal word. For example, placement of a sign that says ''DANGER'' or ''WARNING'' in a location where RF fields may only approach the general population exposure limit might raise unnecessary alarm despite compliance in the area, since the words ''danger'' and ''warning'' imply conditions leading to imminent or likely physical harm.

41. Regarding training and verbal information, the Commission proposes to consider the topics outlined in Annex A of IEEE Std C95.7–2005 as guidance to be referenced in a future revision of OET Bulletin 65. The Commission proposes that training is optional only for transient individuals who must be supervised, and training would be required for all other controlled situations in Category Two and higher categories. Training may include effective web-based or similar programs. The Commission proposes that either spoken word or pre-recorded audio from an authorized individual qualified to provide such instructions on how to remain compliant would be acceptable as forms of verbal information.

42. The Commission has used the environmental categories and guidance provided in IEEE Std C95.7–2005 to develop the following specific proposals that the categories below require the specified control actions:

• Category One—INFORMATION (Below General Population Exposure Limit):

No signs or positive access controls are proposed to be required; optionally a green ''INFORMATION'' sign may offer information to the public that a transmitting source of RF energy is nearby but that it is compliant with Commission exposure limits regardless of duration or usage. Labels or signs would not be required for fixed transmitters that can determine that the transmitter is ''intrinsically compliant'' with the general population exposure limit.

• Category Two—NOTICE (Exceeds General Population Exposure Limit but Less Than the Occupational Exposure Limit):

Signs and positive access control are proposed to be required surrounding the areas in which the general population exposure limit is exceeded, with the appropriate signal word ''NOTICE'' and associated color (blue) on the sign. Signs must contain the content described below. However, the Commission proposes to allow under certain controlled conditions, such as on a rooftop with limited access (*e.g.,* a locked door with appropriate signage), ''[a] label or small sign attached directly to the surface of an antenna . . . if it specifies a minimum approach distance,'' to be sufficient signage. Allowing a label or sign to be affixed to an antenna is consistent with the Commission's policy for certain low-power fixed transmitters operating with a minimum separation distance more than 20 centimeters from the body of persons under normal operating conditions and with its labeling requirements for fixed consumer subscriber antennas. Of course, a label affixed to an antenna would be considered sufficient only if it is legible at least at the separation distance required for compliance with the general population exposure limit in § 1.1310 of the rules. The Commission proposes appropriate training to be required for any occupational personnel with access to the controlled area where the general population exposure limit is exceeded, and transient individuals to be supervised by occupational personnel with appropriate training upon entering any of these areas. Use of time averaging would be required for transient individuals in the area in which the general population exposure limit is exceeded to ensure compliance with the time-averaged general population limit. Use of personal RF monitors in the areas in which the general population exposure limit is exceeded would be recommended but not required.

• Category Three—CAUTION (Exceeds Occupational Exposure Limit but by No More Than Ten Times):

In addition to the mitigation actions required within those areas designated as Category Two, additional signs (with the appropriate signal word ''CAUTION'' and associated color (yellow) on the signs), controls, or indicators (*e.g.,* chains, railings, contrasting paint, diagrams) are proposed to be required surrounding the area in which the exposure limit for occupational personnel in a controlled environment is exceeded. A label or small sign may be attached directly to the surface of an antenna within a controlled environment if it specifies a minimum approach distance where the occupational exposure limit is exceeded. The Commission proposes that transient individuals would not be permitted in any area in which the occupational exposure limit is exceeded. Additionally, appropriate training would be required for any occupational personnel with access to the controlled area where the general population exposure limit is exceeded. Use of personal RF monitors in the areas in which the general population exposure limit is exceeded is recommended but not proposed to be required. Use of personal protective gear (such as properly-worn RF protective suits) is recommended for occupational individuals in the areas in which the occupational exposure limit is exceeded.

• Category Four—WARNING/DANGER (Exceeds Ten Times Occupational Exposure Limit or Serious Contact Injury Possible):

In addition to the mitigation actions required within those areas designated as Category Three, ''WARNING'' signs with the associated color (orange) are proposed to be required where the occupational limit could be exceeded by a factor of ten, and ''DANGER'' signs with the associated color (red) are proposed to be required where immediate and serious injury will occur. For example, ''DANGER'' signs would be required at the base of AM broadcast towers, where serious injuries due to contact burns may occur. If power reduction would not sufficiently protect against the relevant exposure limit in the event of human presence considering the optional additional use of personal protective equipment, lockout/tagout procedures must be followed to ensure human safety.

43. The Commission also proposes to require the following in the content of the sign, adapted from § 2.4 of the National Association of Broadcasters Engineering Handbook, 10th Edition. Specifically, RF exposure advisory signs are proposed to include at least the following components:

• Appropriate signal word and associated color in accord with IEEE Std C95.2–1999 (*e.g.,* ''DANGER,'' ''WARNING,'' ''CAUTION,'' or ''NOTICE'')

• RF energy advisory symbol (Figure A.3 of C95.2–1999)

• An explanation of the RF source (*e.g.,* transmitting antennas)

• Behavior necessary to comply with the exposure limits (*e.g.,* do not climb tower while antennas are energized)

• Contact information (*e.g.,* phone number or email address resulting in a timely response)

44. For the optional information sign discussed in Category One, the Commission recommends that it include at least the following information:

- Appropriate signal word (*e.g.,* ''INFORMATION'') and associated color (green)
- An explanation of safety precaution
- Contact information
- Reminder to obey all postings and boundaries (if higher categories are nearby)

45. Note that the inclusion of the RF energy advisory symbol and directions on how to avoid a potential hazard are excluded from these recommendations on the optional ''INFORMATION'' sign, since inclusion of these aspects on a sign where the general public exposure limit is not exceeded may cause confusion or unnecessary public alarm. If, for example, a member of the general public proceeds past an information sign and continues toward a source of RF energy, only at the point where that individual approaches the general population exposure limit should there be information on how to remain in areas where RF field levels are less than the public limit. Once this individual approaches the boundary where the general population exposure limit is exceeded, then the ''NOTICE'' sign would explain how to avoid exceeding the limits and positive access control would keep the individual from doing so. The Commission proposes that the use of language(s) other than English on an ''INFORMATION'' sign would be particularly advisable since the information sign would not include the universal RF energy symbol.

D. Review and Update All RF Safety Text in Parts 1 and 2 for Clarity and Consistency

46. The Commission takes this opportunity to propose a careful rewording of some of its rules in §§ 1.1307(b), 1.1310, 2.1091, and 2.1093 as necessary to ensure clarity and consistency, as described in its proposed rules. Changes to specific sections of parts 15, 24, 25, 27, 73, 90, 95, 97, and 101 are necessarily dependent on the Commission's proposed changes in parts 1 and 2.

II. Notice of Inquiry (NOI)

47. The first Commission's *Notice of Inquiry* (*1979 NOI*) on the subject of biological effects of radiofrequency radiation occurred in 1979 in response to the need for the Commission to implement the National Environmental Policy Act (NEPA) of 1969. The most recent proceeding inviting comment on exposure limits was initiated in 1993 and culminated in a Report and Order in 1996, which resulted in the Commission's present limits. The instant rulemaking that is underway, initiated with the 2003 *NPRM,* 68 FR 52879, September 8, 2003, specifically excludes consideration of the exposure limits themselves. The Commission continues to have confidence in the current exposure limits, and notes that more recent international standards have a similar basis. At the same time, given the fact that much time has passed since the Commission last sought comment on exposure limits, as a matter of good government, the Commission wishes to develop a current record by opening a new docket with this *Notice of Inquiry* (*NOI*), and seeks comment on whether its limits should be more restrictive, less restrictive, or remain the same.

48. The Commission recognizes the ubiquity of device adoption as well as advancements in technology and developments in the international standards arena since establishing the Commission's present policies in 1996 warrant an inquiry to gather information to determine whether its general regulations and policies limiting human exposure to radiofrequency (RF) radiation are still appropriately drawn. In considering whether there is a need for changes to its RF exposure limit rules, the Commission's intent is to adequately protect the public without imposing an undue burden on industry. While acknowledging the potential difficulty of quantifying benefits and burdens in considering the overall costs of the regulation, the Commission needs to be mindful of its fundamental responsibility to provide for the appropriate protection of consumers, workers, and other members of the public. The Commission therefore requests comment on a wide range of questions that will enable it to weigh those costs and benefits. The Commission also requests comment on the most cost-effective approach for modifying existing exposure limit policies and practices, if such modifications are needed, to achieve its goals. For each cost or benefit addressed, the Commission asks that commenters provide specific data and information such as actual or estimated dollar figures, including a description of how the data or information was calculated or obtained and any supporting documentation. Vague or unsupported assertions regarding costs or benefits generally will receive less weight and be less persuasive than more specific and supported statements.

50. Although the Commission is aware of recent scientific and technical standard publications, it is important to gather additional pertinent information and authoritative expert views to ensure the Commission is meeting its regulatory responsibilities. Continued use of the Commission's present exposure limits is currently supported by statements from significant qualified expert organizations and governmental entities. Some critics of the Commission's exposure limits have contrasting opinions, and it is aware of the general concerns raised some members of the public. The purpose of this NOI is to open a science-based examination of the efficacy, currency, and adequacy of the Commission's exposure limits for RF electromagnetic fields. The Commission underscores that in conducting this review it will work closely with and rely heavily—but not exclusively—on the guidance of other federal agencies with expertise in the health field. This approach will ensure that the Commission will have fully discharged its regulatory responsibility and also will be appropriately responsive to the public's interest in knowing that its RF exposure guidelines are based on the most current information, analysis, and expertise available.

51. As already noted, the Commission is guided by the expertise of federal safety, health, and environmental agencies and institutes that, subject to any budgetary constraints, perform regular reviews of scientific research and periodically recommend any appropriate changes to, or reaffirm the validity of, the Commission's exposure criteria. Nonetheless, the Commission is confident of its own ability to remain abreast of scientific developments and research, and to participate in standards development and implementation, as is necessary to make an independent determination as to the adequacy of its exposure limits in the absence of affirmative input from agencies with more health and safety expertise. Because the Commission does not claim expertise as a *de facto* health agency, it necessarily considers the views of federal health and safety agencies and institutes that continue to address RF exposure issues in formulating such judgments. The Commission notes that the international community has been active in this area, with the World Health Organization (WHO) initiating its electromagnetic fields (EMF) program in 1996 and continuing its broad efforts in this area. The International Commission on Non-Ionizing Radiation Protection (ICNIRP) published exposure guidelines in 1998, and the Institute of Electrical and Electronics Engineers (IEEE) published a major revision to its RF exposure standard in 2006. Although the National Council on Radiation Protection and Measurements (NCRP) has not updated its criteria since its

1986 release, NCRP did subsequently issue comments supporting it in 2002. As the Commission continues to monitor such activity and information, it seeks comment on the appropriate consideration of the evaluations of research conducted by international organizations or by activities in other countries. Moreover, the Commission seeks comment from federal agencies and institutes as to whether there may be any additional information or resources that could be provided by the Commission to support their ongoing activities.

1. Exposure Limits

52. *Introduction.* The more recent limits developed by ICNIRP (supported by WHO) and IEEE are based on the avoidance of known adverse health effects. The adjustments underlying these newer limits are primarily due to significant developments in dosimetry. Also, several other exposure variables in the more recent standards more clearly specify various evaluation requirements, such as spatial averaging, spatial peak field limits, time averaging, overlapping frequency range for heating and shock effects, *etc.* While there has been increasing public discussion about the safety of wireless devices, to date organizations with expertise in the health field, such as the FDA, have not suggested that there is a basis for changing the Commission's standards or similar standards applied in other parts of the world.

53. The Commission asks generally whether its current standards should be modified in any way, notwithstanding the detailed discussion. The Commission specifically solicits information on the scientific basis for such changes as well as the advantages and disadvantages and the associated costs of doing so. In addition to seeking input from federal health and safety agencies and institutes, the Commission solicits comment from national and international standards organizations (specifically including NCRP and IEEE) on the currency of their exposure limits and supporting documents in light of recent research and the international Agency for Research on Cancer (IARC)'s announcement on its classification of RF fields. The Commission notes that IARC's detailed monograph on this classification recently became available, to inform the Commission's consideration during the course of this proceeding, and it invites parties to comment in the Commission's record on the IARC monograph during the comment period established for this *NOI.* Although IEEE Std 1528–2003, which the Commission uses to determine the compliance of devices such as cell phones intended to be used against the head, states that the mannequin in its measurement test setup ''represents a conservative case for men, women, and children'' alike, the Commission specifically seeks comment as to whether its current limits are appropriate as they relate to device use by children.

54. *Partial-body and Whole-body averaging of exposure.* For localized SAR, both the ICNIRP and the newest IEEE standard limit exposure to 2.0 W/kg averaged over 10 grams of tissue as opposed to the Commission's existing localized SAR limit of 1.6 W/kg averaged over 1 gram. (The definitions of the 10-gram averaging volume differ slightly between ICNIRP and IEEE.) Depending on the exposure criteria used internationally, SAR would be the metric between 100 kHz and upper frequencies varying from 3 to 10 GHz (the exact upper limit depends on the particular exposure standard being applied), while power density is the metric at higher frequencies. The Commission requests comment on the significance, if any, of the differences between these standards.

55. *Averaging Area.* The NCRP criteria and Commission regulations do not specify an averaging area for power density or a spatial maximum power density limit, while both the ICNIRP guidelines and the IEEE standards specify a spatial maximum power density, at least at higher frequencies (*e.g.,* between 3 and 10 GHz) of 20 times the whole-body MPE limit, generally averaged over 1 cm^2. In addition, IEEE Std C95.1–2005 specifies frequency-dependent averaging areas for power density above 3 GHz. The Commission invites comment on whether it should change or clarify spatial averaging requirements and spatial maximum power density limits, at least at higher frequencies, either in its rules limiting human exposure to RF energy or in its non-mandatory materials. More generally, the Commission seeks comment on whole-body spatial averaging techniques, particularly as applied to children at any frequency.

56. *Averaging Time.* While different time averaging periods are defined in the various exposure standards, all use time averaging to demonstrate compliance with both SAR and MPE limits. The Commission's exposure limits are intended for continuous exposure, that is, for indefinite time periods. The limits may be applied generally without time averaging, where the limits listed (typically in tables) would then be considered continuous exposure limits. While the averaging time for the Commission's exposure limits is six minutes for occupational and 30 minutes for general population exposure, the ICNIRP guidelines specify six minutes in both cases. IEEE Std C95.1–2005 specifies six minutes for occupational and 30 minutes for general population exposure at frequencies between 3 MHz and 3 GHz. The Commission notes that C95.1–2005 is more restrictive at lower and higher frequencies (*i.e.,* shorter time averaging periods are specified above and below those frequency limits). Below 3 MHz, the Commission's MPE limits, extracted from the 1986 NCRP criteria, could allow for a higher short-term exposure for the general population than for a short-term occupational exposure of the same duration when accounting for averaging times. However, such scenarios are of limited practical importance given that such time averaging near fixed sources would not be applicable for the general population. Moreover, contact burns are the primary issue at such low frequencies and high fields, as discussed below. The Commission invites comment on whether it should modify its time averaging periods. If so, should the Commission comport with recent standards activities? Alternatively from a precautionary perspective, should the Commission consider any potential risk due to long-term exposure as relevant to its time averaging periods, and if so, what scientific evidence supports this?

57. In §§ 2.1091(d)(2) and 2.1093(d)(5) of its existing rules, portable and mobile consumer devices may not use the 30-minute averaging time specified in § 1.1310. However, ''source-based'' time averaging may be used for these consumer products based on inherent transmission properties of a device. Since ''source-based'' averaging often involves consideration of transmit periodicity to determine the time interval over which to average at the maximum power achievable by the device, a 30-minute time averaging interval containing many identical periods at maximum power would result in the same average power as one period. For ''source-based'' time averaging the time period for evaluation is less than 30 minutes. Thus, if the periodicity of a device exceeds 30 minutes, then the largest ''source-based'' time averaging interval to be used for evaluation is 30 minutes. Notwithstanding its current policy, the Commission requests comment on whether consumers would prefer to be given an informed choice to behave in such a manner that may result in

somewhat exceeding the exposure limits.

58. *Peak Pulsed RF Fields.* The present Commission rules do not include limits on peak pulsed RF fields, and independent standard-setting bodies have adopted differing standards applicable to such fields. There is a lack of harmonization among these standards due to limited information about the biological effects of peak pulsed fields. The Commission requests comment on whether it should adopt peak pulsed field limits for RF sources regulated by the Commission.

59. *Contact Currents.* Contact currents can be a safety issue in the vicinity of AM broadcast facilities. The Commission is not aware of similar hazards near other transmitters operated by Commission licensees aside from those used by AM stations. Considering the wavelengths necessary to induce significant currents on large objects, it is not expected that higher frequency RF sources would cause comparable problems, especially given the lack of complaints at these frequencies. The Commission requests comment on the appropriate strategy to promote awareness for construction and maintenance project contractors and planners where the potential for contact RF burns, whether serious or minor, could occur. For example, would it be beneficial for the Commission to provide publicly available maps showing areas where electric fields exceed 10 V/m from AM broadcast stations? If so, the Commission invites comment as to whether AM broadcast stations currently have this information and, if not, to explain the impact of collecting this information and making it available to the Commission. How much time should be required to do so and what would be the costs and benefits? The Commission seeks comment on whether the cost of dealing with potential AM burn hazards as they arise should be the responsibility of the station, the affected party, or both. The Commission also seeks comment as to whether it is the appropriate body to address this issue. While contact burns are a universally recognized hazard of variable severity, adoption of numerical limits on contact RF currents over a broad frequency range may not be effective in avoiding situations where burns actually occur. The Commission requests comment on the feasibility, efficacy, and burden of contact current limits versus other, perhaps informational, approaches such as mapping.

60. *Frequency Range.* The *1979 NOI* opened discussion of exposure limits over the 0 to 300 GHz frequency range, but the limits eventually adopted in 1996 included only frequencies between 100 kHz and 100 GHz as this was the extent of the frequency scope of the standards the Commission adopted and there were few sources of considerable significance outside of this scope at that time. The IEEE and ICNIRP guidelines also encompass the frequency range between 0 and 300 GHz. The Commission requests comment on whether, in addition to the limits already established for RF fields between 100 kHz and 100 GHz, it should also explore actions to control exposure outside of this frequency range (e.g., in the range between 0 and 100 kHz and/or 100 and 300 GHz) due to sources authorized by the Commission. The Commission notes that some wireless inductive chargers operate at frequencies below its current frequency scope, and all terahertz (THz) sources operate at frequencies above its current frequency scope. The Commission also requests comment on whether explicitly controlling exposure in these additional frequency ranges may have a broader impact on or be in conflict with the Commission's rules and what the relative costs and benefits would be. The Commission notes that at frequencies not explicitly within the scope of its existing limits there are still general compliance obligations under §§ 1.1307(c) and (d) for sources it regulates.

60. *Conductive Implanted Objects.* Electrically conductive objects in or on the body may interact with sources of RF energy in ways that are not easily predicted. Examples of conductive objects *in* the body include implanted metallic objects. Examples of conductive objects *on* the body include eyeglasses, jewelry, or metallic accessories. The Commission seeks comment on whether the present volume-averaged SAR limits are protective for the more localized SAR that may occur near the tip of a conductive object such as the end of an implanted wire. In general, the Commission seeks comment on whether high levels of RF exposure may cause internal thermal injury at the site of conductive implants. Commenters are specifically advised to provide scientific research or analysis to support their arguments and to propose practical and effective regulatory responses for any such assertion, and the Commission seeks comment on the costs and benefits of any such approach.

2. Consumer Information

61. The Commission has continually provided information to the general public regarding the potential hazards of radiofrequency electromagnetic fields. The information provided regarding RF safety includes the Commission's Office of Engineering and Technology (OET) Bulletins 56 and 65 (and their Supplements), the *Local Official's Guide,* the Consumer and Governmental Affairs Bureau (CGB) Consumer Guides, and other information (including links to external resources) on its Web site. OET Bulletin 56 was designed to answer general non-technical questions about biological effects of RF fields and explain the exposure limits, and OET Bulletin 65 is intended to be a technical document with supplements designed to provide practical guidance on determining compliance with the Commission's exposure limits. In contrast to the general information provided in OET Bulletin 56, CGB FCC Consumer Guides provide information on specific topics on which the Commission has received numerous inquiries, such as cellular base stations, mobile antennas, wireless devices, and specific absorption rate (SAR). *The Local Official's Guide* provides a framework for local and state governments and wireless service providers to cooperate in the determination of compliance with the Commission's RF exposure limits. The Commission requests comment on what additional information should be provided to consumers and in what format to assist in making decisions about reducing exposure. The Commission also specifically seeks comment on how it can ensure that such information is presented in formats that are accessible to people with disabilities.

62. The Commission continues to receive inquiries on various subjects related to RF exposure, particularly as infrastructure is deployed to support new wireless technologies. Some of those inquirers perceive deployment of fixed transmitters to support a wireless network as an action that may affect them involuntarily (as opposed to use of a cell phone, which is a voluntary activity and exposure). For example, even though exposures generated by fixed wireless base stations (and fixed RF sources in general) are typically orders of magnitude less than those from cell phones and other portable devices (due to proximity), exposures due to fixed RF sources are both involuntary and long-term. However, even if continuous exposure is assumed from wireless base stations, the total energy absorbed from a nearby base station is typically much less on average than that due to using a cell phone. The Commission seeks comment on what

additional information it should develop relating to exposures from common fixed sources.

63. The Consumers Union suggests that the Commission ''mandate that the SAR information included with phones be more consistent.'' The Commission agrees that there is inconsistency in the supplemental information voluntarily provided in the manuals provided with portable and mobile devices. The Commission also notes that for a variety of reasons, the maximum SAR value that is normally supplied is not necessarily a reliable indicator of typical exposure and may not be useful for comparing different devices. The Commission requests comment on whether the Commission should consistently require either disclosure of the maximum SAR value or other more reliable exposure data in a standard format, perhaps in manuals, at point-of-sale, or on a Web site.

64. Information on the SAR of a particular device is available from the Commission's Web site if an individual knows the FCC ID, which is printed on every device. The Commission recognizes that it is not always easy for some to access the SAR information, because the FCC ID is not tied to the model number or marketing name of the device, and there may be multiple records for each FCC ID, potentially creating confusion. Given that private organizations have already linked FCC IDs to device model numbers, the Commission requests comment on whether the Commission should also take actions that would better enable consumers to correlate the make and model number of their device to an FCC ID. If so, how could this be accomplished and what would be the impact on industry? The Commission requests comment in general on the information discussed that would be most useful to provide precautionary guidance to consumers.

3. Exposure Reduction Policies

65. The Commission has a responsibility to ''provide a proper balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible.'' The intent of the Commission's exposure limits is to provide a cap that both protects the public based on scientific consensus and allows for efficient and practical implementation of wireless services. The present Commission exposure limit is a ''bright-line rule.'' That is, so long as exposure levels are below a specified limit value, there is no requirement to further reduce exposure. The limit is readily justified when it is based on known adverse health effects having a well-defined threshold, and the limit includes prudent additional safety factors (*e.g.,* setting the limit significantly below the threshold where known adverse health effects may begin to occur). The Commission's current RF exposure guidelines are an example of such regulation, including a significant ''safety'' factor, whereby the exposure limits are set at a level on the order of 50 times below the level at which adverse biological effects have been observed in laboratory animals as a result of tissue heating resulting from RF exposure. This ''safety'' factor can well accommodate a variety of variables such as different physical characteristics and individual sensitivities—and even the potential for exposures to occur in excess of the Commission's limits without posing a health hazard to humans.

66. Despite this conservative bright-line limit, there has been discussion of going even further to guard against the possibility of risks from non-thermal biological effects, even though such risks have not been established by scientific research. As such, some parties have suggested measures of ''prudent avoidance''—undertaking only those avoidance activities which carry modest costs. For example, New Zealand has not set a specific precautionary environmental limit beyond its adoption of the ICNIRP guidelines, opting instead to minimize, ''as appropriate, RF exposure which is unnecessary or incidental to achievement of service objectives or process requirements, provided that this can be readily achieved at modest expense.'' However, the environmental exposure levels from fixed transmitters, such as broadcast facilities and cellular base stations, are normally not only far below the MPE limit, but also well below exposure from a portable device such as a cell phone. Thus, the adoption and enforcement of considerably more restrictive MPE limits might have little, or no, practical effect under most environmental exposure scenarios, but may significantly increase infrastructure costs which would ultimately be paid by consumers. Nonetheless, some countries have implemented extra ''precautionary'' environmental limits for fixed transmitters far below the prevailing scientifically-based values, sometimes limited to specific locations. The SAR limits for portable devices, however, have not been correspondingly reduced by these considerations because of various practical limitations on device design.

67. In this regard, the Commission stresses that while it must be cognizant of and considerate of other countries' standards or agencies' activities or recommendations, it would be guided by them only to the extent it would have confidence in the research, analysis, and principles upon which they are based, as well as the tangible benefits they would provide. Additionally, the concept of ''prudent avoidance'' encourages a balance between exposure reduction and cost. Imposing additional precautionary restrictions on device design and/or on the siting of fixed transmitting facilities to reduce exposure may entail significant costs that licensees and equipment manufacturers would need to consider when developing communications systems or designing equipment. Nevertheless, the Commission notes, some jurisdictions have adopted precautionary restrictions or comparable requirements. For example, the California Public Utilities Commission requires utility companies to allocate a small percentage of total project cost to ELF field exposure reduction actions during power line construction. The Commission requests comment on whether any general technical approach to reduce exposure below its limits in some situations is appropriate or feasible, particularly in cases in which there is no specific quantitative goal for improvement.

68. There are natural trade-offs that come into play when considering extra precautionary aspects of system design. For example, increased antenna height tends to reduce exposure levels nearby at ground level, but taller towers may increase cost, may possibly have a greater environmental impact, and may be inconsistent with community zoning goals. In addition, higher mounting of antennas could negatively impact system architecture, constraining the provision of service. Local efforts to avoid placement of fixed wireless base stations in particular areas can unintentionally result in increased exposure to users of portable devices within those areas where personal portable devices would transmit using greater power in order to communicate with distant base stations, thus increasing the RF emissions and consequent exposure from the device itself. Finally, distributed antenna systems (DAS) can offer more advanced services from multiple carriers with a single physical network of less visually intrusive lower profile antenna installations and may likely reduce

exposure to device users, but the Commission seeks comment on whether such installations reduce or increase environmental exposures.

69. Given the complexity of the information on research regarding non-thermal biological effects, taking extra precautions in this area may fundamentally be qualitative and may not be well-served by the adoption of lower specific exposure limits without any known, underlying biological mechanism. Additionally, adoption of extra precautionary measures may have the unintended consequence of ''opposition to progress and the refusal of innovation, ever greater bureaucracy, . . . [and] increased anxiety in the population.'' Nevertheless, the Commission invites comment as to whether precautionary measures may be appropriate for certain locations which would not affect the enforceability of its existing exposure limits, as well as any analytical justification for such measures. Parties advocating such measures should suggest specific situations in which more restrictive limits (and corresponding thresholds) or alternative requirements should be applied, and provide their scientific basis and substantive information as to the tangible benefits and corresponding costs. If such action were taken, the Commission solicits views as to whether it should it be applied only prospectively or also to existing situations, and if so, what would be the impact on existing systems in terms of costs and performance and what period of time should be afforded for compliance?

70. The Commission seeks comment on the possibility that there may be other precautionary measures not involving reduction of time-averaged SAR that could possibly reduce potential risk, without necessarily assuming that such risks are known. For example, such precautionary measures could include limitations on characteristics that have little or no impact on performance, such as ELF fields, peak pulsed RF fields, or modulation. The Commission requests comment on what aspects of extra precautionary measures could be effective, what aspects may be counterproductive or unnecessary, and what other extra precautionary measures could be efficiently and practically implemented at modest cost.

71. The Commission significantly notes that extra precautionary efforts by national authorities to reduce exposure below recognized scientifically-based limits is considered by the WHO to be unnecessary but acceptable so long as such efforts do not undermine exposure limits based on known adverse effects. Along these lines, the Commission notes that although it supplies information to consumers on methods to reduce exposure from cell phones, it has also stated that it does not endorse the need for nor set a target value for exposure reduction and it seeks comment on whether these policies are appropriate. The Commission also observes that the FDA has stated that, ''available scientific evidence—including World Health Organization (WHO) findings released May 17, 2010—shows no increased health risk due to radiofrequency (RF) energy, a form of electromagnetic radiation that is emitted by cell phones.'' At the same time, the FDA has stated that ''[a]lthough the existing scientific data do not justify FDA regulatory actions, FDA has urged the cell phone industry to take a number of steps, including … [d]esign[ing] cell phones in a way that minimizes any RF exposure to the user.'' The Commission seeks information on other similar hortatory efforts and comment on the utility and propriety of such messaging as part of this Commission's regulatory regime.

72. While the Commission may not take further action related to the regulatory concepts discussed here, it requests comment on the financial impact and the introduction of regulatory uncertainty due to any initiative to minimize exposure beyond scientifically-established specific limits.

4. Evaluation

73. Evaluation is a rapidly evolving area, keeping pace with technological changes, that is most effectively guided by good engineering practice rather than specific regulations. The Commission uses the term ''evaluation'' here to mean the determination of compliance with its exposure limits by measurement or computation. Evaluation is objectively verifiable in principle, even when various methods are used. However, engineering decisions or assumptions are sometimes required based on limited information. These assumptions are generally argued to be conservative, but verification of these assumptions is not always straightforward. On occasion, some prior presumably conservative assumption is later found to be questionable and warrants further analysis. While non-mandatory evaluation techniques are referenced and reflected in OET Bulletins and in the FCC Laboratory Knowledge Database (KDB), development of them is the result of international engineering efforts by standards setting groups of the IEEE and International Electrotechnical Commission (IEC) and is generally self-correcting as information and analysis becomes more readily available. These are often dosimetric issues that can be resolved by the Commission's reliance on SAR as a primary metric for compliance. However, SAR measurement and modeling methods themselves are complex and continue to evolve to achieve greater accuracy. In particular, SAR evaluation for portable devices (*e.g.,* cell phones) has been a significant undertaking and standards development in this area is a continuous process.

74. Except for the extremities, the Commission's SAR limits for the general public are 0.08 W/kg, as averaged over the whole body, and a peak spatial-average SAR of 1.6 W/kg, averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube) and refer to continuous exposure over time. Evaluation with respect to the SAR limits must demonstrate compliance with both the whole-body and peak spatial-average limits using technically supportable methods and exposure conditions in advance of authorization (licensing or equipment certification) and in a manner that permits independent assessment. While these regulations refer to a cube of tissue, measurement standards have used simplified adult human models, and computational methods may be subject to errors where modeling requirements are not standardized. Most evaluations submitted to the Commission are based on measurement using the standardized specific anthropomorphic mannequin (SAM). The SAM does not model children, tissue layers, or a hand holding the device but SAM was designed to be conservative relative to these factors. Computational standards can in principle more realistically model a range of variables not present using mannequins. Various numerical models of humans (both male and female of different age groups) have been developed, and presumably CAD models of devices can also be made available. However, using this information to produce accurate and practical computational models for individual devices to evaluate SAR on a routine basis may not be ideal for all situations. Since it is not possible to measure the SAR in a 1-gram cube of tissue within the head of a real human being, and given that each human being is different, the Commission requests comment on the pros and cons of measurement versus computation, as well as standardization of human models in general, and the significance of these issues in comparison with procedures that have already been

standardized. The Commission recognizes that a measurement model is standardized by IEEE with the SAM for the head and a flat model for the body; however it seeks comment on whether computation should use the same modeling and test configurations as used for measurement to maintain consistency of results and/or whether more complex human models should be used for computation.

75. The Commission has recently established both whole-body and localized SAR as primary metrics for exposure compliance in the frequency range from 100 kHz to 6 GHz. Other than in the area of portable devices, development of standard procedures for SAR evaluation is more limited. While the Commission generally states that it requires appropriate practices using technically supportable methods for all cases, because of the lack of standard procedures, it requests comment on how SAR evaluation methods should be supported for fixed and mobile RF sources. The Commission also realizes that there may be limitations with any approach to evaluation of SAR due to fixed RF sources, and that the existing MPE limits may not ensure SAR compliance in all cases, in particular where whole-body spatial averaging is used. While this dosimetric issue may be resolved in newer versions of standards, the Commission mentions it here because of its close connection with evaluation using SAR. The Commission requests information to address these issues. Since no OET Bulletin 65 supplement has yet focused on measurement procedures (or SAR evaluation) near fixed RF sources, the Commission requests comment on whether it should develop a future technical supplement to OET Bulletin 65 for fixed evaluation including SAR recognizing the development of the IEC 62232 base station standard. Additionally, the Commission asks interested parties for suggestions for changes to OET Bulletin 56, 65, and the KDB.

5. Proximity Restriction and Disclosure Requirements for Portable RF Sources

76. Since 2001, Supplement C of OET Bulletin 65, Edition 01–01, (Supplement C) has recommended maintaining a body-worn device separation distance up to 2.5 cm (about one inch) during testing of consumer portable devices, since accessories such as holsters would normally be used to wear devices on the body and maintain this distance. Note that, in contrast to the body-worn testing configuration, for consumer portable devices intended to be held against the head during normal use, the device must be placed directly against a head mannequin during testing. Manufacturers have been encouraged since 2001 to include information in device manuals to make consumers aware of the need to maintain the body-worn distance—by using appropriate accessories if they want to ensure that their actual exposure does not exceed the SAR measurement obtained during testing. The testing data for body-worn configurations would not be applicable to situations in which a consumer disregards this information on separation distance and maintains a device closer to the body than the distance at which it is tested. In such situations, it could be possible that exposure in excess of the Commission's limits might result, but only with the device transmitting continuously and at maximum power—such as might happen during a call with a headset and the phone in a user's pocket at the fringe of a reception area.

77. Handsets and wireless technologies have evolved significantly since the release of Supplement C. Body-worn accessories such as holsters have become a matter of consumer choice and are not always supplied with the device. The availability of low power Bluetooth headsets has enabled cell phones to be used away from the head, which may reduce exposure to the head. However, because today's cell phones are smaller and typically have no external antenna, the phone may be placed in a shirt or pants pocket against the body without the consumer appreciating that it is still transmitting. Handsets may also include wireless router functions that require simultaneous transmission of multiple transmitters to support unattended body-worn operations where, unlike with a traditional voice call, users are unaware that transmissions are occurring. With the introduction of LTE technologies (4G), handsets are operating with multiple higher-output power transmitters, which enable simultaneous voice and data connections in both next-to-ear and body-worn use configurations.

78. As devices have continued to evolve, so too have the Commission's policies. Portable devices must comply with the localized SAR limits as they are normally used. In fact, the Commission has established evaluation procedures for newer technologies with reduced body-worn separation distances as small as 0.5 centimeters. Manufacturers have achieved compliance using various methods. Some have used proximity sensors to reduce power when close to the body of the user, although device power reduction in general may degrade performance. Others have simply reduced the power of the device or changed its design. The manual should include operating instructions and advisory statements so that users are aware of the body-worn operating requirements for RF exposure compliance. This allows users to make informed decisions on the type of body-worn accessories and operating configurations that are appropriate for the device.

79. Commission calculations suggest that some devices may not be compliant with its exposure limits without the use of some spacer to maintain a separation distance when body-worn, although this conclusion is not verifiable for individual devices since a test without a spacer has not been routinely performed during the body-worn testing for equipment authorization. Yet, the Commission has no evidence that this poses any significant health risk. Commission rules specify a pass/fail criterion for SAR evaluation and equipment authorization. However, exceeding the SAR limit does not necessarily imply unsafe operation, nor do lower SAR quantities imply ''safer'' operation. The limits were set with a large safety factor, to be well below a threshold for unacceptable rises in tissue temperature. As a result, exposure well above the specified SAR limit should not create an unsafe condition. The Commission notes that, even if a device is tested without a spacer, there are already certain separations built into the SAR test setup, such as the thickness of the mannequin shell, the thickness of the device exterior case, *etc.,* so the Commission seeks comment on the implementation of evaluation procedures without a spacer for the body-worn testing configuration. The Commission also realizes that SAR measurements are performed while the device is operating at its maximum capable power, so that given typical operating conditions, the SAR of the device during normal use would be less than tested. In sum, using a device against the body without a spacer will generally result in actual SAR below the maximum SAR tested; moreover, a use that possibly results in non-compliance with the SAR limit should not be viewed with significantly greater concern than compliant use.

80. In sum, there could be certain circumstances where test configurations may not reflect actual use, and newer technological solutions may exist to allow for devices to be evaluated as close as is feasible to a simulated human under a body-worn configuration. Accordingly, the Commission invites

comment as to what steps, if any, the Commission should take relative to its policies for testing of devices on the basis of an expectation of some separation from the body, including whether it is appropriate to consider ''zero'' spacing, or actual contact with the body when testing. The Commission also seeks comment on the potential negative impacts of such measuring protocols on the design and performance of portable devices and, by extension, network architecture. Alternatively, the Commission seeks comment on whether both requiring that advisory information be more prominent and detailed and supplying accessories to the consumer could be an effective means to ensure adequate awareness and capability to ensure adherence to the SAR standards under all potential usage conditions. Given the considerable safety margin in the Commission's requirements, would the potential number of occurrences resulting from inattention to manual instruction and the extent of resulting exposure constitute a health hazard? The Commission requests information on the costs and benefits of these or other options that will help it progress on this front.

Initial Regulatory Flexibility Analysis

81. As required by the Regulatory Flexibility Act of 1980 (RFA),[1] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *Further Notice of Proposed Rule Making* (*Further 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 provided in the *Further NPRM.* The Commission will send a copy of this *Further NPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[2]

A. Need for, and Objectives of, the Proposed Rules

82. The National Environmental Policy Act of 1969 (NEPA) requires agencies of the Federal Government to evaluate the effects of their actions on the quality of the human environment.[3] To meet its responsibilities under NEPA, the Commission has adopted requirements for evaluating the environmental impact of its actions. One of several environmental factors addressed by these requirements is human exposure to radiofrequency (RF) energy emitted by FCC-regulated transmitters, facilities and devices.[4]

83. The *Further NPRM* proposes to amend parts 1, 2, 15, 24, 25, 27, 73, 90, 95, 97, and 101 of our rules relating to the compliance of FCC-regulated transmitters, facilities, and devices with the guidelines for human exposure to radiofrequency (RF) energy adopted by the Commission in l996 and 1997. Specifically we are proposing to make certain revisions in our rules that we believe will result in more efficient, practical and consistent application of compliance procedures.

B. Legal Basis

84. The proposed action is authorized under Sections 1, 4(i), 4(j), 301, 303(r), 307, 308, 309, 332(a)(1), 332(c)(7)(B)(iv), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 301, 303(r), 307, 308, 309, 332(a)(1), 332(c)(7)(B)(iv), 403; the National Environmental Policy Act of 1969, 42 U.S.C. 4321, *et seq.;* section 704(b) of the Telecommunications Act of 1996, Public Law 104–104; and section 553 of the Administrative Procedure Act, 5 U.S.C. 553.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

85. 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 and policies, if adopted.[5] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''[6] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[7] A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[8]

Small Businesses. Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.[9]

Small Businesses, Small Organizations, and Small Governmental Jurisdictions. Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards.[10] First, nationwide, there are a total of approximately 27.5 million small businesses, according to the SBA.[11] In addition, a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.''[12] Nationwide, as of 2007, there were approximately 1,621,315 small organizations.[13] Finally, the term ''small governmental jurisdiction'' is defined generally as ''governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.''[14] Census Bureau data for 2011 indicate that there were 89,476 local governmental jurisdictions in the United States.[15] We estimate that, of this total, as many as 88, 506 entities may qualify as ''small governmental jurisdictions.''[16] Thus,

[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, 110 Stat. 857 (1996).

[2] *See* 5 U.S.C. 603(a).

[3] National Environmental Policy Act of 1969, as amended, 42 U.S.C. 4321–4335.

[4] *See* 47 CFR 1.1307(b).

[5] 5 U.S.C. 603(b)(3).

[6] 5 U.S.C. 601(6).

[7] 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**.''

[8] 15 U.S.C. 632.

[9] *See* SBA, Office of Advocacy, ''Frequently Asked Questions,'' *http://web.sba.gov/faqs* (accessed Jan. 2009).

[10] *See* 5 U.S.C. 601(3)–(6).

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

[12] 5 U.S.C. 601(4).

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

[14] 5 U.S.C. 601(5).

[15] U.S. Census Bureau, Statistical Abstract of the United States: 2011, Table 427 (2007).

[16] The 2007 U.S. Census data for small governmental organizations indicate that there were 89, 476 ''Local Governments'' in 2007. (U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2011, Table 428.) The criterion by which the size of such local governments is determined to be small is a population of 50,000. However, since the Census Bureau does not specifically apply that criterion, it cannot be determined with precision how many of such local governmental organizations is small. Nonetheless, the inference seems reasonable that substantial number of these governmental organizations has a population of less than 50,000. To look at Table 428 in conjunction with a related set of data in Table 429 in the Census's Statistical Abstract of the U.S., that inference is further supported by the fact that in both Tables, many entities that may well be small are included in the 89,476 local governmental organizations, e.g. county, municipal, township and town, school district and special district entities. Measured by a criterion of a population of 50,000 many specific sub-entities in this category seem more likely than larger county-level governmental organizations to have small populations. Accordingly, of the 89,746

we estimate that most governmental jurisdictions are small.

Experimental Radio Service (Other Than Broadcast). The majority of experimental licenses are issued to companies such as Motorola and Department of Defense contractors such as Northrop, Lockheed and Martin Marietta. Businesses such as these may have as many as 200 licenses at one time. The majority of these applications are from entities such as these. Given this fact, the remaining 30 percent of applications, we assume, for purposes of our evaluations and conclusions in this FRFA, will be awarded to small entities, as that term is defined by the SBA.

The Commission processes approximately 1,000 applications a year for experimental radio operations. About half or 500 of these are renewals and the other half are for new licenses. We do not have adequate information to predict precisely how many of these applications will be impacted by our rule revisions. However, based on the above figures we estimate that as many as 300 of these applications could be from small entities and potentially could be impacted.

International Broadcast Stations. Commission records show that there are 19 international high frequency broadcast station authorizations. We do not request nor collect annual revenue information, and are unable to estimate the number of international high frequency broadcast stations that would constitute a small business under the SBA definition. Since all international broadcast stations operate using relatively high power levels, it is likely that they could all be impacted by our proposed rule revisions.

Satellite Telecommunications Providers. Two economic census categories address the satellite industry. The first category has a small business size standard of $15 million or less in average annual receipts, under SBA rules.[17] The second has a size standard of $25 million or less in annual receipts.[18]

The category of Satellite Telecommunications ''comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' [19] Census Bureau data for 2007 show that 512 Satellite Telecommunications firms that operated for that entire year.[20] Of this total, 464 firms had annual receipts of under $10 million, and 18 firms had receipts of $10 million to $24,999,999.[21] Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by our proposals.

The second category, i.e. ''All Other Telecommunications'' comprises ''establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.'' [22] For this category, Census Bureau data for 2007 shows that there were a total of 2,383 firms that operated for the entire year.[23] Of this total, 2,347 firms had annual receipts of under $25 million and 12 firms had annual receipts of $25 million to $49,999,999.[24] Consequently, the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by our action.

Fixed Satellite Transmit/Receive Earth Stations. There are approximately 4,303 earth station authorizations, a portion of which are Fixed Satellite Transmit/Receive Earth Stations. We do not request nor collect annual revenue information, and are unable to estimate the number of the earth stations that would constitute a small business under the SBA definition. However, the majority of these stations could be impacted by our proposed rules.

Fixed Satellite Small Transmit/Receive Earth Stations. There are approximately 4,303 earth station authorizations, a portion of which are Fixed Satellite Small Transmit/Receive Earth Stations. We do not request nor collect annual revenue information, and are unable to estimate the number of fixed small satellite transmit/receive earth stations that would constitute a small business under the SBA definition. However, the majority of these stations could be impacted by our proposed rules.

Fixed Satellite Very Small Aperture Terminal (VSAT) Systems. These stations operate on a primary basis, and frequency coordination with terrestrial microwave systems is not required. Thus, a single ''blanket'' application may be filed for a specified number of small antennas and one or more hub stations. There are 492 current VSAT System authorizations. We do not request nor collect annual revenue information, and are unable to estimate the number of VSAT systems that would constitute a small business under the SBA definition. However, it is expected that many of these stations could be impacted by our proposed rules.

Mobile Satellite Earth Stations. There are 19 licensees. We do not request nor collect annual revenue information, and are unable to estimate the number of mobile satellite earth stations that would constitute a small business under the SBA definition. However, it is expected that many of these stations could be impacted by our proposed rules.

Wireless Telecommunications Carriers (except satellite). This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services.[25] The appropriate size standard under SBA rules is for the category Wireless Telecommunications Carriers. The size standard for that category is that a business is small if it has 1,500 or fewer employees.[26] Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer

small governmental organizations identified in the 2007 Census, the Commission estimates that a substantial majority is small. 16 13 CFR 121.201, NAICS code 517110.

[17] 13 CFR 121.201, NAICS code 517410.

[18] 13 CFR 121.201, NAICS code 517919.

[19] U.S. Census Bureau, 2007 NAICS Definitions, 517410 Satellite Telecommunications.

[20] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.*

[21] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.*

[22] *http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2007%20NAICS%20Search.*

[23] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.*

[24] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=900&-ds_name=EC0751SSSZ4&-_lang=en.*

[25] *http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517210&search=2007%20NAICS%20Search.*

[26] 13 CFR 121.201, NAICS code 517210.

employees.[27] For this category, census data for 2007 show that there were 1,383 firms that operated for the entire year.[28] Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more.[29] Thus under this category and the associated small business size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities that may be affected by our proposed action.[30]

Licenses Assigned by Auctions. Initially, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

Paging Services. Neither the SBA nor the FCC has developed a definition applicable exclusively to paging services. However, a variety of paging services is now categorized under Wireless Telecommunications Carriers (except satellite).[31] This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular phone services, paging services, wireless Internet access, and wireless video services. Illustrative examples in the paging context include paging services, except satellite; two-way paging communications carriers, except satellite; and radio paging services communications carriers. The SBA has deemed a paging service in this category to be small if it has 1,500 or fewer employees.[32] For this category, census data for 2007 show that there were 1,383 firms that operated for the entire year.[33] Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more.[34] Thus under this category and the associated small business size standard, the Commission estimates that the majority of paging services in the category of wireless telecommunications carriers (except satellite) are small entities that may be affected by our proposed action.[35]

In addition, in the Paging Second Report and Order, the Commission adopted a size standard for ''small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits.[36] A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[37] The SBA has approved this definition.[38] An initial auction of Metropolitan Economic Area (''MEA'') licenses was conducted in the year 2000. Of the 2,499 licenses auctioned, 985 were sold.[39] Fifty-seven companies claiming small business status won 440 licenses.[40] A subsequent auction of MEA and Economic Area (''EA'') licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold.[41] One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.[42] A fourth auction of 9,603 lower and upper band paging licenses was held in the year 2010. 29 bidders claiming small or very small business status won 3,016 licenses.

2.3 GHz Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission defined ''small business'' for the wireless communications services (''WCS'') auction as an entity with average gross revenues of $40 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues of $15 million for each of the three preceding years.[43] The SBA approved these definitions.[44] The Commission conducted an auction of geographic area licenses in the WCS service in 1997. In the auction, seven bidders that qualified as very small business entities won 31 licenses, and one bidder that qualified as a small business entity won a license.

1670–1675 MHz Services. This service can be used for fixed and mobile uses, except aeronautical mobile.[45] An auction for one license in the 1670–1675 MHz band was conducted in 2003. The Commission defined a ''small business'' as an entity with attributable average annual gross revenues of not more than $40 million for the preceding three years, which would thus be eligible for a 15 percent discount on its winning bid for the 1670–1675 MHz band license. Further, the Commission defined a ''very small business'' as an entity with attributable average annual gross revenues of not more than $15 million for the preceding three years, which would thus be eligible to receive a 25 percent discount on its winning bid for the 1670–1675 MHz band license. The winning bidder was not a small entity.

Wireless Telephony. Wireless telephony includes cellular, personal

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[27] 13 CFR 121.201, NAICS code 517210. The now-superseded, pre-2007 C.F.R. citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[28] U.S. Census Bureau, Subject Series: Information, Table 5, ''Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210'' (issued Nov. 2010).

[29] *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''100 employees or more.''

[30] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en*

[31] U.S. Census Bureau, 2007 NAICS Definitions, ''517210 Wireless Telecommunications Categories (Except Satellite)''; *http://www.census.gov/naics/2007/def/ND517210.HTM#N517210.*

[32] U.S. Census Bureau, 2007 NAICS Definitions, ''517210 Wireless Telecommunications Categories (Except Satellite)''.

[33] U.S. Census Bureau, Subject Series: Information, Table 5, ''Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210'' (issued Nov. 2010).

[34] *Id.* Available census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with ''100 employees or more.''

[35] *See http://factfinder.census.gov/servlet/IBQTable?_bm=y&-fds_name=EC0700A1&-geo_id=&-_skip=600&-ds_name=EC0751SSSZ5&-_lang=en.*

[36] *Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems,* Second Report and Order, 12 FCC Rcd 2732, 2811–2812, paras. 178–181 (''*Paging Second Report and Order*''); *see also Revision of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems,* Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 10030, 10085–10088, paras. 98–107 (1999).

[37] *Paging Second Report and Order,* 12 FCC Rcd at 2811, para. 179.

[38] *See* Letter from Aida Alvarez, Administrator, SBA, to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau (''WTB''), FCC (Dec. 2, 1998) (''*Alvarez Letter 1998*'').

[39] *See* ''*929 and 931 MHz Paging Auction Closes,*'' Public Notice, 15 FCC Rcd 4858 (WTB 2000).

[40] *See id.*

[41] *See* ''*Lower and Upper Paging Band Auction Closes,*'' Public Notice, 16 FCC Rcd 21821 (WTB 2002).

[42] *See* ''Lower and Upper Paging Bands Auction Closes,'' Public Notice, 18 FCC Rcd 11154 (WTB 2003). The current number of small or very small business entities that hold wireless licenses may differ significantly from the number of such entities that won in spectrum auctions due to assignments and transfers of licenses in the secondary market over time. In addition, some of the same small business entities may have won licenses in more than one auction.

[43] *Amendment of the Commission's Rules to Establish Part 27, the Wireless Communications Service (WCS),* Report and Order, 12 FCC Rcd 10785, 10879, para. 194 (1997).

[44] *See Alvarez Letter 1998.*

[45] 47 CFR 2.106; *see generally* 47 CFR 27.1–.70.

communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).[46] Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.[47] Census data for 2007 shows that there were 1,383 firms that operated that year.[48] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. According to Trends in Telephone Service data, 434 carriers reported that they were engaged in wireless telephony.[49] Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees.[50] Therefore, approximately half of these entities can be considered small. Similarly, according to Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) Telephony services.[51] Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.[52] Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

Broadband Personal Communications Service. The broadband personal communications services (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission initially defined a ''small business'' for C- and F-Block licenses as an entity that has average gross revenues of $40 million or less in the three previous years.[53] For F-Block licenses, an additional small business size standard for ''very small business'' was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three years.[54] These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.[55] No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that claimed small business status in the first two C-Block auctions. A total of 93 bidders that claimed small and very small business status won approximately 40 percent of the 1,479 licenses in the first auction for the D, E, and F Blocks.[56] On April 15, 1999, the Commission completed the re-auction of 347 C-, D-, E-, and F-Block licenses in Auction No. 22.[57] Of the 57 winning bidders in that auction, 48 claimed small business status and won 277 licenses.

On January 26, 2001, the Commission completed the auction of 422 C and F Block Broadband PCS licenses in Auction No. 35. Of the 35 winning bidders in that auction, 29 claimed small business status.[58] Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. On February 15, 2005, the Commission completed an auction of 242 C-, D-, E-, and F-Block licenses in Auction No. 58. Of the 24 winning bidders in that auction, 16 claimed small business status and won 156 licenses.[59] On May 21, 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction No. 71.[60] Of the 14 winning bidders in that auction, six claimed small business status and won 18 licenses.[61] On August 20, 2008, the Commission completed the auction of 20 C-, D-, E-, and F-Block Broadband PCS licenses in Auction No. 78.[62] Of the eight winning bidders for Broadband PCS licenses in that auction, six claimed small business status and won 14 licenses.[63]

Advanced Wireless Services. In 2006, the Commission conducted its first auction of Advanced Wireless Services licenses in the 1710–1755 MHz and 2110–2155 MHz bands (''AWS–1''), designated as Auction 66.[64] For the AWS–1 bands, the Commission has defined a ''small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a ''very small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $15 million.[65] In 2006, the Commission conducted its first auction of AWS–1 licenses.[66] In that initial AWS–1 auction, 31 winning bidders identified themselves as very small businesses won 142 licenses.[67] Twenty-six of the winning bidders identified themselves as small businesses and won 73 licenses.[68] In a subsequent 2008 auction, the Commission offered 35 AWS–1

[46] 13 CFR 121.201, NAICS code 517210.

[47] *Id.*

[48] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

[49] *Trends in Telephone Service,* at tbl. 5.3.

[50] Id.

[51] *See Trends in Telephone Service,* at tbl. 5.3.

[52] *See id.*

[53] *See Amendment of Parts 20 and 24 of the Commission's Rules—Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule,* WT Docket No. 96–59, GN Docket No. 90–314, Report and Order, 11 FCC Rcd 7824, 7850–52, paras. 57–60 (1996) (''*PCS Report and Order*''); *see also* 47 CFR 24.720(b).

[54] *See PCS Report and Order,* 11 FCC Rcd at 7852, para. 60.

[55] *See Alvarez Letter 1998.*

[56] *See Broadband PCS, D, E and F Block Auction Closes,* Public Notice, Doc. No. 89838 (rel. Jan. 14, 1997).

[57] *See C, D, E, and F Block Broadband PCS Auction Closes,* Public Notice, 14 FCC Rcd 6688 (WTB 1999). Before Auction No. 22, the Commission established a very small standard for the C Block to match the standard used for F Block. *Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees,* WT Docket No. 97–82, Fourth Report and Order, 13 FCC Rcd 15743, 15768 para. 46 (1998).

[58] *See C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,* Public Notice, 16 FCC Rcd 2339 (2001).

[59] *See Broadband PCS Spectrum Auction Closes; Winning Bidders Announced for Auction No. 58,* Public Notice, 20 FCC Rcd 3703 (2005).

[60] *See Auction of Broadband PCS Spectrum Licenses Closes; Winning Bidders Announced for Auction No. 71, Public Notice, 22 FCC Rcd 9247 (2007).*

[61] *Id.*

[62] *See Auction of AWS–1 and Broadband PCS Licenses Closes; Winning Bidders Announced for Auction* 78, Public Notice, 23 FCC Rcd 12749 (WTB 2008).

[63] *Id.*

[64] *See* Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66, AU Docket No. 06–30, *Public Notice,* 21 FCC Rcd 4562 (2006) (''*Auction 66 Procedures Public Notice*'');

[65] *See* Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, *Report and Order,* 18 FCC Rcd 25,162, App. B (2003), *)modified by* Service Rules for Advanced Wireless Services In the 1.7 GHz and 2.1 GHz Bands, *Order on Reconsideration,* 20 FCC Rcd 14,058, App. C (2005).

[66] *See Auction of Advanced Wireless Services Licenses Scheduled for June 29, 2006; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 66,* AU Docket No. 06–30, Public Notice, 21 FCC Rcd 4562 (2006) (''*Auction 66 Procedures Public Notice*'').

[67] *See* Auction of Advanced Wireless Services Licenses Closes; Winning Bidders Announced for Auction *No. 66,* Public Notice, 21 FCC Rcd 10,521 (2006) (''*Auction 66 Closing Public Notice*'').

[68] *See id.*

licenses.[69] Four winning bidders identified themselves as very small businesses, and three of the winning bidders identifying themselves as a small businesses won five AWS–1 licenses.[70]

Narrowband Personal Communications Services. In 1994, the Commission conducted two auctions of Narrowband PCS licenses. For these auctions, the Commission defined a ''small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $40 million.[71] Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses.[72] To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order.*[73] A ''small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million.[74] A ''very small business'' is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million.[75] The SBA has approved these small business size standards.[76] A third auction of Narrowband PCS licenses was conducted in 2001. In that auction, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses.[77] Three of the winning bidders claimed status as a small or very small entity and won 311 licenses.

Lower 700 MHz Band Licenses. The Commission previously adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits.[78] The Commission defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[79] A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[80] Additionally, the Lower 700 MHz Service had a third category of small business status for Metropolitan/Rural Service Area (''MSA/RSA'') licenses —''entrepreneur''— which is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $3 million for the preceding three years.[81] The SBA approved these small size standards.[82] An auction of 740 licenses was conducted in 2002 (one license in each of the 734 MSAs/RSAs and one license in each of the six Economic Area Groupings (EAGs)). Of the 740 licenses available for auction, 484 licenses were won by 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business, or entrepreneur status and won a total of 329 licenses.[83] A second auction commenced on May 28, 2003, closed on June 13, 2003, and included 256 licenses.[84] Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.[85] In 2005, the Commission completed an auction of 5 licenses in the lower 700 MHz band (Auction 60). All three winning bidders claimed small business status.

In 2007, the Commission reexamined its rules governing the 700 MHz band in the *700 MHz Second Report and Order.*[86] An auction of A, B and E block licenses in the Lower 700 MHz band was held in 2008.[87] Twenty winning bidders claimed small business status (those with attributable average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years). Thirty three winning bidders claimed very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years). In 2011, the Commission conducted Auction 92, which offered 16 lower 700 MHz band licenses that had been made available in Auction 73 but either remained unsold or were licenses on which a winning bidder defaulted. Two of the seven winning bidders in Auction 92 claimed very small business status, winning a total of four licenses.

Upper 700 MHz Band Licenses. In the 700 MHz Second Report and Order, the Commission revised its rules regarding Upper 700 MHz licenses.[88] On January 24, 2008, the Commission commenced Auction 73 in which several licenses in the Upper 700 MHz band were available for licensing: 12 Regional Economic Area Grouping licenses in the C Block, and one nationwide license in the D Block.[89] The auction concluded on March 18, 2008, with 3 winning bidders claiming very small business status (those with attributable average annual gross revenues that do not exceed $15 million for the preceding three years) and winning five licenses.

700 MHz Guard Band Licenses. In 2000, the Commission adopted the *700 MHz Guard Band Report and Order,* in which it established rules for the A and B block licenses in the Upper 700 MHz

[69] *See AWS–1 and Broadband PCS Procedures Public Notice,* 23 FCC Rcd at 7499. Auction 78 also included an auction of broadband PCS licenses.

[70] *See Auction of AWS–1 and Broadband PCS Licenses Closes, Winning Bidders Announced for Auction 78, Down Payments Due September 9, 2008, FCC Forms 601 and 602 Due September 9, 2008, Final Payments Due September 23, 2008, Ten-Day Petition to Deny Period,* Public Notice, 23 FCC Rcd 12,749 (2008).

[71] Implementation of Section 309(j) of the Communications Act—Competitive Bidding Narrowband PCS, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196, para. 46 (1994).

[72] *See* ''Announcing the High Bidders in the Auction of Ten Nationwide Narrowband PCS Licenses, Winning Bids Total $617,006,674,'' *Public Notice,* PNWL 94–004 (rel. Aug. 2, 1994); ''Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total $490,901,787,'' *Public Notice,* PNWL 94–27 (rel. Nov. 9, 1994).

[73] *Amendment of the Commission's Rules to Establish New Personal Communications Services,* Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476, para. 40 (2000) (''*Narrowband PCS Second Report and Order*'').

[74] *Narrowband PCS Second Report and Order,* 15 FCC Rcd at 10476, para. 40.

[75] *Id.*

[76] *See Alvarez Letter 1998.*

[77] *See* ''Narrowband PCS Auction Closes,'' *Public Notice,* 16 FCC Rcd 18663 (WTB 2001).

[78] See *Reallocation and Service Rules for the 698–746 MHz Spectrum Band (Television Channels 52–59),* Report and Order, 17 FCC Rcd 1022 (2002) (''*Channels 52–59 Report and Order*'').

[79] *See Channels 52–59 Report and Order,* 17 FCC Rcd at 1087–88, para. 172.

[80] *See* id.

[81] See *id,* 17 FCC Rcd at 1088, para. 173.

[82] *See* Letter from Aida Alvarez, Administrator, SBA, to Thomas Sugrue, Chief, WTB, FCC (Aug. 10, 1999) (''*Alvarez Letter 1999*'').

[83] *See* ''Lower 700 MHz Band Auction Closes,'' *Public Notice,* 17 FCC Rcd 17272 (WTB 2002).

[84] *See* Lower 700 MHz Band Auction Closes, *Public Notice,* 18 FCC Rcd 11873 (WTB 2003).

[85] *See id.*

[86] Service Rules for the 698–746, 747–762 and 777–792 MHz Band, WT Docket No. 06–150, *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems,* CC Docket No. 94–102, § 68.4(a) of the Commission's rules Governing Hearing Aid-Compatible Telephone, WT Docket No. 01–309, Biennial Regulatory Review—Amendment of parts 1, 22, 24, 27, and 90 to Streamline and Harmonize Various rules Affecting Wireless Radio Services, WT Docket No. 03–264, Former Nextel Communications, Inc. Upper 700 MHz Guard Band Licenses and Revisions to part 27 of the Commission's Rules, WT Docket No. 06–169, *Implementing a Nationwide, Broadband Interoperable Public Safety Network in the 700 MHz Band,* PS Docket No. 06–229, *Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State, and Local Public Safety Communications Requirements Through the Year 2010,* WT Docket No. 96–86, Second Report and Order, 22 FCC Rcd 15289 (2007) (''*700 MHz Second Report and Order*'').

[87] *See* Auction of 700 MHz Band Licenses Closes, *Public Notice,* 23 FCC Rcd 4572 (WTB 2008).

[88] *700 MHz Second Report and Order,* 22 FCC Rcd 15289.

[89] *See Auction of 700 MHz Band Licenses Closes,* Public Notice, 23 FCC Rcd 4572 (WTB 2008).

band, including size standards for ''small businesses'' and ''very small businesses'' for purposes of determining their eligibility for special provisions such as bidding credits.[90] A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years.[91] Additionally, a very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years.[92] SBA approval of these definitions is not required.[93] An auction of these licenses was conducted in 2000.[94] Of the 104 licenses auctioned, 96 licenses were won by nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of 700 MHz Guard Band licenses was held in 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.[95]

Specialized Mobile Radio. The Commission adopted small business size standards for the purpose of determining eligibility for bidding credits in auctions of Specialized Mobile Radio (SMR) geographic area licenses in the 800 MHz and 900 MHz bands. The Commission defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[96] The Commission defined a ''very small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $3 million for the preceding three years.[97] The SBA has approved these small business size standards for both the 800 MHz and 900 MHz SMR Service.[98] The first 900 MHz SMR auction was completed in 1996. Sixty bidders claiming that they qualified as small businesses under the $15 million size standard won 263 licenses in the 900 MHz SMR band. In 2004, the Commission held a second auction of 900 MHz SMR licenses and three winning bidders identifying themselves as very small businesses won 7 licenses.[99] The auction of 800 MHz SMR licenses for the upper 200 channels was conducted in 1997. Ten bidders claiming that they qualified as small or very small businesses under the $15 million size standard won 38 licenses for the upper 200 channels.[100] A second auction of 800 MHz SMR licenses was conducted in 2002 and included 23 BEA licenses. One bidder claiming small business status won five licenses.[101]

The auction of the 1,053 800 MHz SMR licenses for the General Category channels was conducted in 2000. Eleven bidders who won 108 licenses for the General Category channels in the 800 MHz SMR band qualified as small or very small businesses.[102] In an auction completed in 2000, a total of 2,800 Economic Area licenses in the lower 80 channels of the 800 MHz SMR service were awarded.[103] Of the 22 winning bidders, 19 claimed small or very small business status and won 129 licenses. Thus, combining all four auctions, 41 winning bidders for geographic licenses in the 800 MHz SMR band claimed to be small businesses.

In addition, there are numerous incumbent site-by-site SMR licensees and licensees with extended implementation authorizations in the 800 and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR pursuant to extended implementation authorizations, nor how many of these providers have annual revenues not exceeding $15 million. One firm has over $15 million in revenues. In addition, we do not know how many of these firms have 1500 or fewer employees.[104] We assume, for purposes of this analysis, that all of the remaining existing extended implementation authorizations are held by small entities, as that small business size standard is approved by the SBA.

220 MHz Radio Service—Phase I Licensees. The 220 MHz service has both Phase I and Phase II licenses. Phase I licensing was conducted by lotteries in 1992 and 1993. There are approximately 1,515 such non-nationwide licensees and four nationwide licensees currently authorized to operate in the 220 MHz band. The Commission has not developed a small business size standard for small entities specifically applicable to such incumbent 220 MHz Phase I licensees. To estimate the number of such licensees that are small businesses, the Commission applies the small business size standard under the SBA rules applicable. The SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.[105] For this service, the SBA uses the category of Wireless Telecommunications Carriers (except Satellite). Census data for 2007, which supersede data contained in the 2002 Census, show that there were 1,383 firms that operated that year.[106] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

220 MHz Radio Service—Phase II Licensees. The 220 MHz service has both Phase I and Phase II licenses. The Phase II 220 MHz service licenses are assigned by auction, where mutually exclusive applications are accepted. In the *220 MHz Third Report and Order,* the Commission adopted a small business size standard for defining ''small'' and ''very small'' businesses for purposes of determining their eligibility for special provisions such as bidding credits.[107] This small business standard indicates that a ''small business'' is an entity that, together with its affiliates

[90] *See Service Rules for the 746–764 MHz Bands, and Revisions to part 27 of the Commission's rules,* Second Report and Order, 15 FCC Rcd 5299 (2000) (''*700 MHz Guard Band Report and Order*'').

[91] *See 700 MHz Guard Band Report and Order,* 15 FCC Rcd at 5343, para. 108.

[92] *See id.*

[93] *See id.,* 15 FCC Rcd 5299, 5343, para. 108 n.246 (for the 746–764 MHz and 776–794 MHz bands, the Commission is exempt from 15 U.S.C. 632, which requires Federal agencies to obtain SBA approval before adopting small business size standards).

[94] *See* ''700 MHz Guard Bands Auction Closes: Winning Bidders Announced,'' *Public Notice,* 15 FCC Rcd 18026 (2000).

[95] *See* ''700 MHz Guard Bands Auction Closes: Winning Bidders Announced,'' *Public Notice,* 16 FCC Rcd 4590 (WTB 2001).

[96] 47 CFR 90.810, 90.814(b), 90.912.

[97] 47 CFR 90.810, 90.814(b), 90.912.

[98] *See Alvarez Letter 1999.*

[99] *See* 900 MHz Specialized Mobile Radio Service Spectrum Auction Closes: Winning Bidders Announced,'' *Public Notice,* 19 FCC Rcd. 3921 (WTB 2004).

[100] *See* ''Correction to Public Notice DA 96–586 'FCC Announces Winning Bidders in the Auction of 1020 Licenses to Provide 900 MHz SMR in Major Trading Areas,''' *Public Notice,* 18 FCC Rcd 18367 (WTB 1996).

[101] *See* ''Multi-Radio Service Auction Closes,'' *Public Notice,* 17 FCC Rcd 1446 (WTB 2002).

[102] *See* ''800 MHz Specialized Mobile Radio (SMR) Service General Category (851–854 MHz) and Upper Band (861–865 MHz) Auction Closes; Winning Bidders Announced,'' *Public Notice,* 15 FCC Rcd 17162 (2000).

[103] *See,* ''800 MHz SMR Service Lower 80 Channels Auction Closes; Winning Bidders Announced,'' *Public Notice,* 16 FCC Rcd 1736 (2000).

[104] *See generally* 13 CFR 121.201, NAICS code 517210.

[105] 13 CFR 121.201, NAICS code 517210 (2007 NAICS). The now-superseded, pre-2007 CFR citations were 13 CFR 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

[106] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

[107] *Amendment of Part 90 of the Commission's Rules to Provide For the Use of the 220–222 MHz Band by the Private Land Mobile Radio Service, Third Report and Order, 12 FCC Rcd 10943, 11068–70 paras. 291–295 (1997).*

and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years.[108] A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues that do not exceed $3 million for the preceding three years.[109] The SBA has approved these small size standards.[110] Auctions of Phase II licenses commenced on and closed in 1998.[111] In the first auction, 908 licenses were auctioned in three different-sized geographic areas: three nationwide licenses, 30 Regional Economic Area Group (EAG) Licenses, and 875 Economic Area (EA) Licenses. Of the 908 licenses auctioned, 693 were sold.[112] Thirty-nine small businesses won 373 licenses in the first 220 MHz auction. A second auction included 225 licenses: 216 EA licenses and 9 EAG licenses. Fourteen companies claiming small business status won 158 licenses.[113] A third auction included four licenses: 2 BEA licenses and 2 EAG licenses in the 220 MHz Service. No small or very small business won any of these licenses.[114] In 2007, the Commission conducted a fourth auction of the 220 MHz licenses, designated as Auction 72.[115] Auction 72, which offered 94 Phase II 220 MHz Service licenses, concluded in 2007.[116] In this auction, five winning bidders won a total of 76 licenses. Two winning bidders identified themselves as very small businesses won 56 of the 76 licenses. One of the winning bidders that identified themselves as a small business won 5 of the 76 licenses won.

Private Land Mobile Radio (''PLMR''). PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, we use the broad census category, Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.[117] The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. We note that PLMR licensees generally use the licensed facilities in support of other business activities, and therefore, it would also be helpful to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.[118]

As of March 2010, there were 424,162 PLMR licensees operating 921,909 transmitters in the PLMR bands below 512 MHz. We note that any entity engaged in a commercial activity is eligible to hold a PLMR license, and that any revised rules in this context could therefore potentially impact small entities covering a great variety of industries.

Fixed Microwave Services. Microwave services include common carrier,[119] private-operational fixed,[120] and broadcast auxiliary radio services.[121] They also include the Local Multipoint Distribution Service (''LMDS''),[122] the Digital Electronic Message Service (''DEMS''),[123] and the 24 GHz Service,[124] where licensees can choose between common carrier and non-common carrier status.[125] The Commission has not yet defined a small business with respect to microwave services. For purposes of this IRFA, the Commission will use the SBA's definition applicable to Wireless Telecommunications Carriers (except satellite)—*i.e.,* an entity with no more than 1,500 persons is considered small.[126] For the category of Wireless Telecommunications Carriers (except Satellite), Census data for 2007 shows that there were 1,383 firms that operated that year.[127] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the number of firms does not necessarily track the number of licensees. The Commission estimates that virtually all of the Fixed Microwave licensees (excluding broadcast auxiliary licensees) would qualify as small entities under the SBA definition.

39 GHz Service. The Commission adopted small business size standards for 39 GHz licenses. A ''small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million in the preceding three years.[128] A ''very small business'' is defined as an entity that, together with its affiliates and controlling principals, has average gross revenues of not more than $15 million for the preceding three years.[129] The SBA has approved these small business size standards.[130] In 2000, the Commission conducted an auction of 2,173 39 GHz licenses. A total of 18 bidders who claimed small or very small business status won 849 licenses.

Local Multipoint Distribution Service. Local Multipoint Distribution Service (''LMDS'') is a fixed broadband point-to-multipoint microwave service that provides for two-way video

[108] *Id.* at 11068 para. 291.

[109] *Id.*

[110] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated January 6, 1998 (*Alvarez to Phythyon Letter 1998*).

[111] *See generally 220 MHz Service Auction Closes,* Public Notice, 14 FCC Rcd 605 (WTB 1998).

[112] *See FCC Announces It is Prepared to Grant 654 Phase II 220 MHz Licenses After Final Payment is Made,* Public Notice, 14 FCC Rcd 1085 (WTB 1999).

[113] See Phase II 220 MHz Service Spectrum Auction Closes, Public Notice, 14 FCC Rcd 11218 (WTB 1999).

[114] *See Multi-Radio Service Auction Closes,* Public Notice, 17 FCC Rcd 1446 (WTB 2002).

[115] *See* ''Auction of Phase II 220 MHz Service Spectrum Scheduled for June 20, 2007, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction 72, *Public Notice,* 22 FCC Rcd 3404 (2007).

[116] *See Auction of Phase II 220 MHz Service Spectrum Licenses Closes, Winning Bidders Announced for Auction 72, Down Payments due July 18, 2007, FCC Forms 601 and 602 due July 18, 2007, Final Payments due August 1, 2007, Ten-Day Petition to Deny Period,* Public Notice, 22 FCC Rcd 11573 (2007).

[117] *See* 13 CFR 121.201, NAICS code 517210.

[118] *See generally* 13 CFR 121.201.

[119] See 47 CFR part 101, subparts C and I.

[120] *See id.* subparts C and H.

[121] Auxiliary Microwave Service is governed by part 74 of Title 47 of the Commission's rules. *See* 47 CFR part 74. Available to licensees of broadcast stations and to broadcast and cable network entities, broadcast auxiliary microwave stations are used for relaying broadcast television signals from the studio to the transmitter, or between two points such as a main studio and an auxiliary studio. The service also includes mobile TV pickups, which relay signals from a remote location back to the studio.

[122] *See* 47 CFR part 101, subpart L.

[123] *See id.* Subpart G.

[124] *See id.*

[125] *See* 47 CFR 101.533, 101.1017.

[126] 13 CFR 121.201, NAICS code 517210.

[127] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

[128] *See Amendment of the Commission's Rules Regarding the 37.0–38.6 GHz and 38.6–40.0 GHz Bands,* ET Docket No. 95–183, Report and Order, 12 FCC Rcd 18600 (1997).

[129] *Id.*

[130] *See* Letter from Aida Alvarez, Administrator, SBA, to Kathleen O'Brien Ham, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb. 4, 1998); *see* Letter from Hector Barreto, Administrator, SBA, to Margaret Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Jan. 18, 2002).

telecommunications.[131] The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous years.[132] An additional small business size standard for ''very small business'' was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three years.[133] The SBA has approved these small business size standards in the context of LMDS auctions.[134] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. In 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

218–219 MHz Service. The first auction of 218–219 MHz Service (previously referred to as the Interactive and Video Data Service or IVDS) licenses resulted in 170 entities winning licenses for 594 Metropolitan Statistical Areas (''MSAs'').[135] Of the 594 licenses, 557 were won by 167 entities qualifying as a small business. For that auction, the Commission defined a small business as an entity that, together with its affiliates, has no more than a $6 million net worth and, after federal income taxes (excluding any carry over losses), has no more than $2 million in annual profits each year for the previous two years.[136] In the *218–219 MHz Report and Order and Memorandum Opinion and Order,* the Commission revised its small business size standards for the 218–219 MHz Service and defined a small business as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and their affiliates, has average annual gross revenues not exceeding $15 million for the preceding three years.[137] The Commission defined a ''very small business'' as an entity that, together with its affiliates and persons or entities that hold interests in such an entity and its affiliates, has average annual gross revenues not exceeding $3 million for the preceding three years.[138] The SBA has approved these definitions.[139]

Location and Monitoring Service (''LMS''). Multilateration LMS systems use non-voice radio techniques to determine the location and status of mobile radio units. For auctions of LMS licenses, the Commission has defined a ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million.[140] A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $3 million.[141] These definitions have been approved by the SBA.[142] An auction of LMS licenses was conducted in 1999. Of the 528 licenses auctioned, 289 licenses were sold to four small businesses.

Rural Radiotelephone Service. The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service.[143] A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System (''BETRS'').[144] For purposes of its analysis of the Rural Radiotelephone Service, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite),'' which is 1,500 or fewer employees.[145] Census data for 2007 shows that there were 1,383 firms that operated that year.[146] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms in the Rural Radiotelephone Service can be considered small.

Air-Ground Radiotelephone Service.[147] The Commission has previously used the SBA's small business definition applicable to Wireless Telecommunications Carriers (except Satellite), *i.e.,* an entity employing no more than 1,500 persons.[148] There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and under that definition, we estimate that almost all of them qualify as small entities under the SBA definition. For purposes of assigning Air-Ground Radiotelephone Service licenses through competitive bidding, the Commission has defined ''small business'' as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $40 million.[149] A ''very small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the preceding three years not exceeding $15 million.[150] These definitions were approved by the SBA.[151] In 2006, the Commission completed an auction of nationwide commercial Air-Ground Radiotelephone Service licenses in the 800 MHz band (Auction 65). The auction closed with two winning bidders winning two Air-Ground Radiotelephone Services licenses. Neither of the winning bidders claimed small business status.

Aviation and Marine Radio Services. Small businesses in the aviation and marine radio services use a very high frequency (''VHF'') marine or aircraft radio and, as appropriate, an emergency position-indicating radio beacon (and/or radar) or an emergency locator

[131] *See* Rulemaking to Amend parts 1, 2, 21, 25, of the Commission's rules to Redesignate the 27.5–29.5 GHz Frequency Band, Reallocate the 29.5–30.5 Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services, *CC Docket No. 92–297, Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rule Making, 12 FCC Rcd 12545, 12689–90*, para. 348 (1997) (''*LMDS Second Report and Order*'').

[132] *See LMDS Second Report and Order, 12 FCC Rcd at 12689–90*, para. 348.

[133] *See id.*

[134] *See Alvarez to Phythyon Letter 1998.*

[135] See ''*Interactive Video and Data Service (IVDS) Applications Accepted for Filing,''* Public Notice, 9 FCC Rcd 6227 (1994).

[136] *Implementation of Section 309(j) of the Communications Act—Competitive Bidding,* Fourth Report and Order, 9 FCC Rcd 2330 (1994).

[137] *Amendment of part 95 of the Commission's rules to Provide Regulatory Flexibility in the 218–219 MHz Service,* Report and Order and Memorandum Opinion and Order, 15 FCC Rcd 1497 (1999).

[138] *Id.*

[139] *See Alvarez to Phythyon Letter 1998.*

[140] *Amendment of part 90 of the Commission's rules to Adopt Regulations for Automatic Vehicle Monitoring Systems,* Second Report and Order, 13 FCC Rcd 15182, 15192, para. 20 (1998) (''*Automatic Vehicle Monitoring Systems Second Report and Order*''); *see also* 47 CFR 90.1103.

[141] *Automatic Vehicle Monitoring Systems Second Report and Order,* 13 FCC Rcd at 15192, para. 20; *see* also 47 CFR 90.1103.

[142] *See Alvarez Letter 1998.*

[143] The service is defined in § 22.99 of the Commission's rules.

[144] BETRS is defined in §§ 22.757 and 22.759 of the Commission's rules.

[145] 13 CFR 121.201, NAICS code 517210.

[146] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

[147] The service is defined in § 22.99 of the Commission's rules.

[148] 13 CFR 121.201, NAICS codes 517210.

[149] *Amendment of part 22 of the Commission's Rules to Benefit the Consumers of Air-Ground Telecommunications Services, Biennial Regulatory Review—Amendment of parts 1, 22, and 90 of the Commission's Rules, Amendment of parts 1 and 22 of the Commission's rules to Adopt Competitive Bidding Rules for Commercial and General Aviation Air-Ground Radiotelephone Service,* WT Docket Nos. 03–103 and 05–42, Order on Reconsideration and Report and Order, 20 FCC Rcd 19663, paras. 28–42 (2005).

[150] *Id.*

[151] *See* Letter from Hector V. Barreto, Administrator, SBA, to Gary D. Michaels, Deputy Chief, Auctions and Spectrum Access Division, WTB, FCC (Sept. 19, 2005).

transmitter. The Commission has not developed a small business size standard specifically applicable to these small businesses. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except satellite),'' which is 1,500 or fewer employees.[152] Census data for 2007 shows that there were 1,383 firms that operated that year.[153] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

Offshore Radiotelephone Service. This service operates on several UHF television broadcast channels that are not used for television broadcasting in the coastal areas of states bordering the Gulf of Mexico.[154] There are presently approximately 55 licensees in this service. The Commission is unable to estimate at this time the number of licensees that would qualify as small under the SBA's small business size standard for the category of Wireless Telecommunications Carriers (except Satellite) under that standard.[155] Under that SBA small business size standard, a business is small if it has 1,500 or fewer employees.[156] Census data for 2007 shows that there were 1,383 firms that operated that year.[157] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small.

Multiple Address Systems (''MAS''). Entities using MAS spectrum, in general, fall into two categories: (1) Those using the spectrum for profit-based uses, and (2) those using the spectrum for private internal uses. The Commission defines a small business for MAS licenses as an entity that has average gross revenues of less than $15 million in the preceding three years.[158] A very small business is defined as an entity that, together with its affiliates, has average gross revenues of not more than $3 million for the preceding three years.[159] The SBA has approved these definitions.[160] The majority of these entities will most likely be licensed in bands where the Commission has implemented a geographic area licensing approach that would require the use of competitive bidding procedures to resolve mutually exclusive applications. The Commission's licensing database indicates that, as of March 5, 2010, there were over 11,500 MAS station authorizations. In 2001, an auction of 5,104 MAS licenses in 176 EAs was conducted.[161] Seven winning bidders claimed status as small or very small businesses and won 611 licenses. In 2005, the Commission completed an auction (Auction 59) of 4,226 MAS licenses in the Fixed Microwave Services from the 928/959 and 932/941 MHz bands. Twenty-six winning bidders won a total of 2,323 licenses. Of the 26 winning bidders in this auction, five claimed small business status and won 1,891 licenses.

With respect to entities that use, or seek to use, MAS spectrum to accommodate internal communications needs, we note that MAS serves an essential role in a range of industrial, safety, business, and land transportation activities. MAS radios are used by companies of all sizes, operating in virtually all U.S. business categories, and by all types of public safety entities. For the majority of private internal users, the small business size standard developed by the SBA would be more appropriate. The applicable size standard in this instance appears to be that of Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons.[162] The Commission's licensing database indicates that, as of January 20, 1999, of the 8,670 total MAS station authorizations, 8,410 authorizations were for private radio service, and of these, 1,433 were for private land mobile radio service.

1.4 GHz Band Licensees. The Commission conducted an auction of 64 1.4 GHz band licenses in the paired 1392–1395 MHz and 1432–1435 MHz bands, and in the unpaired 1390–1392 MHz band in 2007.[163] For these licenses, the Commission defined ''small business'' as an entity that, together with its affiliates and controlling interests, had average gross revenues not exceeding $40 million for the preceding three years, and a ''very small business'' as an entity that, together with its affiliates and controlling interests, has had average annual gross revenues not exceeding $15 million for the preceding three years.[164] Neither of the two winning bidders claimed small business status.[165]

Incumbent 24 GHz Licensees. This analysis may affect incumbent licensees who were relocated to the 24 GHz band from the 18 GHz band, and applicants who wish to provide services in the 24 GHz band. For this service, the Commission uses the SBA small business size standard for the category ''Wireless Telecommunications Carriers (except satellite),'' which is 1,500 or fewer employees.[166] To gauge small business prevalence for these cable services we must, however, use the most current census data. Census data for 2007 shows that there were 1,383 firms that operated that year.[167] Of those 1,383, 1,368 had fewer than 100 employees, and 15 firms had more than 100 employees. Thus under this category and the associated small business size standard, the majority of firms can be considered small. The Commission notes that the Census' use of the classifications ''firms'' does not track the number of ''licenses''. The Commission believes that there are only two licensees in the 24 GHz band that were relocated from the 18 GHz band, Teligent [168] and TRW, Inc. It is our understanding that Teligent and its related companies have less than 1,500 employees, though this may change in the future. TRW is not a small entity. Thus, only one incumbent licensee in

[152] 13 CFR 121.201, NAICS code 517210.

[153] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

[154] This service is governed by subpart I of part 22 of the Commission's rules. *See* 47 CFR 22.1001–22.1037.

[155] 13 CFR 121.201, NAICS code 517210.

[156] *Id.*

[157] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

[158] *See Amendment of the Commission's rules Regarding Multiple Address Systems,* Report and Order, 15 FCC Rcd 11956, 12008, para. 123 (2000).

[159] *Id.*

[160] *See Alvarez Letter 1999.*

[161] *See* ''*Multiple Address Systems Spectrum Auction Closes,*'' Public Notice, 16 FCC Rcd 21011 (2001).

[162] *See* 13 CFR 121.201, NAICS code 517210.

[163] *See* ''*Auction of 1.4 GHz Band Licenses Scheduled for February 7, 2007,*'' Public Notice, 21 FCC Rcd 12393 (WTB 2006); ''*Auction of 1.4 GHz Band Licenses Closes; Winning Bidders Announced for Auction No. 69,*'' Public Notice, 22 FCC Rcd 4714 (2007) (''Auction No. 69 Closing PN'').

[164] *Auction No. 69 Closing PN,* Attachment C.

[165] See Auction No. 69 Closing PN.

[166] 13 CFR 121.201, NAICS code 517210.

[167] U.S. Census Bureau, 2007 Economic Census, Sector 51, 2007 NAICS code 517210 (rel. Oct. 20, 2009), *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-fds_name=EC0700A1&-_skip=700&-ds_name=EC0751SSSZ5&-_lang=en.*

[168] Teligent acquired the DEMS licenses of FirstMark, the only licensee other than TRW in the 24 GHz band whose license has been modified to require relocation to the 24 GHz band.

the 24 GHz band is a small business entity.

Future 24 GHz Licensees. With respect to new applicants for licenses in the 24 GHz band, for the purpose of determining eligibility for bidding credits, the Commission established three small business definitions. An ''entrepreneur'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $40 million.[169] A ''small business'' is defined as an entity that, together with controlling interests and affiliates, has average annual gross revenues for the three preceding years not exceeding $15 million.[170] A ''very small business'' in the 24 GHz band is defined as an entity that, together with controlling interests and affiliates, has average gross revenues not exceeding $3 million for the preceding three years.[171] The SBA has approved these small business size standards.[172] In a 2004 auction of 24 GHz licenses, three winning bidders won seven licenses.[173] Two of the winning bidders were very small businesses that won five licenses.

Broadband Radio Service and Educational Broadband Service. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service (''MDS'') and Multichannel Multipoint Distribution Service (''MMDS'') systems, and ''wireless cable,'' transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service (''BRS'') and Educational Broadband Service (''EBS'') (previously referred to as the Instructional Television Fixed Service (''ITFS'').[174] In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three years.[175] The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (''BTAs''). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities.[176] After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas.[177] The Commission offered three levels of bidding credits: (i) A bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid.[178] Auction 86 concluded in 2009 with the sale of 61 licenses.[179] Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities.[180] Thus, we estimate that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: ''This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.'' [181] For these services, the Commission uses the SBA small business size standard for the category ''Wireless Telecommunications Carriers (except satellite),'' which is 1,500 or fewer employees.[182] To gauge small business prevalence for these cable services we must, however, use the most current census data. According to Census Bureau data for 2007, there were a total of 955 firms in this previous category that operated for the entire year.[183] Of this total, 939 firms employed 999 or fewer employees, and 16 firms employed 1,000 employees or more.[184] Thus, the majority of these firms can be considered small.

Television Broadcasting. This Economic Census category ''comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the

[169] *Amendments to parts 1, 2, 87 and 101 of the Commission's rules To License Fixed Services at 24 GHz,* Report and Order, 15 FCC Rcd 16934, 16967 para. 77 (2000) (''24 GHz Report and Order''); *see also* 47 CFR 101.538(a)(3).

[170] *24 GHz Report and Order,* 15 FCC Rcd at 16967 para. 77 ; *see also* 47 CFR 101.538(a)(2).

[171] 24 GHz Report and Order, 15 FCC Rcd at 16967 para. 77; *see also* 47 CFR 101.538(a)(1).

[172] *See* Letter to Margaret W. Wiener, Deputy Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from Gary M. Jackson, Assistant Administrator, SBA (July 28, 2000).

[173] Auction of 24 GHz Service Spectrum Auction Closes, Winning Bidders Announced for Auction 56, Down Payments Due August 16, 2004, Final Payments Due August 30, 2004, Ten-Day Petition to Deny Period, Public Notice, 19 FCC Rcd 14738 (2004).

[174] *Amendment of parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act—Competitive Bidding,* MM Docket No. 94–131, PP Docket No. 93–253, Report and Order, 10 FCC Rcd 9589, 9593 para 7 (1995).

[175] 47 CFR 21.961(b)(1).

[176] 47 U.S.C. 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of section 309(j) of the Communications Act of 1934, 47 U.S.C. 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standard of 1500 or fewer employees.

[177] *Auction of Broadband Radio Service (BRS) Licenses, Scheduled for October 27, 2009, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 86,* Public Notice, 24 FCC Rcd 8277 (2009).

[178] *Id.* at 8296.

[179] *Auction of Broadband Radio Service Licenses Closes, Winning Bidders Announced for Auction 86, Down Payments Due November 23, 2009, Final Payments Due December 8, 2009, Ten-Day Petition to Deny Period,* Public Notice, 24 FCC Rcd 13572 (2009).

[180] The term ''small entity'' within SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. 601(4)–(6). We do not collect annual revenue data on EBS licensees.

[181] U.S. Census Bureau, 2007 NAICS Definitions, 517110 Wired Telecommunications Carriers, (partial definition), *www.census.gov/naics/2007/def/ND517110.HTM#N517110.*

[182] 13 CFR 121.201, NAICS code 517210.

[183] U.S. Census Bureau, 2007 Economic Census, Subject Series: Information, Table 5, Employment Size of Firms for the United States: 2007, NAICS code 5171102 (issued November 2010).

[184] *Id.*

public.'' [185] The SBA has created the following small business size standard for Television Broadcasting firms: Those having $14 million or less in annual receipts.[186] The Commission has estimated the number of licensed commercial television stations to be 1,387.[187] In addition, according to Commission staff review of the BIA Advisory Services, LLC's *Media Access Pro Television Database* on March 28, 2012, about 950 of an estimated 1,300 commercial television stations (or approximately 73 percent) had revenues of $14 million or less.[188] We therefore estimate that the majority of commercial television broadcasters are small entities.

We note, however, that in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations [189] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. In addition, an element of the definition of ''small business'' is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply does not exclude any television station from the definition of a small business on this basis and is therefore possibly over-inclusive to that extent.

In addition, the Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 396.[190] These stations are non-profit, and therefore considered to be small entities.[191]

In addition, there are also 2,528 low power television stations, including Class A stations (LPTV).[192] Given the nature of these services, we will presume that all LPTV licensees qualify as small entities under the above SBA small business size standard.

Radio Broadcasting. This Economic Census category ''comprises establishments primarily engaged in broadcasting aural programs by radio to the public. Programming may originate in their own studio, from an affiliated network, or from external sources.'' [193] The SBA has established a small business size standard for this category, which is: Such firms having $7 million or less in annual receipts.[194] According to Commission staff review of BIA Advisory Services, LLC's *Media Access Pro Radio Database* on March 28, 2012, about 10,759 (97%) of 11,102 commercial radio stations had revenues of $7 million or less. Therefore, the majority of such entities are small entities.

We note, however, that in assessing whether a business concern qualifies as small under the above size standard, business affiliations must be included.[195] In addition, to be determined to be a ''small business,'' the entity may not be dominant in its field of operation.[196] We note that it is difficult at times to assess these criteria in the context of media entities, and our estimate of small businesses may therefore be over-inclusive.

Auxiliary, Special Broadcast and Other Program Distribution Services. This service involves a variety of transmitters, generally used to relay broadcast programming to the public (through translator and booster stations) or within the program distribution chain (from a remote news gathering unit back to the station). The Commission has not developed a definition of small entities applicable to broadcast auxiliary licensees. The applicable definitions of small entities are those, noted previously, under the SBA rules applicable to radio broadcasting stations and television broadcasting stations.[197]

The Commission estimates that there are approximately 6,099 FM translators and boosters.[198] The Commission does not collect financial information on any broadcast facility, and the Department of Commerce does not collect financial information on these auxiliary broadcast facilities. We believe that most, if not all, of these auxiliary facilities could be classified as small businesses by themselves. We also recognize that most commercial translators and boosters are owned by a parent station which, in some cases, would be covered by the revenue definition of small business entity discussed above. These stations would likely have annual revenues that exceed the SBA maximum to be designated as a small business ($7.0 million for a radio station or $14.0 million for a TV station). Furthermore, they do not meet the Small Business Act's definition of a ''small business concern'' because they are not independently owned and operated.[199]

Multichannel Video Distribution and Data Service. MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defines a very small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years.[200] These definitions were approved by the SBA.[201] On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten

[185] U.S. Census Bureau, 2007 NAICS Definitions, ''515120 Television Broadcasting'' (partial definition); *http://www.census.gov/naics/2007/def/ND515120.HTM#N515120.*

[186] 13 CFR 121.201, NAICS code 515120 (updated for inflation in 2010).

[187] *See FCC News Release,* ''Broadcast Station Totals as of December 31, 2011,'' dated January 6, 2012; *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC–311837A1.pdf.*

[188] We recognize that BIA's estimate differs slightly from the FCC total given *supra.*

[189] ''[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.'' 13 CFR 21.103(a)(1).

[190] *See FCC News Release,* ''Broadcast Station Totals as of December 31, 2011,'' dated January 6, 2012; *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC–311837A1.pdf.*

[191] *See generally* 5 U.S.C. 601(4), (6).

[192] See *FCC News Release,* ''Broadcast Station Totals as of December 31, 2011,'' dated January 6, 2012; *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC–311837A1.pdf.*

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

[194] 13 CFR 121.201, NAICS code 515112 (updated for inflation in 2010).

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

[196] 13 CFR 121.102(b) (an SBA regulation).

[197] 13 CFR 121.201, NAICS codes 515112 and 515120.

[198] *See FCC News Release,* ''Broadcast Station Totals as of December 31, 2011,'' dated January 6, 2012; *http://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0106/DOC–311837A1.pdf.*

[199] *See* 15 U.S.C. 632.

[200] *Amendment of parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range; Amendment of the Commission's rules to Authorize Subsidiary Terrestrial Use of the 12.2–12.7 GHz Band by Direct Broadcast Satellite Licenses and their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to provide A Fixed Service in the 12.2–12.7 GHz Band,* ET Docket No. 98–206, Memorandum Opinion and Order and Second Report and Order, 17 FCC Rcd 9614, 9711, para. 252 (2002).

[201] *See* Letter from Hector V. Barreto, Administrator, U.S. Small Business Administration, to Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, WTB, FCC (Feb.13, 2002).

winning bidders won a total of 192 MVDDS licenses.[202] Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.[203]

Amateur Radio Service. These licensees are held by individuals in a noncommercial capacity; these licensees are not small entities.

Personal Radio Services. Personal radio services provide short-range, low power radio for personal communications, radio signaling, and business communications not provided for in other services. The Personal Radio Services include spectrum licensed under part 95 of our rules.[204] These services include Citizen Band Radio Service (''CB''), General Mobile Radio Service (''GMRS''), Radio Control Radio Service (''R/C''), Family Radio Service (''FRS''), Wireless Medical Telemetry Service (''WMTS''), Medical Implant Communications Service (''MICS''), Low Power Radio Service (''LPRS''), and Multi-Use Radio Service (''MURS'').[205] There are a variety of methods used to license the spectrum in these rule parts, from licensing by rule, to conditioning operation on successful completion of a required test, to site-based licensing, to geographic area licensing. Under the RFA, the Commission is required to make a determination of which small entities are directly affected by the rules being proposed. Since all such entities are wireless, we apply the definition of Wireless Telecommunications Carriers (except Satellite), pursuant to which a small entity is defined as employing 1,500 or fewer persons.[206] Many of the licensees in these services are individuals, and thus are not small entities. In addition, due to the mostly unlicensed and shared nature of the spectrum utilized in many of these services, the Commission lacks direct information upon which to base an estimation of the number of small entities under an SBA definition that might be directly affected by our proposed actions.

Public Safety Radio Services. Public Safety radio services include police, fire, local government, forestry conservation, highway maintenance, and emergency medical services.[207] There are a total of approximately 127,540 licensees in these services. Governmental entities [208] as well as private businesses comprise the licensees for these services. All governmental entities with populations of less than 50,000 fall within the definition of a small entity.[209]

IMTS Resale Carriers. Providers of IMTS resale services are common carriers that purchase IMTS from other carriers and resell it to their own customers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[210] Census data for 2007 show that 1,523 firms provided resale services during that year. Of that number, 1,522 operated with fewer than 1000 employees and one operated with more than 1,000.[211] Thus under this category and the associated small business size standard, the majority of these local resellers can be considered small entities. According to Commission data, 213 carriers have reported that they are engaged in the provision of local resale services.[212] Of these, an estimated 211 have 1,500 or fewer employees and two have more than 1,500 employees.[213] Consequently, the Commission estimates that the majority of IMTS resellers are small entities that may be affected by our proposed actions.

Wireless Carriers and Service Providers. Included among the providers of IMTS resale are a number of wireless carriers that also provide wireless telephony services domestically. The Commission classifies these entities as providers of Commercial Mobile Radio Services (CMRS). At present, most, if not all, providers of CMRS that offer IMTS provide such service by purchasing IMTS from other carriers to resell it to their customers. The Commission has not developed a size standard specifically for CMRS providers that offer resale IMTS. Such entities would fall within the larger category of wireless carriers and service providers. For those services subject to auctions, the Commission notes that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

86. The proposals being made in this *Further Notice,* may require additional analysis and mitigation activities regarding compliance with our RF exposure limits for certain facilities, operations and transmitters, such as some wireless base stations, particularly those on rooftops, and some antennas at multiple transmitter sites. In other cases, current analytical requirements are being relaxed.

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

87. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) The establishment of

[202] *See* ''*Multichannel Video Distribution and Data Service Auction Closes,*'' Public Notice, 19 FCC Rcd 1834 (2004).

[203] See ''Auction of Multichannel Video Distribution and Data Service Licenses Closes; Winning Bidders Announced for Auction No. 63,'' Public Notice, 20 FCC Rcd 19807 (2005).

[204] 47 CFR part 90.

[205] The Citizens Band Radio Service, General Mobile Radio Service, Radio Control Radio Service, Family Radio Service, Wireless Medical Telemetry Service, Medical Implant Communications Service, Low Power Radio Service, and Multi-Use Radio Service are governed by subpart D, subpart A, subpart C, subpart B, subpart H, subpart I, subpart G, and subpart J, respectively, of part 95 of the Commission's rules. *See generally* 47 CFR part 95.

[206] 13 CFR 121.201, NAICS Code 517210.

[207] With the exception of the special emergency service, these services are governed by subpart B of part 90 of the Commission's rules, 47 CFR 90.15–90.27. The police service includes approximately 27,000 licensees that serve state, county, and municipal enforcement through telephony (voice), telegraphy (code) and teletype and facsimile (printed material). The fire radio service includes approximately 23,000 licensees comprised of private volunteer or professional fire companies as well as units under governmental control. The local government service is presently comprised of approximately 41,000 licensees that are state, county, or municipal entities that use the radio for official purposes not covered by other public safety services. There are approximately 7,000 licensees within the forestry service which is comprised of licensees from state departments of conservation and private forest organizations who set up communications networks among fire lookout towers and ground crews. The approximately 9,000 state and local governments are licensed for highway maintenance service to provide emergency and routine communications to aid other public safety services to keep main roads safe for vehicular traffic. The approximately 1,000 licensees in the Emergency Medical Radio Service (''EMRS'') use the 39 channels allocated to this service for emergency medical service communications related to the delivery of emergency medical treatment. 47 CFR 90.15–90.27. The approximately 20,000 licensees in the special emergency service include medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated areas, communications standby facilities, and emergency repair of public communications facilities. 47 CFR 90.33–90.55.

[208] 47 CFR 1.1162.

[209] 5 U.S.C. 601(5).

[210] 13 CFR 121.201, NAICS code 517911.

[211] *http://factfinder.census.gov/servlet/IBQTable?_bm=y&-geo_id=&-_skip=800&-ds_name=EC0751SSSZ5&-_lang=en.*

[212] *See Trends in Telephone Service,* at tbl. 5.3.

[213] *Id.*

differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[214] In this proceeding, our proposals are consistent with (2), in that our goal is making our RF rules more consistent and clarifying certain areas that have created confusion in the past. In addition, due to our revisions in our policy on categorical exclusions, we are providing exemptions from routine RF evaluation for many small entities that should reduce the overall impact on small entities (see number 4 above).

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

88. None.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Proposed Rules

For the reasons set forth in the preamble the Federal Communications Commission proposes to amend 47 CFR parts 1, 2, 15, 24, 25, 27, 73, 90, 95, 97, and 101 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 15 U.S.C. 79 *et seq.;* 47 U.S.C. 151, 154(i), 154(j), 155, 157, 225, 227, 303(r), and 309, Cable Landing License Act of 1921, 47 U.S.C. 35–39, and the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112–96.

■ 2. Section 1.1307 is amended by revising paragraph (b) to read as follows:

§ 1.1307 Actions that may have a significant environmental effect, for which Environmental Assessments (EAs) must be prepared.

* * * * *

(b) In addition to the actions listed in paragraph (a) of this section, Commission actions granting or modifying construction permits, licenses or renewals thereof, temporary authorities, equipment authorizations, or any other authorizations for radiofrequency (RF) sources require the preparation of an Environmental Assessment (EA) if those RF sources would cause human exposure to levels of RF radiation in excess of the limits in § 1.1310 of this chapter. Applications to the Commission for construction permits, licenses or renewals thereof, temporary authorities, equipment authorizations, or any other authorizations requesting either approval or modification of RF sources must contain a statement confirming compliance by RF evaluation with the limits in § 1.1310 of this chapter unless those RF sources are exempt from such RF evaluation, as discussed below. Technical information showing the basis for compliance with the limits in § 1.1310 of this chapter, either by RF evaluation or exemption, must be submitted to the Commission upon request. Notwithstanding the above, in the event that RF sources cause human exposure to levels of RF radiation in excess of the limits in § 1.1310 of this chapter, such RF evaluations and exemptions are not deemed sufficient to show that there is no significant effect on the quality of the human environment or that the RF sources are categorically excluded from environmental processing.

(1) Evaluation of compliance with the exposure limits in § 1.1310 of this chapter is required only for RF sources not exempt from such evaluation. Evaluation of compliance with the exposure limits may be based on either computation or measurement in accordance with § 1.1310 of this chapter. Exemption from evaluation may be based on frequency, power, and separation distance. However, all single RF sources having less than an available maximum time-averaged power of 1 mW are exempt from evaluation, as specified in paragraph (b)(1)(iii) of this section. The ''available maximum time-averaged power'' for a fixed RF source is the maximum available power as averaged over any 30 minute time period, and for a mobile or portable RF source is the maximum available power as averaged over a period inherent from device transmission characteristics. Evaluation of compliance with the exposure limits in § 1.1310 of this chapter is necessary for single fixed, mobile, or portable RF sources above 1 mW and having an ERP greater than listed in Table 1 specified in paragraph (b)(1)(i) of this section or single fixed, mobile, or portable RF sources greater than the threshold P_{th} for separation distances between 0.5 cm and 20 cm (inclusive) or ERP_{20cm} for separation distances of at least 20 cm up to 40 cm as listed in paragraph (b)(1)(ii) of this section. Mobile devices, as defined in § 2.1091(b) of this chapter, and portable devices, as defined in § 2.1093(b) of this chapter, with multiple RF sources shall refer to §§ 2.1091(c) and 2.1093(c), respectively, for relevant exemption criteria. For the purposes of this section, a fixed RF source is defined as one that is physically secured at one location, even temporarily, and is not able to be easily moved to another location.

(i) Evaluation of compliance with the exposure limits in § 1.1310 of this chapter, and preparation of an EA if the limits are exceeded, is necessary for single RF sources either above an available maximum time-averaged power of 1 mW or above the ERP listed in Table 1 below, whichever is greater. The ERP, defined as the product of the maximum antenna gain and the maximum delivered time-averaged power summed over all polarizations, shall be used for comparison with the value calculated from the applicable formula in Table 1, where the term ''maximum antenna gain'' is the largest far-field total power gain relative to a dipole in any direction for all transverse polarization components and the term ''delivered maximum time-averaged power'' is the largest net power delivered or supplied to the antenna as averaged over any 30 minute time period for fixed sources and as averaged over a period inherent from device transmission characteristics for mobile and portable sources. The term ''separation distance,'' R in Table 1, is defined as the minimum distance in any direction from any part of the radiating structure of a transmitting antenna or antenna array to the body of a nearby person.

[214] 5 U.S.C. 603(c).

TABLE 1—SINGLE RF SOURCES SUBJECT TO ROUTINE ENVIRONMENTAL EVALUATION

Transmitter frequency (MHz)	Threshold ERP (watts)
Regardless of ERP, evaluation is required if the separation distance R is less than $\lambda/2\pi$ from the radiating structure, where λ is the free-space operating wavelength, unless the available maximum time-averaged power is less than one milliwatt. In addition, evaluation is required if the ERP in watts is greater than the value given by the formula below for the appropriate frequency, f, in MHz at the separation distance, R, in meters.	
0.3–1.34	ERP ≥ 1,920 R^2
1.34–30	ERP ≥ 3,450 R^2/f^2
30–300	ERP ≥ 3.83 R^2
300–1,500	ERP ≥ 0.0128 R^2f
1,500–100,000	ERP ≥ 19.2R^2

(ii) Evaluation of compliance with the exposure limits in § 1.1310 of this chapter is necessary for single RF sources not exempted by paragraph (b)(1)(i) of this section if either its available maximum time-averaged power or effective radiated power (ERP) is greater than the threshold P_{th} listed in the formula below, which shall only be used at distances from 0.5 to 20 centimeters and at frequencies from 0.3 to 6 GHz. For distances from 20 to 40 centimeters at frequencies from 0.3 to 6 GHz, evaluation of compliance with the exposure limits in § 1.1310 of this chapter is necessary if the ERP is greater than ERP_{20cm} in the formula below. If the ERP of a single RF source at distances from 0.5 to 40 centimeters and at frequencies from 0.3 to 6 GHz is not easily obtained, then the available maximum time-averaged power may be used (*i.e.,* without consideration of ERP) in comparison with the formula below only if the device antenna(s) or radiating structure(s) do not exceed the electrical length of $\lambda/4$.

P_{th} (mW) = ERP_{20cm} $(d/20\ cM)^x$

Where

$$x = -\log_{10}\left(\frac{60}{ERP_{20cm}\sqrt{f}}\right) \text{ and } f \text{ is in GHz;}$$

$$ERP_{20cm}\ (\text{mW}) = \begin{cases} 2040f & 0.3\ \text{GHz} \le f < 1.5\ \text{GHz} \\ 3060 & 1.5\ \text{GHz} \le f \le 6\ \text{GHz} \end{cases}$$

d = the minimum separation distance in any direction from any part of the device antenna(s) or radiating structure(s) to the body of the device user.

(iii) In order for the 1 mW exemption criterion in paragraph (b)(1) of this section to apply, a separation distance of two centimeters is required between any portion of a radiating structure operating at less than 1 mW and the nearest portion of any other radiating structure in the same device.

(iv) A routine RF evaluation of compliance with the exposure limits in § 1.1310 of this chapter is necessary for single fixed RF sources that exceed the thresholds defined in paragraph (b)(1) introductory text, (b)(1)(i), or (b)(1)(ii) of this section. Multiple fixed RF sources require evaluation of compliance with the exposure limits in § 1.1310 of this chapter if the sum of the fractional contributions to the applicable ERP thresholds and the ambient exposure quotient (AEQ) is greater than or equal to 1 as indicated in the following equation:

$$\sum_{i=1}^{a}\frac{P_i}{P_{th,i}} + \frac{\sum_{j=1}^{b} SAR_j}{1.6\ \text{W/kg}} + \sum_{k=1}^{c}\frac{ERP_k}{ERP_{th,k}} + \text{AEQ} \ge 1$$

Where

a = number of fixed RF sources using paragraph (b)(1)(ii) of this section.

b = number of existing fixed RF sources with known SAR.

c = number of fixed RF sources using ERP, either according to (b)(1)(i) or (b)(1)(ii) of this section.

P_i = the available maximum time-averaged power or the ERP, whichever is greater, for RF source i.

$P_{th,i}$ = the threshold power according to the formula in (b)(1)(ii) of this section for RF source i.

SAR_j = the maximum SAR reported from the jth fixed RF source.

ERP_k = ERP of RF source k.

$ERP_{th,k}$ = exemption threshold ERP for RF source k, either according to (b)(1)(ii) of this section or (b)(1)(i) of this section, as applicable.

AEQ = the ambient exposure quotient (AEQ) for the general population/uncontrolled limit from an existing evaluation of exposure at the site from fixed sources not included in the summations. An AEQ less than 0.05 may be considered insignificant.

(v) Where applicable, for multiple mobile or portable RF sources within a device operating in the same time averaging period, evaluation is required if:

$$\sum_{i=1}^{a}\frac{P_i}{P_{th,i}}+\frac{\sum_{j=1}^{b}SAR_j}{1.6W/kg}+\sum_{k=1}^{c}\frac{ERP_k}{ERP_{th,k}}\geq 1$$

Where

a = number of mobile or portable transmitters that use P_{th}, including existing transmitters and those being added.

b = number of existing mobile or portable transmitters with known SAR.

c = number of mobile or portable transmitters using ERP, according to either (b)(1)(i) or (b)(1)(ii) of this section, including existing transmitters and those being added.

P_i = the available maximum time-averaged power or the ERP, whichever is greater, for mobile or portable transmitter i.

$P_{th,i}$ = the threshold power according to the formula in § 1.1307(b)(1)(ii) for mobile or portable transmitter i.

SAR_j = the maximum SAR reported for equipment certification from the jth mobile or portable transmitter in the device.

ERP_k = ERP of mobile or portable transmitter k.

$ERP_{th,k}$ = exemption threshold ERP for mobile or portable transmitter k, either according to (b)(1)(ii) of this section or (b)(1)(i) of this section, as applicable.

(vi) Unless otherwise specified in this chapter, any other single or multiple RF source(s) is exempt from routine environmental evaluation for RF exposure prior to authorization (licensing or equipment certification), except as specified in paragraphs (c) and (d) of this section.

(2) Specific mitigation actions are required for fixed RF sources in order to ensure compliance with our exposure limits, including the implementation of an RF safety plan, restriction of access to those RF sources, and disclosure of spatial regions where exposure limits are exceeded. For the purpose of this section, Category One described in paragraph (b)(2)(i) of this section is defined as compliant with the general population exposure limit in § 1.1310 of this chapter at any separation distance; Category Two described in paragraph (b)(2)(ii) of this section is defined as above the general population exposure limit but compliant with the occupational exposure limit in § 1.1310 of this chapter within its defined spatial region; Category Three described in paragraph (b)(2)(iii) of this section is defined as above the occupational exposure limit but no more than ten times the occupational exposure limit in § 1.1310 of this chapter within its defined spatial region; and Category Four described in paragraph (b)(2)(iv) of this section is defined as more than ten times the occupational exposure limit in § 1.1310 of this chapter within its defined spatial region.

(i) *Category One—INFORMATION.* No mitigation actions are required. Optionally a green ''INFORMATION'' sign may offer information to those persons who might be approaching RF sources. This optional sign should include at least the following information: appropriate signal word ''INFORMATION'' and associated color (green) in accord with section 5.8 of IEEE Std C95.2–1999, a specification of the RF source, contact information, and a reminder to obey all postings and boundaries.

(ii) *Category Two—NOTICE.* Mitigation actions are required in the form of signs and positive access control surrounding the areas in which the general population exposure limit is exceeded, with the appropriate signal word ''NOTICE'' and associated color (blue) on the signs. Signs must contain the components discussed in paragraph (b)(2)(v) of this section. Under certain controlled conditions, such as on a rooftop with limited access, a sign containing the components discussed in paragraph (b)(2)(v) of this section attached directly to the surface of an antenna will be considered a sufficient mitigation action if the sign specifies and is legible at the separation distance required for compliance with the general population exposure limit in § 1.1310 of this chapter. Appropriate training is required for any occupational personnel with access to controlled areas within restrictive barriers where the general population exposure limit is exceeded, and transient individuals must be supervised by trained personnel upon entering any of these areas. Use of time averaging is required for transient individuals in the area in which the general population exposure limit is exceeded to ensure compliance with the time-averaged general population exposure limit.

(iii) *Category Three—CAUTION.* In addition to the mitigation actions required within those areas designated as Category Two, further signs, controls, or indicators are required surrounding the area in which the occupational exposure limit is exceeded, with the appropriate signal word ''CAUTION'' and associated color (yellow) on the signs. If signs are used at the occupational exposure limit boundary, they must contain the components discussed in paragraph (b)(2)(v) of this section. If the boundaries between Category Two and Three are such that placement of both Category Two and Three signs would be in the same location, then the Category Two sign is optional. A label or small sign may be attached directly to the surface of an antenna within a controlled environment if it specifies a minimum approach distance where the occupational exposure limit is exceeded. If signs are not used at the occupational exposure limit boundary, controls or indicators (*e.g.,* chains, railings, contrasting paint, diagrams, *etc.*) must designate the spatial regions where the occupational exposure limit is exceeded. Transient individuals are not permitted in any area for any period of time in which the occupational exposure limit is exceeded. Further mitigation by reducing exposure time in accord with six minute time averaging is required for occupational personnel in the area in which the occupational exposure limit is exceeded. However, proper use of RF personal protective equipment may be considered sufficient in lieu of time averaging for occupational personnel in the areas in which the occupational exposure limit is exceeded.

(iv) *Category Four—WARNING/DANGER.* In addition to the mitigation actions required within those areas designated as Category Three, ''WARNING'' signs with the associated color (orange) are required where the occupational limit is exceeded by a factor of ten, and ''DANGER'' signs with the associated color (red) are required where immediate and serious injury will occur on contact. Signs must contain the components discussed in paragraph (b)(2)(v) of this section. If the boundaries between Category Three and Four are such that placement of both Category Three and Four signs would be in the same location, then the Category Three sign is optional. If power reduction, and therefore Category reduction, is not feasible, then lockout/tagout procedures in 29 CFR 1910.147 must be followed.

(v) *RF exposure advisory signs.* RF exposure advisory signs must include at least the following five components:

(A) Appropriate signal word and associated color {*i.e.,* ''DANGER'' (red),

''WARNING'' (orange), ''CAUTION,'' (yellow) ''NOTICE'' (blue)} in accord with IEEE Std C95.2–1999, ''IEEE Standard for Radio-Frequency Energy and Current-Flow Symbols,'' copyright 1999 by the Institute of Electrical and Electronics Engineers, Inc., New York, New York 10017

(B) RF energy advisory symbol (Figure A.3 of IEEE Std C95.2–1999)

(C) An explanation of the RF source

(D) Behavior necessary to comply with the exposure limits

(E) Contact information

(3) In general, when the exposure limits specified in § 1.1310 are exceeded in an accessible area due to the emissions from multiple fixed RF sources, actions necessary to bring the area into compliance or preparation of an Environmental Assessment as specified in § 1.1311 are the shared responsibility of all licensees whose RF sources produce, at the area in question, levels that exceed 5% of the applicable exposure limit. Field strengths must be squared to be proportional to SAR or power density. Specifically, these compliance requirements apply if the square of the electric or magnetic field strength exposure level applicable to a particular RF source exceeds 5% of the square of the electric or magnetic field strength limit at the area in question where the levels due to multiple fixed RF sources exceed the exposure limit. Site owners and managers are expected to allow applicants and licensees to take reasonable steps to comply with the requirements contained in § 1.1307(b) and, where feasible, should encourage co-location of RF sources and common solutions for controlling access to areas where the RF exposure limits contained in § 1.1310 might be exceeded. Additionally, applicants for proposed RF sources and applicants for renewal of licenses for RF sources shall inform other licensees at a site in question of evaluations indicating possible non-compliance with the exposure limits.

(i) Applicants for proposed RF sources that would cause non-compliance with the limits specified in § 1.1310 at an accessible area previously in compliance must submit an EA if emissions from the applicant's RF source would produce, at the area in question, levels that exceed 5% of the applicable exposure limit. Field strengths must be squared if necessary to be proportional to SAR or power density.

(ii) Renewal applicants whose RF sources would cause non-compliance with the limits specified in § 1.1310 at an accessible area previously in compliance must submit an EA if emissions from the applicant's RF source would produce, at the area in question, levels that exceed 5% of the applicable exposure limit. Field strengths must be squared if necessary to be proportional to SAR or power density.

* * * * *

■ 3. Section 1.1310 is revised to read as follows:

§ 1.1310 Radiofrequency radiation exposure limits.

(a) Specific absorption rate (SAR) shall be used to evaluate the environmental impact of human exposure to radiofrequency (RF) radiation as specified in § 1.1307(b) within the frequency range of 100 kHz to 6 GHz (inclusive).

(b) The SAR limits for occupational/controlled exposure are 0.4 W/kg, as averaged over the whole body, and a peak spatial-average SAR of 8 W/kg, averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube). Exceptions are the parts of the human body treated as extremities, such as hands, wrists, feet, ankles, and pinnae, where the peak spatial-average SAR limit for occupational/controlled exposure is 20 W/kg, averaged over any 10 grams of tissue (defined as a tissue volume in the shape of a cube). Exposure may be averaged over a time period not to exceed 6 minutes to determine compliance with occupational/controlled SAR limits.

(c) The SAR limits for general population/uncontrolled exposure are 0.08 W/kg, as averaged over the whole body, and a peak spatial-average SAR of 1.6 W/kg, averaged over any 1 gram of tissue (defined as a tissue volume in the shape of a cube). Exceptions are the parts of the human body treated as extremities, such as hands, wrists, feet, ankles, and pinnae, where the peak spatial-average SAR limit is 4 W/kg, averaged over any 10 grams of tissue (defined as a tissue volume in the shape of a cube). Exposure may be averaged over a time period not to exceed 30 minutes to determine compliance with general population/uncontrolled SAR limits.

(d)(1) Evaluation with respect to the SAR limits in this section must demonstrate compliance with both the whole-body and peak spatial-average limits using technically supported measurement or computational methods and exposure conditions in advance of authorization (licensing or equipment certification) and in a manner that facilitates enforcement. Numerical computation of SAR must be supported by adequate documentation showing that the numerical method as implemented in the computational software has been fully validated; in addition, the equipment under test and exposure conditions must be modeled according to protocols established by numerical computation standards or available FCC procedures for the specific computational method.

(2) For operation within the frequency range of 300 kHz and 6 GHz (inclusive), the limits for maximum permissible exposure (MPE), derived from whole-body SAR limits and listed in Table 1 of paragraph (e) of this section, may be used instead of whole-body SAR limits as set forth in paragraphs (a) through (c) of this section to evaluate the environmental impact of human exposure to RF radiation as specified in § 1.1307(b), except for portable devices as defined in § 2.1093 as these evaluations shall be performed according to the SAR provisions in § 2.1093 of this chapter.

(3) At operating frequencies above 6 GHz, the MPE limits listed in Table 1 of paragraph (e) of this section shall be used in all cases to evaluate the environmental impact of human exposure to RF radiation as specified in § 1.1307(b).

(4) Both the MPE limits listed in Table 1 of paragraph (e) of this section and the SAR limits as set forth in paragraphs (a) through (c) of this section are for continuous exposure, that is, for indefinite time periods. Exposure levels higher than the limits are permitted for shorter exposure times, as long as the average exposure over the specified averaging time in Table 1 is less than the exposure limits. Detailed information on our policies regarding procedures for evaluating compliance with all of these exposure limits can be found in the most current edition of FCC's OET Bulletin 65, ''Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields,'' and its supplements, all available at the FCC's Internet Web site: *http://www.fcc.gov/oet/rfsafety.*

Note to Paragraphs (a) through (d): SAR is a measure of the rate of energy absorption due to exposure to RF electromagnetic energy. These SAR limits to be used for evaluation are based generally on criteria published by the American National Standards Institute (ANSI) for localized SAR in section 4.2 of ''IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz,'' ANSI/IEEE Std C95.1–1992, copyright 1992 by the Institute of Electrical and Electronics Engineers, Inc., New York, New York 10017. These criteria for SAR evaluation are similar to those recommended by the National Council on Radiation Protection and Measurements (NCRP) in ''Biological Effects and Exposure

Criteria for Radiofrequency Electromagnetic Fields,'' NCRP Report No. 86, section 17.4.5, copyright 1986 by NCRP, Bethesda, Maryland 20814. Limits for whole body SAR and peak spatial-average SAR are based on recommendations made in both of these documents. The MPE limits in Table 1 are based generally on criteria published by the NCRP in ''Biological Effects and Exposure Criteria for Radiofrequency Electromagnetic Fields,'' NCRP Report No. 86, sections 17.4.1, 17.4.1.1, 17.4.2 and 17.4.3, copyright 1986 by NCRP, Bethesda, Maryland 20814. In the frequency range from 100 MHz to 1500 MHz, these MPE exposure limits for field strength and power density are also generally based on criteria recommended by the ANSI in section 4.1 of ''IEEE Standard for Safety Levels with Respect to Human Exposure to Radio Frequency Electromagnetic Fields, 3 kHz to 300 GHz,'' ANSI/IEEE Std C95.1–1992, copyright 1992 by the Institute of Electrical and Electronics Engineers, Inc., New York, New York 10017.

(e) Table 1 in this paragraph sets forth limits for Maximum Permissible Exposure (MPE) to radiofrequency electromagnetic fields.

TABLE 1—LIMITS FOR MAXIMUM PERMISSIBLE EXPOSURE (MPE)

Frequency range (MHz)	Electric field strength (V/m)	Magnetic field strength (A/m)	Power density (mW/cm^2)	Averaging time (minutes)
(A) Limits for Occupational/Controlled Exposure				
0.3–3.0	614	1.63	*(100)	6
3.0–30	1842/f	4.89/f	*($900/f^2$)	6
30–300	61.4	0.163	1.0	6
300–1500			f/300	6
1500–100,000			5	6
(B) Limits for General Population/Uncontrolled Exposure				
0.3–1.34	614	1.63	*(100)	30
1.34–30	824/f	2.19/f	*($180/f^2$)	30
30–300	27.5	0.073	0.2	30
300–1500			f/1500	30
1500–100,000			1.0	30

f = frequency in MHz.
* = Plane-wave equivalent power density.

(1) Occupational/controlled exposure limits apply in situations in which persons are exposed as a consequence of their employment provided those persons are fully aware of the potential for exposure and can exercise control over their exposure. Limits for occupational/controlled exposure also apply in situations when a person is transient through a location where occupational/controlled limits apply provided he or she is made aware of the potential for exposure. The phrase *fully aware* in the context of applying these exposure limits means that an exposed person has received written and/or verbal information fully explaining the potential for RF exposure resulting from his or her employment. With the exception of *transient* persons, this phrase also means that an exposed person has received appropriate training regarding work practices relating to controlling or mitigating his or her exposure. *See* § 1.1307(b)(2) of this chapter. The phrase exercise control means that an exposed person is allowed and also knows how to reduce or avoid exposure by administrative or engineering work practices, such as use of personal protective equipment or time averaging of exposure.

(2) General population/uncontrolled exposure limits apply in situations in which the general public may be exposed, or in which persons who are exposed as a consequence of their employment may not be fully aware of the potential for exposure or cannot exercise control over their exposure. For example, RF sources intended for consumer use shall be subject to the limits for general population/uncontrolled exposure in this section.

§ 1.4000 [Amended]

■ 4. Section 1.4000 is amended by removing paragraph (c) and redesignating paragraphs (d) through (h) as paragraphs (c) through (g).

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

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

Authority: 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

■ 6. Section 2.1091 is amended by revising paragraphs (b), (c), (d) introductory text, (d)(1), and (d)(2) to read as follows:

§ 2.1091 Radiofrequency radiation exposure evaluation: mobile devices.

* * * * *

(b) For purposes of this section, a mobile device is defined as a transmitting device designed to be used in other than fixed locations and to generally be used in such a way that a separation distance of at least 20 centimeters is normally maintained between the transmitter's radiating structure(s) and the body of the user or nearby persons. In this context, the term ''fixed location'' means that the device is physically secured at one location and is not able to be easily moved to another location while transmitting. Transmitting devices designed to be used by consumers or workers that can be easily re-located, such as wireless devices associated with a personal desktop computer, are considered to be mobile devices if they meet the 20 centimeter separation requirement.

(c) Evaluation of compliance with the exposure limits in § 1.1310 of this chapter, and preparation of an EA if the limits are exceeded, is necessary for mobile devices with single RF sources either more than an available maximum time-averaged power of 1 mW or more than the ERP listed in Table 1 of § 1.1307(b)(1)(i) of this chapter, whichever is greater. For mobile devices not exempt by § 1.1307(b)(1)(i) at distances from 20 to 40 centimeters and frequencies from 0.3 to 6 GHz, evaluation of compliance with the exposure limits in § 1.1310 of this chapter is necessary if the ERP of the device is greater than ERP_{20cm} in the formula below. If the ERP of a single RF source at distances from 20 to 40 centimeters and frequencies from 0.3 to 6 GHz is not easily obtained, then the available maximum time-averaged RF output power may be used (*i.e.,* without

consideration of ERP) in comparison with the formula below only if the device antenna(s) or radiating structure(s) do not exceed the electrical length of λ/4.

$$ERP_{20cm}\,(\mathrm{mW}) = \begin{cases} 2040f & 0.3\,\mathrm{GHz} \le f < 1.5\,\mathrm{GHz} \\ 3060 & 1.5\,\mathrm{GHz} \le f \le 6\,\mathrm{GHz} \end{cases}$$

(1) For multiple mobile RF sources within a device operating in the same time averaging period, when all transmitting antennas are at a separation distance of at least 20 centimeters, evaluation is required if:

$$\sum_{i=1}^{a} \frac{P_i}{P_{th,i}} + \frac{\sum_{j=1}^{b} SAR_j}{1.6\ \mathrm{W/kg}} + \sum_{k=1}^{c} \frac{ERP_k}{ERP_{th,k}} \ge 1$$

Where

a = number of mobile transmitters that use P_{th}, including existing transmitters and those being added.

b = number of existing mobile transmitters with known SAR.

c = number of mobile transmitters using ERP, according to either § 1.1307(b)(1)(i) or § 1.1307(b)(1)(ii) of this chapter, including existing transmitters and those being added.

P_i = the available maximum time-averaged power or the ERP, whichever is greater, for mobile transmitter i.

$P_{th,i}$ = the threshold power according to the formula in § 1.1307(b)(1)(ii) of this chapter for mobile transmitter i.

SAR_j = the maximum SAR reported for equipment certification from the j^{th} mobile transmitter in the device.

ERP_k = ERP of mobile transmitter k.

$ERP_{th,k}$ = exemption threshold ERP for mobile transmitter k, either according to § 1.1307(b)(1)(ii) of this chapter or § 1.1307(b)(1)(i) of this chapter, as applicable.

(2) For multiple mobile or portable RF sources within a device operating in the same time averaging period, routine environmental evaluation is required if the formula in § 2.1093(c)(2) of this chapter is applied to determine the exemption ratio and the result is greater than or equal to 1.

(3) Unless otherwise specified in this chapter, any other single mobile or multiple mobile and portable RF source(s) associated with a device is exempt from routine environmental evaluation for RF exposure prior to equipment authorization or use, except as specified in § 1.1307(c) and (d) of this chapter.

(d) Applications for equipment authorization of mobile transmitting devices subject to routine environmental evaluation must contain a statement confirming compliance with the limits specified in § 1.1310 of this chapter as part of their application. Technical information showing the basis for this statement must be submitted to the Commission upon request. In general, maximum time-averaged power levels must be used for evaluation. All unlicensed personal communications service (PCS) devices and unlicensed NII devices shall be subject to the limits for general population/uncontrolled exposure.

(1) For purposes of analyzing mobile transmitting devices under the occupational/controlled criteria specified in § 1.1310 of this chapter, time averaging provisions of the limits may be used in conjunction with maximum duty factor to determine maximum time-averaged exposure levels under normal operating conditions.

(2) Such time averaging provisions based on maximum duty factor may not be used in determining exposure levels for devices intended for use by consumers in general population/uncontrolled environments as defined in § 1.1310 of this chapter. However, ''source-based'' time averaging based on an inherent property of the RF source is allowed. An example of this is the determination of exposure from a device that uses digital technology such as a time-division multiple-access (TDMA) scheme for transmission of a signal.

* * * * *

■ 7. Section 2.1093 is amended by revising paragraphs (c) and (d) to read as follows:

§ 2.1093 Radiofrequency radiation exposure evaluation: portable devices.

* * * * *

(c) Evaluation of compliance with the exposure limits in § 1.1310 of this chapter, and preparation of an EA if the limits are exceeded, is necessary for portable devices with single RF sources with more than an available maximum time-averaged power of 1 mW, more than the ERP listed in Table 1 of § 1.1307(b)(1)(i), or more than the P_{th} in the formula below, whichever is greater. The formula below shall only be used in conjunction with portable devices not exempt by § 1.1307(b)(1)(i) at distances from 0.5 to 20 centimeters and frequencies from 0.3 to 6 GHz. If the ERP of a single RF source at distances from 0.5 to 20 centimeters and frequencies from 0.3 to 6 GHz is not easily obtained, then available maximum time-averaged power may be used (*i.e.,* without consideration of ERP) in comparison with the formula below only if the device antenna(s) or radiating structure(s) do not exceed the electrical length of λ/4.

$P_{th}\ (\mathrm{mW}) = ERP_{20cm}\ (d / 20\ \mathrm{cm})^x$

Where

$$x = -\log_{10}\left(\frac{60}{ERP_{20cm}\sqrt{f}}\right) \text{ and } f \text{ is in GHz;}$$

$$ERP_{20cm}\,(\text{mW}) = \begin{cases} 2040f & 0.3\,\text{GHz} \le f < 1.5\,\text{GHz} \\ 3060 & 1.5\,\text{GHz} \le f \le 6\,\text{GHz} \end{cases}$$

d = the minimum separation distance in any direction from any part of the device antenna(s) or radiating structure(s) to the body of the device user

(1) For multiple portable RF sources within a device operating in the same time averaging period, when all transmitting antennas are at a separation distance of up to 20 centimeters, evaluation is required if:

$$\sum_{i=1}^{a}\frac{P_i}{P_{th,i}} + \frac{\sum_{j=1}^{b} SAR_j}{1.6\ \text{W/kg}} + \sum_{k=1}^{c}\frac{ERP_k}{ERP_{th,k}} \ge 1$$

Where

a = number of portable transmitters that use P_{th}, including existing transmitters and those being added.

b = number of existing portable transmitters with known SAR.

c = number of portable transmitters using ERP, according to either § 1.1307(b)(1)(i) or § 1.1307(b)(1)(ii) of this chapter, including existing transmitters and those being added.

P_i = the available maximum time-averaged power or the ERP, whichever is greater, for portable transmitter i.

$P_{th,i}$ = the threshold power according to the formula in § 1.1307(b)(1)(ii) of this chapter for portable transmitter i.

SAR_j = the maximum SAR reported for equipment certification from the j^{th} portable transmitter in the device.

ERP_k = ERP of portable transmitter k.

$ERP_{th,k}$ = exemption threshold ERP for portable transmitter k, either according to § 1.1307(b)(1)(ii) of this chapter or § 1.1307(b)(1)(i) of this chapter, as applicable.

(2) For multiple mobile or portable RF sources within a device operating in the same time averaging period, evaluation is required if:

$$\sum_{i=1}^{a}\frac{P_i}{P_{th,i}} + \frac{\sum_{j=1}^{b} SAR_j}{1.6W/kg} + \sum_{k=1}^{c}\frac{ERP_k}{ERP_{th,k}} \ge 1$$

Where

a = number of mobile or portable transmitters that use P_{th}, including existing transmitters and those being added.

b = number of existing mobile or portable transmitters with known SAR.

c = number of mobile or portable transmitters using ERP, according to either § 1.1307(b)(1)(i) or § 1.1307(b)(1)(ii) of this chapter, including existing transmitters and those being added.

P_i = the available maximum time-averaged power or the ERP, whichever is greater, for mobile or portable transmitter i.

$P_{th,i}$ = the threshold power according to the formula in § 1.1307(b)(1)(ii) of this chapter for mobile or portable transmitter i.

SAR_j = the maximum SAR reported for equipment certification from the jth mobile or portable transmitter in the device.

ERP_k = ERP of mobile or portable transmitter k.

$ERP_{th,k}$ = exemption threshold ERP for mobile or portable transmitter k, either according to § 1.1307(b)(1)(ii) of this chapter or § 1.1307(b)(1)(i) of this chapter, as applicable.

(3) Unless otherwise specified in this chapter, any other single portable or multiple mobile and portable RF source(s) associated with a device is exempt from routine environmental evaluation for RF exposure prior to equipment authorization or use, except as specified in §§ 1.1307(c) and 1.1307(d) of this chapter.

(d) Applications for equipment authorization of portable transmitting devices subject to routine environmental evaluation must contain a statement confirming compliance with the limits specified in § 1.1310 of this chapter as part of their application. The limits to be used for evaluation shall apply for portable devices transmitting in the frequency range from 100 kHz to 6 GHz in terms of the SAR limits specified in § 1.1310(a) through (c) of this chapter. The device must be evaluated at a separation distance applicable to the operating configurations and exposure conditions of the device. Portable devices that transmit at frequencies above 6 GHz are to be evaluated in terms of the MPE limits specified in Table 1 of § 1.1310(e) of this chapter. Technical information showing the basis for this statement must be submitted to the Commission upon request. In general, maximum time-averaged power levels must be used for evaluation. All unlicensed personal communications service (PCS) devices and unlicensed NII devices shall be subject to the limits for general population/uncontrolled exposure.

(1) Evaluation of compliance with the SAR limits can be demonstrated by either laboratory measurement techniques or by computational modeling. The latter must be supported by adequate documentation showing that the numerical method as implemented in the computational software has been fully validated; in addition, the equipment under test and exposure conditions must be modeled according to protocols established by numerical computation standards or available FCC procedures for the specific computational method.

Guidance regarding SAR measurement techniques can be found in the Office of Engineering and Technology (OET) Laboratory Division Knowledge Database (KDB). The staff guidance provided in the KDB does not necessarily represent the only acceptable methods for measuring RF exposure or emissions, and is not binding on the Commission or any interested party.

(2) For purposes of analyzing portable transmitting devices under the occupational/controlled SAR criteria specified in § 1.1310 of this chapter, the time averaging provisions of these SAR criteria may be used to determine maximum time-averaged exposure levels under normal operating conditions.

(3) The time averaging provisions for occupational/controlled SAR criteria, based on maximum duty factor, may not be used in determining typical exposure levels for portable devices intended for use by consumers, such as cellular telephones, that are considered to operate in general population/uncontrolled environments as defined in § 1.1310 of this chapter. However, ''source-based'' time averaging based on an inherent property of the RF source is allowed. An example of this would be the determination of exposure from a device that uses digital technology such as a time-division multiple-access (TDMA) scheme for transmission of a signal.

(4) Visual advisories (such as labeling, embossing, or on an equivalent electronic display) on portable devices designed only for occupational use can be used as part of an applicant's evidence of the device user's awareness of occupational/controlled exposure limits. Such visual advisories shall be legible and clearly visible to the user from the exterior of the device. Visual advisories must indicate that the device is for occupational use only, refer the user to specific information on RF exposure, such as that provided in a user manual and note that the advisory and its information is required for FCC RF exposure compliance. Such instructional material must provide the user with information on how to use the device in order to ensure compliance with the occupational/controlled exposure limits. A sample of the visual advisory, illustrating its location on the device, and any instructional material intended to accompany the device when marketed, shall be filed with the Commission along with the application for equipment authorization. Details of any special training requirements pertinent to limiting RF exposure should also be submitted. Holders of grants for portable devices to be used in occupational settings are encouraged, but not required, to coordinate with end-user organizations to ensure appropriate RF safety training.

(5) General population/uncontrolled exposure limits defined in § 1.1310 of this chapter apply to portable devices intended for use by consumers or persons who are exposed as a consequence of their employment and may not be fully aware of the potential for exposure or cannot exercise control over their exposure. No communication with the consumer including either visual advisories or manual instructions will be considered sufficient to allow consumer portable devices to be evaluated subject to limits for occupational/controlled exposure specified in § 1.1310 of this chapter.

PART 15—RADIO FREQUENCY DEVICES

■ 8. 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.

■ 9. Section 15.709 is amended by revising paragraph (d) to read as follows:

§ 15.709 General technical requirements.

* * * * *

(d) *Compliance with radio frequency exposure requirements.* TVBDs shall ensure compliance with the Commission's radio frequency exposure requirements in §§ 1.1307(b), 2.1091 and 2.1093 of this chapter, where applicable.

PART 24—PERSONAL COMMUNICATIONS SERVICES

■ 10. The authority citation for part 24 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 309 and 332.

§ 24.51 [Amended]

■ 11. Section 24.51 is amended by removing and reserving paragraph (c).

■ 12. Section 24.52 is amended to read as follows:

§ 24.52 RF exposure.

Licensees and manufacturers shall ensure compliance with the Commission's radio frequency exposure requirements in § 1.1307(b) of this chapter. An environmental assessment may be required if RF radiation from the proposed facilities would, in combination with radiation from other sources, cause RF power density or field strength in an accessible area to exceed the applicable limits specified in § 1.1310 of this chapter. Applications for equipment authorization of mobile or portable devices operating under this section must contain a statement confirming compliance with these requirements for both fundamental emissions and unwanted emissions. Technical information showing the basis for this statement must be submitted to the Commission upon request.

PART 25—SATELLITE COMMUNICATIONS

■ 13. The authority citation for part 25 continues to read as follows:

Authority: 47 U.S.C. 701–744. Interprets or applies sections 4, 301, 302, 303, 307, 309 and 332 of the Communications Act, as amended, 47 U.S.C. 154, 301, 302a, 303, 307, 309 and 332, unless otherwise noted.

■ 14. Section 25.115 is amended by adding paragraph (j) to read as follows:

§ 25.115 Application for earth station authorizations.

* * * * *

(j) The licensee and grantees shall ensure compliance with the Commission's radio frequency exposure requirements in § 1.1307(b) of this chapter. An environmental assessment may be required if RF radiation from the proposed facilities would, in combination with radiation from other sources, cause RF power density or field strength in an accessible area to exceed the applicable limits specified in § 1.1310 of this chapter. See § 1.1307(b)(3)(i).

■ 15. Section 25.117 is amended by revising paragraph (g) to read as follows:

§ 25.117 Modification of station license.

* * * * *

(g) The licensee and grantees shall ensure compliance with the Commission's radio frequency exposure requirements in § 1.1307(b) of this chapter. An environmental assessment may be required if RF radiation from the proposed facilities would, in combination with radiation from other sources, cause RF power density or field strength in an accessible area to exceed the applicable limits specified in § 1.1310 of this chapter. *See* § 1.1307(b)(3)(ii).

■ 16. Section 25.129 is amended by revising paragraph (c) to read as follows:

§ 25.129 Equipment authorization for portable earth-station transceivers.

* * * * *

(c) In addition to the information required by § 2.1033(c) of this chapter, applicants for certification required by this section shall submit any additional equipment test data necessary to demonstrate compliance with pertinent

standards for transmitter performance prescribed in §§ 25.138, 25.202(f), 25.204, 25.209, and 25.216, and shall ensure compliance with the Commission's radio frequency exposure requirements in § 1.1307(b) of this chapter. An environmental assessment may be required if RF radiation from the proposed facilities would, in combination with radiation from other sources, cause RF power density or field strength in an accessible area to exceed the applicable limits specified in § 1.1310 of this chapter. Applications for equipment authorization of mobile or portable devices operating under this section must contain a statement confirming compliance with these requirements for both fundamental emissions and unwanted emissions. Technical information showing the basis for this statement must be submitted to the Commission upon request.

* * * * *

■ 17. Section 25.149 is amended by revising paragraph (c)(3) to read as follows:

§ 25.149 Application requirements for ancillary terrestrial components in the Mobile-Satellite Service networks operating in the 1.5/1.6 GHz, 1.6/2.4 GHz and 2 GHz Mobile-Satellite Service.

* * * * *

(c) * * *

(3) Licensees and manufacturers shall ensure compliance with the Commission's radio frequency exposure requirements in § 1.1307(b) of this chapter. An environmental assessment may be required if RF radiation from the proposed facilities would, in combination with radiation from other sources, cause RF power density or field strength in an accessible area to exceed the applicable limits specified in § 1.1310 of this chapter. Applications for equipment authorization of mobile or portable devices operating under this section must contain a statement confirming compliance with these requirements for both fundamental emissions and unwanted emissions. Technical information showing the basis for this statement must be submitted to the Commission upon request.

* * * * *

■ 18. Section 25.226 is amended by revising paragraph (b)(8) to read as follows:

§ 25.226 Blanket Licensing provisions for domestic, U.S. Vehicle-Mounted Earth Stations (VMESs) receiving in the 10.95–11.2 GHz (space-to-Earth), 11.45–11.7 GHz (space-to-Earth), and 11.7–12.2 GHz (space-to-Earth) bands and transmitting in the 14.0–14.5 GHz (Earth-to-space) band, operating with Geostationary Satellites in the Fixed-Satellite Service.

* * * * *

(b) * * *

(8) All VMES applicants shall ensure compliance with the Commission's radio frequency exposure requirements in § 1.1307(b) of this chapter. An environmental assessment may be required if RF radiation from the proposed facilities would, in combination with radiation from other sources, cause RF power density or field strength in an accessible area to exceed the applicable limits specified in § 1.1310 of this chapter. VMES applicants with VMES terminals that will exceed the guidelines in § 1.1310 of this chapter for radio frequency radiation exposure shall provide, with their environmental assessment, a plan for mitigation of radiation exposure to the extent required to meet those guidelines. All VMES licensees shall ensure installation of VMES terminals on vehicles by qualified installers who have an understanding of the antenna's radiation environment and the measures best suited to maximize protection of the general public and persons operating the vehicle and equipment. A VMES terminal exhibiting radiation exposure levels exceeding 1.0 mW/cm^2 in accessible areas, such as at the exterior surface of the radome, shall have a label attached to the surface of the terminal warning about the radiation hazard and shall include thereon a diagram showing the regions around the terminal where the radiation levels could exceed 1.0 mW/cm^2. All VMES applicants shall demonstrate that their VMES terminals are capable of automatically ceasing transmissions upon the loss of synchronization or within 5 seconds of loss of reception of the satellite downlink signal, whichever is the shorter timeframe.

* * * * *

PART 27—MISCELLANEOUS WIRELESS COMMUNICATIONS SERVICES

■ 19. The authority citation for part 27 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302a, 303, 307, 309, 332, 336, and 337 unless otherwise noted.

■ 20. Section 27.52 is revised to read as follows:

§ 27.52 RF exposure.

Licensees and manufacturers shall ensure compliance with the Commission's radio frequency exposure requirements in § 1.1307(b) of this chapter. An environmental assessment may be required if RF radiation from the proposed facilities would, in combination with radiation from other sources, cause RF power density or field strength in an accessible area to exceed the applicable limits specified in § 1.1310 of this chapter. Applications for equipment authorization of mobile or portable devices operating under this section must contain a statement confirming compliance with these requirements for both fundamental emissions and unwanted emissions. Technical information showing the basis for this statement must be submitted to the Commission upon request.

PART 73—RADIO BROADCAST SERVICES

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

Authority: 47 U.S.C. 154, 303, 334, 336, and 339.

■ 22. Section 73.404 is amended by revising paragraph (e)(10) to read as follows:

§ 73.404 Interim hybrid IBOC DAB operation.

* * * * *

(e) * * *

(10) Licensees and permittees shall ensure compliance with the Commission's radio frequency exposure requirements in § 1.1307(b) of this chapter. An environmental assessment may be required if RF radiation from the proposed facilities would, in combination with radiation from other sources, cause RF power density or field strength in an accessible area to exceed the applicable limits specified in § 1.1310 of this chapter.

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

■ 23. The authority citation for part 90 continues to read as follows:

Authority: Sections 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), and 332(c)(7), and Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112–96, 126 Stat. 156.

■ 24. Section 90.1217 is revised to read as follows:

§ 90.1217 RF exposure.

Licensees and manufacturers shall ensure compliance with the

Commission's radio frequency exposure requirements in § 1.1307(b) of this chapter. An environmental assessment may be required if RF radiation from the proposed facilities would, in combination with radiation from other sources, cause RF power density or field strength in an accessible area to exceed the applicable limits specified in § 1.1310 of this chapter. Applications for equipment authorization of mobile or portable devices operating under this section must contain a statement confirming compliance with these requirements for both fundamental emissions and unwanted emissions. Technical information showing the basis for this statement must be submitted to the Commission upon request.

PART 95—PERSONAL RADIO SERVICES

■ 25. The authority citation for part 95 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

■ 26. Section 95.628 is amended by revising paragraph (f) to read as follows:

§ 95.628 MedRadio transmitters in the 413–419 MHz, 426–432 MHz, 438–444 MHz, and 451–457 MHz and 2360–2400 MHz bands.

* * * * *

(f) *Measurement procedures.* (1) MedRadio transmitters shall be tested for frequency stability, radiated emissions and EIRP limit compliance in accordance with paragraphs (f)(2) and (3) of this section.

(2) Frequency stability testing shall be performed over the temperature range set forth in (d) of this section.

(3) Radiated emissions and EIRP measurements may be determined by measuring the radiated field from the equipment under test at 3 meters and calculating the EIRP. The equivalent radiated field strength at 3 meters for 1 milliwatt, 25 microwatts, 250 nanowatts, and 100 nanowatts EIRP is 115.1, 18.2, 1.8, or 1.2 mV/meter, respectively, when measured on an open area test site; or 57.55, 9.1, 0.9, or 0.6 mV/meter, respectively, when measured on a test site equivalent to free space such as a fully anechoic test chamber. Compliance with the maximum transmitter power requirements set forth in § 95.639(f) shall be based on measurements using a peak detector function and measured over an interval of time when transmission is continuous and at its maximum power level. In lieu of using a peak detector function, measurement procedures that have been found to be acceptable to the Commission in accordance with § 2.947 of this chapter may be used to demonstrate compliance.

(i) For a transmitter intended to be implanted in a human body, radiated emissions and EIRP measurements for transmissions by stations authorized under this section may be made in accordance with a Commission-approved human body simulator and test technique. The reference to be used for dielectric properties of the tissue-equivalent material for the body simulator is in 2.1093(d)(1) of this chapter.

(ii) [RESERVED]

■ 27. Section 95.1125 is revised to read as follows:

§ 95.1125 RF exposure.

Portable devices as defined in § 2.1093(b) of this chapter operating in the WMTS shall ensure compliance with the Commission's radio frequency exposure requirements in § 1.1307(b) of this chapter. An environmental assessment may be required if RF radiation from the proposed facilities would, in combination with radiation from other sources, cause RF power density or field strength in an accessible area to exceed the applicable limits specified in § 1.1310 of this chapter. Applications for equipment authorization of WMTS devices operating under this section must contain a statement confirming compliance with these requirements for both fundamental emissions and unwanted emissions. Technical information showing the basis for this statement must be submitted to the Commission upon request.

■ 28. Section 95.1221 is revised to read as follows:

§ 95.1221 RF exposure.

A MedRadio medical implant device or medical body-worn transmitter is subject to the radiofrequency radiation exposure requirements specified in §§ 1.1307(b) and 2.1093 of this chapter, as appropriate. Applications for equipment authorization of devices operating under this section must demonstrate compliance with these requirements using either computational modeling or laboratory measurement techniques. Where a showing is based on computational modeling, the Commission retains the discretion to request that supporting documentation and/or specific absorption rate (SAR) measurement data be submitted, as described in 2.1093(d)(1).

PART 97—AMATEUR RADIO SERVICE

■ 29. The authority citation for part 97 continues to read as follows:

Authority: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303. Interpret or apply 48 Stat. 1064–1068, 1081–1105, as amended; 47 U.S.C. 151–155, 301–609, unless otherwise noted.

■ 30. Section 97.13 is amended by revising paragraph (c)(1) to read as follows:

§ 97.13 Restrictions on station location.

* * * * *

(c) * * *

(1) The licensee shall ensure compliance with the Commission's radio frequency exposure requirements in §§ 1.1307(b), 2.1091 and 2.1093 of this chapter, where applicable. In lieu of evaluation with the general population/uncontrolled exposure limits, amateur licensees may evaluate their operation with respect to members of his or her immediate household using the occupational/controlled exposure limits in § 1.1310, provided appropriate training and information has been supplied to the amateur licensee and members of his/her household. Other nearby persons who are not members of the amateur licensee's household must be evaluated with respect to the general population/uncontrolled exposure limits. Appropriate methodologies and guidance for evaluating amateur radio service operation is described in the Office of Engineering and Technology (OET) Bulletin 65, Supplement B.

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PART 101—FIXED MICROWAVE SERVICE

■ 31. The authority citation for part 101 continues to read as follows:

Authority: 47 U.S.C. 154, 303.

■ 32. Section 101.1425 is revised to read as follows:

§ 101.1425 RF exposure.

MVDDS stations in the 12.2–12.7 GHz frequency band shall ensure compliance with the Commission's radio frequency exposure requirements in § 1.1307(b) of this chapter. An environmental assessment may be required if RF radiation from the proposed facilities would, in combination with radiation from other sources, cause RF power density or field strength in an accessible area to exceed the applicable limits specified in § 1.1310 of this chapter.

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H.R. 360/P.L. 113–11
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